THE ORIGINS AND NATURE OF LAW REFORM COMMISSIONS IN THE CANADIAN PROVINCES: A REPLY TO "RECOMMISSIONING LAW REFORM" BY PROFESSOR R.A. MACDONALD

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I. INTRODUCTION

In his article "Recommissioning Law Reform,"[1] Professor R.A. Macdonald advances a number of propositions about Canadian law reform commissions. I do not think that his propositions are correct, at least with respect to the provincial law reform commissions. I will set out my objections to some of them in Parts II and III of this reply so that the reader may assess them. In Part IV, I will go on to make some comments about Professor Macdonald's view of the future of "expert Law Reform Commissions."

A. LAW REFORM COMMISSIONS

Professor Macdonald includes in the term "law reform commission" all the Canadian provincial statutory law reform commissions past and present, the Alberta Law Reform Institute (ALRI), and the Law Reform Commission of Canada. It is his view that,

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1 (1997) 35 Alta. L. Rev. 831.

although some specific details of organization, mandate and operation may qualify some of his statements with respect to individual commissions, "the general patterns I trace are applicable at least to all Canadian expert Law Reform Commissions."[2]

Parts I, II and III of this reply are a commentary on Professor Macdonald's article only insofar as it deals with the provincial law reform commissions. These include the statutory Law Reform Commissions of British Columbia, Manitoba, Ontario, Newfoundland, Nova Scotia,[3] Prince Edward Island and Saskatchewan. They also include ALRI, although it was established and has been continued by a series of agreements between the Attorney General of Alberta, the University of Alberta and the Law Society of Alberta, and is structured differently from the other provincial law reform commissions. Occasional reference is made to the Law Reform Commission of Canada and the Law Commission of Canada, but these are not included in the subject matter of the reply.

ALRI and the Nova Scotia Law Reform Commission are the only provincial law reform commissions that are in full-scale operation at the present time. The other provincial law reform commissions have been discontinued or, in the cases of the Saskatchewan and Manitoba LRCs, allowed resources which enable them to function only at a very low level of activity.[4]

B. MAGISTERIAL STATEMENTS

Much of what Professor Macdonald says, at least insofar as it applies to the provincial law reform commissions, is said on his own authority, that is, it is said magisterially or *ex cathedra*.[5] It is difficult to comment sensibly on statements without knowing the basis on which they were made, but I will in this reply try to do so.

A principal example of an aggregation of magisterial statements is a description of the law reform commissions which is the cumulative effect of a number of statements in Professor Macdonald's article. His model is a law reform commission which purports to be "expert"; which has an "intellectual project" of "rationalistic, scientific, instrumentalist law reform";[6] which purports to "own" legal information and the law reform process; which is concerned to solve a problem "in a manner that maintains and reinforces the notion that it has an expertise in diagnosing and remedying social pathologies by a better deployment of formal law";[7] and which considers that "the

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2 *Supra* note 1 at 834.

3 My general remarks about provincial law reform commissions apply to the Nova Scotia Law Reform Advisory Commission, which was discontinued. Some, particularly those with respect to the establishment of the provincial law reform commissions, may not properly apply to the present Nova Scotia Law Reform Commission, which was established in 1990.

4 The soul of the Law Reform Commission of B.C. has transmigrated to the British Columbia Law Institute, a non-governmental organization.

5 I make statements in this reply which are magisterial in form. I intend do so only when speaking from personal knowledge of the facts.

6 Macdonald, *supra* note 1 at 869.

7 *Ibid.* at 850.

highest type of law, and the only type which is worthy of the efforts of experts, is law that is made explicitly by an official body such as the legislature or its delegates."[8]

Professor Macdonald does not give any fact or analysis tending to show that the provincial law reform commissions have conformed or now conform to any aspect of this model. In particular, he does not justify its adoption by any reference to or analysis of law reform proposals made by provincial law reform commissions, individually or collectively. I will give reasons in this reply for thinking that neither the model nor any of the quoted aspects of it exists or has existed in the provinces which have established law reform commissions.

Another magisterial statement is Professor Macdonald's pronouncement that the "intellectual project" of the provincial law reform commissions has been a failure; again, as will be seen later in this reply, Professor Macdonald neither sets out criteria for success nor gives any facts about, or analysis of, the work of the provincial law reform commissions, or the effect of that work, to show that the criteria of success have not been met.

I will pause to deal at this point with Professor Macdonald's use of the term "expert Law Reform Commission" to describe all of the Canadian law reform commissions, including those of the provinces. It is true that a provincial law reform commission may have some members who qualify as "experts" in an area of law. It is also true, at least in my opinion, that provincial law reform commissions develop skills in and a feeling for the processes involved in developing law reform proposals which have social utility. But the provincial law reform commissions as a group do not claim to speak from the higher level of the "expert," and to characterize them by that term is misleading. What they do is try to grope their way from a less satisfactory state of the law (broadly conceived), through investigative, analytical, consultative and integrative processes, to proposals that will lead to a more satisfactory state. There is no applied science called "law reform" in which practitioners can become expert.[9]

If "expert" were only used as convenient shorthand, there might be no harm in it. But I think that repeating it often enough will inevitably leave an impression with the reader that the provincial law reform commissions do indeed claim to speak from the higher level of the "expert."

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[8] *Ibid.* at 851.

[9] Professor Macdonald refers to "the agenda of expertise trumpeted by those members of the legal *élite* who first promoted the expert Law Reform Commission idea" (*supra* note 1 at 867). In Alberta, those who first promoted the ALRI idea, whether or not they were members of an *élite*, spoke softly and did not have any agenda of expertise. It is true that Chief Justice McRuer, in an address to the Grand Jury of the High Court in 1963 which is sometimes credited with being the genesis of the Ontario LRC, thought that legal research "should be organized as to harness not only the experience and wisdom of Judges and practising lawyers but the vast resources of academic scholarship that we have in Canada today," but that is the highest rhetorical peak I have come across in the provinces and it is not a trumpeting of institutional expertise.

C. THE PRESENT AUTHOR'S INTEREST

I should say a word about my own interest in provincial law reform commissions. In 1967 I helped to organize the Alberta Law Reform Institute (ALRI).[10] I have been a member of ALRI's board from its inception to the present, with one short interruption, and have been chairman of the board. I left the private practice of law at the end of 1973 to become ALRI's Associate Director and later its Director, leaving the latter position in 1986. I now function as part-time, though generally unpaid, counsel as well as a member of the board.[11]

As these facts imply, I have long held the opinion that the establishment of ALRI was in the public interest and that ALRI functions in the public interest. As I became acquainted with the other provincial law reform commissions and the able and devoted people who have animated them, I formed similar opinions about each of those commissions. The reader should be aware that that is my starting point. The reader will be able to form their own judgment about its validity.

This reply has not, however, been submitted to ALRI or considered by it. It is an expression of the present writer's views and nothing more.

II. REASONS FOR THE ESTABLISHMENT OF THE PROVINCIAL LAW REFORM COMMISSIONS

A. PROFESSOR MACDONALD'S VIEWS

Although Professor Macdonald gives an account of some earlier intellectual and philosophical trends in the civil law world and the United States, he concludes that the Law Reform Commission idea did not take hold in Canada until after the Second World War.[12] Then, at different points in his article, he gives what appear to be three contributing causes of the establishment of the Canadian law reform commissions:

(1) "The development of systematizing theories of legal knowledge in the form of, for example, overarching concepts of institutional competence promoted by the Harvard legal process school paved the intellectual pathway for the establishment of expert Law Reform Commissions in Canada."[13]

(2) "Because the progressive tide could not longer be resisted..., the *élites* in the profession jumped on the law reform bandwagon to preserve their control of law's doctrine."[14]

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10 ALRI was established under the name of "the Institute of Law Research and Reform."

11 My vested *financial* interest in the establishment or operation of ALRI has been negative, as the opportunity cost of my association with it has always exceeded the financial returns.

12 *Supra* note 1 at 834-38.

13 *Ibid.* at 841.

14 *Ibid.* at 845. I will return to this statement below at 887.

(3) "The rationalizing project of institutional law reform" was made to seem both worthwhile and necessary by a number of factors: "the flourishing of academic legal education and scholarship, the euphoria of an expanding economy and an expanding state, a faith in the capacity of instrumental reasoning, and a series of high-profile federal initiatives in matters of divorce, criminal law, administrative law and the judicial appointments process." These factors, it seems, were "coupled with an explosion of provincial social legislation in matters of family law, health care, legal aid, landlord and tenant law, consumer law, and so on."[15]

These statements are magisterial with no background fact or analysis that relates to the provincial law reform commissions.

My views with respect to these three points, based on my participation in the development of ALRI, contacts with participants in other provincial law reform commissions, and my reading of what literature there is, are as follows:

(1) The promoters of the provincial law reform commissions did not hold systematizing theories of legal knowledge or overarching concepts of institutional competence. Such theories and concepts accordingly did not have anything to do with the establishment of the provincial law reform commissions.

(2) The *élites* in the profession did not control law's doctrine and, not having such control, did not join in promoting provincial law reform commissions in order to preserve it. If there was a "bandwagon" effect, it came into being only after a number of the provincial law reform commissions had been established.

I do not remember any movement by *élites* to jump aboard whatever vehicle was there,[16] nor have I seen any literature that suggests that such a movement took place. I will return to this statement below.

(3) It is not possible to say that the factors mentioned in Professor Macdonald's third point did not have an effect. They were not, however, present to the conscious thinking of the founders of ALRI. Nor did the founders think of ALRI as a "rationalizing" project so much as a project for making law more suitable for the needs of those affected by it, an end which may sometimes be, but is not always, served by "rationalizing." Further, it seems unlikely that the factors listed by Professor Macdonald would have resulted in the creation of agencies with the characteristics of the provincial law reform commissions.

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[15] *Supra* note 1 at 845.

[16] I make this statement with some diffidence as I do not know who the *élites* were.

B. THE PRESENT AUTHOR'S VIEWS

Although Canadian lawyers might well have devised similar institutions without external example, it was English examples and their application in the Canadian provinces that led to the establishment of the provincial law reform commissions.

For hundreds of years, *ad hoc* efforts were made to reform the laws of England, sometimes with some success, sometimes with none. The *Common Law Procedures Act* and the *Judicature Acts* are examples of reforms which reached fruition.[17]

However, it was not until the twentieth century that English reform-minded lawyers were able to bring about the establishment of a permanent law reform body. This was the Law Revision Committee, which was established by Lord Chancellor Sankey in 1934 to consider "legal maxims and doctrines" referred to the committee by the Lord Chancellor. The Law Revision Committee dealt with such prosaic things as the survival of actions; contribution between tortfeasors; and the recovery of interest in civil proceedings; but it reflected the notion that the law is in continuous need of reform and that a standing law reform agency was needed to propose reforms. Although the Law Revision Committee became dormant upon the outbreak of the Second World War, it was succeeded in 1952 by a similar body called the Lord Chancellor's Law Reform Committee.[18]

The examples of the English Law Revision and Law Reform Committees led to the establishment of similar bodies in Ontario (1941 and 1956); Nova Scotia (1954); Saskatchewan (1958); Manitoba (1962); and Alberta (1964).[19] Essentially, these were part-time volunteer bodies with little or no administrative assistance or legally trained staffs to assist them with research, consultation or drafting of proposals.[20] Since they lacked support, their accomplishments, while they brought about some useful reforms, were strictly limited in quantity and were restricted to subjects that such bodies could cope with.

The work of the law reform committees led reform-minded lawyers in the Canadian provinces to two conclusions. One was that a law reform agency composed of lawyers could make useful proposals for law reform. The second was that the work of a law reform agency composed of part-time members without legal staff or administrative

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17 For a more complete account of early attempts at law reform in England and Scotland and of the establishment and work of the law reform committees, see W.H. Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Edmonton: Juriliber, 1987) at 15-50.

18 A Criminal Law Revision Committee and a Private International Law Committee were also established for England and a Lord Advocate's Law Revision Committee was established for Scotland, but these examples were less influential in Canada.

19 For an account of the few early attempts at law reform in Canada, and for an account of the establishment and work of the Uniform Law Conference of Canada and law reform committees in Canada, see Hurlburt, *supra* note 17 at 169-77.

20 Manitoba's committee was rather more successful than the rest because of the active participation of the Chief Legislative Counsel in the committee's work (see R.L. Deech, "Law Reform: The Choice of Method" (1969) 47 Can. Bar Rev. 395). The Alberta Government provided some secretarial help for the Alberta Law Reform Committee.

support could not meet the perceived need for law reform. The two conclusions led them to push for the establishment of bodies capable of doing more substantial work. The existence and work of the law reform committees thus led to the next step, the creation of permanent commissions with full-time staffs and government funding. The first of these permanent commissions was the Ontario LRC, which was established in 1964.

The examples of the law reform committees, the example of the Ontario LRC, and the example of the English Law Commission, which was established in 1965,[21] led to the establishment between 1967 and 1971 of provincial law reform commissions in Alberta, British Columbia, Manitoba, Nova Scotia, Prince Edward Island and Saskatchewan, as well as to the establishment of the Law Reform Commission of Canada, which is outside the scope of this reply.

In 1967, I became a member of the law reform committee of the benchers of the Law Society of Alberta, and thus a member of the larger Alberta Law Reform Committee. The deficiencies of the latter had become apparent, and the benchers' law reform committee accordingly devised a proposal for the establishment of a law reform institute and were successful in persuading the Attorney General (Hon. E.C. Manning) and the University of Alberta to participate in it. The proposal was intended, by the creation of a new law reform agency, to build on the Alberta Law Reform Committee's virtues and to remedy its deficiencies. That is, ALRI was linked to the Alberta Law Reform Committee, which, as noted above, was inspired by the English Law Reform Committee and Law Revision Committee.

The provincial law reform commissions established between 1967 and 1971 were thus an evolutionary step in the development of a law reform process and law reform institutions which commenced with English examples and was continued and developed further by the work of Canadian lawyers. Although appointed by their respective governments (with the exception of ALRI, where the government has influence over appointments but does not control most of them), the provincial law reform commissions reflected the virtues and deficiencies of common law lawyers. That is, the provincial law reform commissions have tended to take pragmatic approaches to law, its application and development, and have tended to be dubious about the wisdom of wide-ranging schemes for reform, however attractive to the intellect, that go beyond the re-ordering of law, institutions, practices and procedures in ways which will have demonstrable social utility.[22]

The origins of the provincial law reform commissions in the pragmatic common law tradition shaped the commissions initially and have influenced them throughout. Without an understanding of those origins it is, in my view, impossible to arrive at an

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[21] The *Law Commissions Act, 1965* (U.K.) established the Scottish Law Commission as well as the English Law Commission, but it is the example of the latter that influenced Canadian law reformers.

[22] The present Nova Scotia Law Reform Commission was established in 1990. I have not analyzed the thinking behind it. Of its seven members, only three are appointed by the government.

accurate understanding of the commissions. That is not to say that the provincial law reform commissions have confined themselves to the sorts of things that their predecessors did. Rather, they have evolved, and become capable of functioning in areas far beyond those contemplated by their predecessors and their founders, including the procedures and functioning of institutions, and even including areas much more akin to social policy than to law. But their nature has not changed.

III. OTHER PROPOSITIONS ADVANCED BY PROFESSOR MACDONALD

A. PROPOSITIONS AND COMMENTARY

I propose to set out some of the propositions advanced by Professor Macdonald and to comment on them.

1. Élites, Bandwagons and Control of Law's Doctrine?

> *The élites in the profession jumped on the law reform bandwagon to preserve their control of law's doctrine. This permitted them to assert ownership of the process of legislative law reform.... The continuing dominant influence of professional organizations on the law until the late 1950s — for example, the Canadian Bar Association, the Law Society of Upper Canada — precluded (and perhaps even obviated the need for) any official law reform agency.*[23]

I am mystified by the proposition that the *élites* of the legal profession control or did control law's doctrine. Judges do control some of law's doctrine, but the *élites* of the Canadian legal profession, whoever they maybe, have not done so during my time, or, I think, any other time in common law Canada.

During the time when the provincial law reform commissions (other than the present Nova Scotia LRC) were being established I was intimately involved with the affairs of the Law Society of Alberta and the Federation of Law Societies of Canada, and I was throughout a member of the Canadian Bar Association. Whether or not those organizations constituted *élites*, any control of law's doctrine asserted by *élites* would have had to be asserted through them. During that time, no one suggested that any of these organizations had control over law's doctrine or should try to assert or preserve such control,[24] and there was no apparent mechanism by which any of them could do so. Nor did the Law Society of Alberta, to the extent of its involvement with the Alberta Law Reform Institute, regard ALRI as a means of controlling legal doctrine or anything else; nor has it ever tried to exert any control over ALRI.

Neither professional *élites* nor the provincial law reform commissions assert "ownership," whatever that may mean,[25] of the process of legislative law reform. Any

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[23] Macdonald, *supra* note 1 at 845.

[24] The CBA has a law reform function, but it does not have control over legal doctrine.

[25] Professor Macdonald also refers to "ownership" of legal knowledge (*supra* note 1 at 867, 869). It is, in his view, very important: "The future of expert Law Reform Commissions depends on their adopting a more heterogeneous view of where ownership of legal knowledge resides" (*ibid.*

such assertion of "ownership" they might make would be transparently false. Neither *élites* nor commissions can implement law reform proposals. Provincial governments can and do accept and implement some proposals made by the provincial law reform commissions, but they can and do make changes in others and decline to accept or implement yet others. Provincial governments adopt law reform measures that do not come from the relevant provincial law reform commissions. If there is something that can be called "ownership" of the process of provincial legislative law reform, and if it has to be vested in someone in order to avoid a vacuum, it must be vested in the provincial governments.

It is implicit in Professor Macdonald's statement that professional *élites* control the provincial law reform commissions: otherwise, the establishment of the provincial law reform commission would not preserve the *élites*' control over law's doctrine. But, except for ALRI and the present Nova Scotia Law Reform commission, all members of the provincial law reform commissions have been appointed, not by the *élites*, but by governments, and neither ALRI nor the Nova Scotia LRC is structured so that any *élite* of the profession controls it.

2. Subservience of Ideology to Knowledge?

The provincial Law Reform Commissions, Professor Macdonald says, *"were established in the first place as a consequence of the belief that ideology could be made subservient to knowledge."*[26]

Presumably the ideology which was to be made subservient includes the ideology of governments, and the knowledge to which ideology was to be made subservient was the knowledge of the provincial law reform commissions.

The notion that a provincial law reform commission *does* or *can* make the ideology of a government subservient to the knowledge of the commission, if that is what is meant by the proposition, has never, so far as I know, occurred to a provincial law reform commission or to anyone who has taken part in the establishment of a provincial law reform commission. Provincial governments control the implementation of most law reform proposals, and provincial law reform commissions, being composed of practical-minded people, do not expect governments to make their ideologies subservient to law reform commissions' knowledge.

3. Law Reform or Institutional Self-Perpetuation?

Professor Macdonald suggests that when arriving at solutions to be recommended Law Reform Commissions pose the following questions:

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at 869). Presumably "ownership" is used in some technical sense.

[26] Macdonald, *supra* note 1 at 846; see also at 864.

[W]hat reinforces the Commission's own view of its special talents, and how can it solve the problem in a manner that maintains and reinforces the notion that it has an expertise in diagnosing and remedying societal pathologies by a better deployment of formal law?[27]

He further suggests that the success of a Law Reform Commission is judged by the extent to which these questions are addressed:

At bottom, the success of institutionalized expert law reform agencies is to be measured not by their success in having their proposals enacted, but by their success in convincing their primary constituencies — in government, in the legal professions and in the legal academy — that institutionalized expert law reform is necessary.[28]

I can only read these statements as meaning that provincial law reform commissions, despite what they say, do not exist for law reform, but rather for the purpose of perpetuating themselves. That is, they pretend to advance the public interest while in fact they advance only their own interests.

The statements, again, are made magisterially. They are an argument *ad hominem* applied indiscriminately to all Canadian law reform commissions. In the absence of supporting fact or analysis they ought not to be made. No supporting fact or analysis is adduced. Needless to say, I say they are wrong.

4. Idealization of Formal Law?

The mandate and method of law reform commissions, as conceived of by Professor Macdonald,

presumes that the highest type of law, and the only type which is worthy of the efforts of experts, is law that is made explicitly by an official body such as the legislature or its delegates. It also implies that legislation is the most effective way of controlling and changing people's behaviour. Moreover, it seems to concede that the state legal system, rather than any other legal order, is the most perfect juridical form. And finally, this approach to law reform rests on the view that expertise backed by empirical evidence is the best insurance against the politicization of law.[29]

Insofar as the provincial law reform commissions are concerned, I disagree with all of these statements. Neither ALRI's mandate or its approach presumes, implies or rests

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27 *Ibid.* at 850.

28 *Ibid.* at 851.

29 Macdonald, *supra* note 1 at 851. See also at 875, where reference is made to "intellectual currents" followed by the law reform commissions: the view that law is simply a manifestation of state power and that law is a science. A further "intellectual current" is said to be "the severance of *means and ends*, with a concentration on either one or the other in particular projects" (*ibid.* at 875). I do not understand this. To me, a means is not a means unless it has an end, so I do not know how a project could be mounted to determine a means without an end. While I suppose that there could be a case in which it would be appropriate to suggest an end without suggesting means, I do not remember any case in which a provincial law reform commission has done so. I do not believe in the existence of these currents.

on any of them. I have not seen or heard anything to indicate that the mandate or approach of any other provincial law reform commission has ever done so. I have never encountered a member of a provincial law reform commission who has expressed or suggested any of them, orally or in writing.

The motivation of lawyers who promoted the provincial law reform commissions, and of the commissions themselves, may, in my experience, be put in a much simpler and more prosaic way than the various ways in which Professor Macdonald puts it:[30]

(1) Judge-made law and statute law exist and will continue to exist.

(2) Some judge-made law and statute law is misconceived when it is adopted. More of it becomes inappropriate as times and customs change: and this is a process which will continue. The operation of legal institutions may also become inappropriate or inefficient.

(3) Judges, scholars and practising lawyers see the judge-made and legislative law and legal institutions in operation. Some judges, scholars and practising lawyers are bothered because some parts of the law and the legal system operate less fairly or efficiently than is right, and they perceive that continual changes in times and customs will make more of the law and the operation of the system inappropriate. They observe that governments rarely do anything about the problems of maladjustment, because the maladjusted laws, institutions, practices and procedures are not immediately oppressive to a large enough number of people to attract the attention of the political process and because there is little effective pressure brought to bear on governments for change.

(4) Reform-minded lawyers and judges note that a law reform commission can identify and investigate problems in the law and put forward proposals for change, thus enabling, though not compelling, a government or a legislature to carry out the necessary remedial action, whether in the precise form proposed by the law reform commission or in some other form.

The reason that the provincial law reform commissions tend to focus, though by no means exclusively, on judge-made and statute law and the workings of legal institutions[31] is that those are the areas in which their legal experience and skills are most useful, although it has been found that the experience and skills can upon occasion be transported into areas of law which largely involve social policy. There is quite enough to do in areas of activity suited to lawyers to keep a small institution occupied.

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30 As noted elsewhere in this reply, the scope of the work of some of the provincial law reform commissions has been broader than this statement of initial motivation would suggest.

31 The term "legal institutions" is intended here to cover not only institutions of the judicial system but also administrative bodies and alternative dispute resolution, including arbitration, mediation and other mechanisms.

The fact that provincial law reform commissions have done certain jobs does not reflect a value judgment that no other jobs are worth doing. It is not a defect in a law reform commission that it does not undertake things that are outside its skills, experience and mandate or that it does not expend its very scarce resources on such things. If there are other jobs to be done in the public interest, different institutions or *ad hoc* arrangements can be made to do those jobs.

5. Obligatory Draft Legislation as a Claim to Expertise?

Professor Macdonald sets out some *"pragmatic advantages to supplying draft legislation."* But, he goes on to say, *"the draft statute has an important symbolic purpose as well. It demonstrates the Commission's claim to technical expertise."*[32] Later, he states, *"Once an expert Law Reform Commission frees itself from the obligation to produce draft statutes..."*[33]

The first of these statements implies that law reform commissions say that they purport to put forward draft statutes for certain purposes but that, in addition, they have a self-serving purpose — the demonstration of expertise. Again, the article puts forward no factual or analytical basis for that statement.[34]

The second statement suggests that there is an *obligation* on law reform commissions to produce a draft statute. There is no such obligation. Indeed, many law reform commission proposals have been and continue to be put forward without draft legislation. A draft statute is prepared when a proposal has been formulated which calls for legislation.[35]

A draft statute has a number of purposes. One is to smoke out hiatuses and deficiencies in reasoning, which often become apparent when proposals are put into legislative form. Another is to demonstrate that proposals are capable of being put into legislative form. Yet another is to make the proposals more easily comprehensible by that segment of the readership that is used to reading legislation. Yet another is to facilitate implementation by making Legislative Counsel's task easier: Legislative Counsel are not bound to accept a law reform commission's homespun drafting, but a draft does put out the proposal in a way which may assist them in doing their own draft.[36]

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32 Macdonald, *supra* note 1 at 850.

33 Macdonald, *supra* note 1 at 872.

34 I was privy to ALRI's first decision to attach a draft statute to a report, and I drafted some of the later ones. A suggestion that these and other drafts by untrained drafters demonstrate expertise would probably be a source of innocent merriment in Legislative Counsel's office.

35 Professor Macdonald says (*supra* note 1 at 872) that "a draft statute often acts as a 'why-stopper' in respect of the very question being addressed." But all of the "whys" are answered before the draft legislation is prepared, save for any which might be raised by the drafting process.

36 On occasion, ALRI has been able to enlist Legislative Counsel or a professional drafter to prepare a draft statute, but this option is not usually available.

6. A Failed Rationalistic, Scientific, Instramentalist Project?

> *Does the failure of the intellectual project of the 1960s, that is, the achievement of rationalistic, scientific, instrumentalist law reform, necessarily mean the failure of the principal vehicle by which such reform was to be managed: the expert Law Reform Commission?*[37]

The statement in this passage that there was an intellectual project that was to be managed by expert Law Reform Commissions, and that that project was rationalistic, scientific, instrumentalist law reform is again made magisterially with no factual or analytical support.

Professor Macdonald does not give facts or analysis to demonstrate that the provincial law reform commissions had one "intellectual project." In my experience, they did not. ALRI and the Ontario, British Columbia and Prince Edward Island LRCs, though grounded in the same traditions, took different views of the scope and substance of the law reforms they should develop. Indeed, the views of one commission about the appropriate scope of their activities might change over time and, in ALRI's case at least, have done so.

If the provincial law reform commissions, despite their diversity, had an "intellectual project," it was not one that could be characterized as "rationalistic, scientific, instrumentalist law reform." The three words, taken together, constitute a characterization which is and always has been foreign to the thinking of the provincial law reform commissions and those who promoted them.

If the term "instrumentalist" denotes a tendency to think of the law reform process as a method of serving practical ends by reordering law, legal relationships and the practises and procedures of institutions, it might, taken by itself, be an appropriate description of the approach of the provincial law reform commissions to law reform. The ends to be served must, of course, have to do with social utility and must be determined according to an appropriate value-system. But the word must be read in the context of the words "rationalistic" and "scientific."

If the term "rationalistic" referred only to proposals intended to substitute common sense and utility in a legal area for confusion and the frustration of legitimate interests, it would make some sense. But if, as the context suggests, it implies that the provincial law reform commissions have a project involving the pursuit of intellectual elegance for its own sake, or involving grandiose schemes based on abstract reasoning or on deduction from abstract principles,[38] it is irrelevant to the provincial law reform commissions and the process in which they have engaged.

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[37] Macdonald, *supra* note 1 at 869 [emphasis added].

[38] At one point, Professor Macdonald uses the term "ambition to universalistic rationality" (*supra* note 1 at 841). At another, he says that "claims that law has a latent rationality waiting to be uncovered by specially selected jurists smacked of the absurd" (*ibid.* at 843). Provincial law reform commissions, in my experience, have had no such ambition and have made no such claims.

"Scientific" is not a term that can be properly applied to the law reform processes in which the provincial law reform commissions have participated. It is true that the commissions try to balance interests, but they do not pretend that there is a scientific principle upon which the balancing can be effected. The commissions try to make the law more fair, but they do not pretend to have a litmus test of fairness. The commissions try to make the law more efficient, but they do not pretend to be able to devise some kind of time and motion analysis that can measure the efficiency obtained by a law reform.

Value-based benefits cannot be weighed in any fact-based scale against either economic or value-based costs. The law reform process engaged in by the provincial law reform commissions is pragmatic and prosaic — the application of skills, experience, consultation and invention to devise a reordering of law, institutions or practices so that they will have greater social utility. Professor Macdonald describes a "project," in which the provincial law reform commissions have not engaged.

Having described an "intellectual project" which does not exist, Professor Macdonald pronounces that "project," whatever it may be, a "failure." Again, the suggestion is magisterial. Professor Macdonald does not disclose the criteria by which the success of the provincial law reform commissions should be determined, nor does he analyze any of the work of the commissions to show how their work, or the effect of that work, fails to meet reasonable criteria of success.

It is difficult to assess such a pronouncement based on unstated criteria and with no analysis of the subject matter. I will therefore, in the next part of this reply, put forward my own criteria and assessment.

B. A BETTER DESCRIPTION OF THE OBJECTIVES OF THE PROVINCIAL LAW REFORM COMMISSIONS

1. Summary of Views

I will first summarize the views which I have expressed above and will express in this part of the reply.

It is my submission

(1) that the provincial law reform commissions were an evolutionary development based on a history of efforts by common law lawyers to bring about law reform, though they have continued the evolution by devising new systems of law reform and by extending their activities into the structure and operation of institutions, practices, procedures, and, in some cases, questions involving a high degree of social policy;

(2) that the approach of the provincial law reform commissions has been pragmatic rather than being based on rationalistic abstractions and "scientism";

(3) that the proposals of the provincial law reform commissions, though not formally so, have in general been based on the values of fairness or justice, equality of treatment, satisfaction of current interests, maximization of freedom, conformity to current morality, comprehensibility, and enforceability;

(4) that the work of the provincial law reform commissions has, on the whole, been beneficial to those affected by provincial law, practices and institutions and has been successful;

(5) that the establishment of the provincial law reform commissions was very much in the public interest and that the discontinuance or cutting back of some of them has been very much against the public interest;

(6) that the provincial law reform commissions have concentrated on the jobs they can do, a proposition which does not carry with it the implication that there are no other jobs that can and should be done, whether or not those other jobs are called law reform;

(7) that reform-minded Canadian lawyers in provinces in which law reform commissions have been discontinued should consider urging their governments to re-establish the commissions or similar institutions to perform similar functions.

2. Specific Effects of Provincial Law Reform Proposals

First, it may help, by way of example, to give a barest of bare-bones recital of some changes in law and practice that have come from the law reform process participated in by one of the law reform commissions — ALRI. In reading this recital it should be remembered that a reform encapsulated in a single sentence may have required months or years of the patient labour necessary to understand a large area of law, identify the problems, consult those affected, draft proposals, consult again, hone the result into comprehensible proposals that will fit into the surrounding law, and deal with many associated questions and problems.

In Alberta, on the breakdown of a marriage, the economic gains made during the marriage are now shared between husband and wife instead of being scooped up by one of them. An abused spouse can claim damages from the abusing spouse. The law no longer discriminates among children according to the marital status of their parents. A claim for actual financial loss against a wrongdoer now survives the victim's death. Parents, spouses and children of a person whose death is caused by a wrongful act now have direct claims against the wrongdoer without having to prove the laceration of their feelings by testimony in court. Victims of a crime can now obtain compensation for losses caused by the crime. Owners of land can no longer be brushed aside by expropriating authorities and are able deal with them on a much more even footing. The legal duties of occupiers of land have been simplified. The age of majority has been rationalized (though ALRI refrained from making a recommendation as to the age to be chosen). Residential tenants and tenants of mobile home sites have more effective

rights against their landlords. The reform of the rule against perpetuities, though that is one of the most esoteric areas of the law, has removed traps which had defeated the intentions of persons who had wanted to make long-term arrangements with respect to land. Abuses in the use of wage assignments have been rectified. A balance has been struck between the wishes of beneficiaries, on the one hand, and, on the other, the wishes of those who leave property in trust for those beneficiaries but subject to postponements and conditions. Executors can grant options and advance money for the maintenance and advancement of beneficiaries. Technical objections to transactions on the ground that one party is on both sides of a transaction, which constituted a trap in the way of legitimate transactions, have been removed. Businesspeople have a much more efficient corporate business form, freed from such antiquated concepts as the *ultra vires* rule and with a new right to obtain relief against oppressive conduct by those in control of a corporation. Civil arbitration stands much more on its own feet and is much less a mere station stop on the way to court. The rules limiting the time for bringing legal actions have been simplified and a discovery rule applied more broadly, with an ultimate guillotine (though the statute is not yet proclaimed in force). Albertans can make advance arrangements for the care of their property in the event that they become incapable of managing it themselves, and soon will be able to make advance arrangements for the care of their persons as well. Beneficiary designations for RRSPs and RRIFs have been validated. The system of realizing on money judgments has been rationalized. The *Bulk Sales Act*, which entangled good-faith purchasers of stocks of goods, has been abolished.

At a more technical level — but one still important to the real people whose interests become involved with the legal system — an antiquated section prohibiting actions against cabinet ministers without government permission has been abolished. The Rules of Court were amended to allow a property action to be brought along with a divorce action. The validity of the Rules of Court was confirmed by statute, thus avoiding claims that some of them were unauthorized. The rules relating to the division or sale of land owned by two or more people were rationalized and made more effective. Provision was made for a case in which a postal strike made it impossible to serve documents by mail as required by a contract. The defence of fair comment was made available to newspapers who publish letters to the editor. A simplified system was adopted for applications for judicial review of administrative proceedings, and procedural traps were eliminated. A conviction for a crime or offence was made admissible in evidence in civil proceedings to prove that the crime or offence had occurred. The administration of estates has been made more efficient by the adoption of revised Surrogate Court Rules.[39]

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[39] The reader is invited to assess together this recital of reforms and Professor Macdonald's statement that "[The expert Law Reform Commissions] do explore the practical consequences of certain legislative rules, especially for the day-to-day practice of law. But it is far from clear that these lawyers' rules have much relevance to the normative commitments that shape the way most people live their lives: whatever action the law produces, it is not meaningful to large segments of the population" (*supra* note 1 at 852).

Professor Macdonald deprecates the importance of such changes in the law. He says, for example,

> It follows that a faith in the capacity of legislative texts to control or to change behaviour instrumentally is misplaced. Legislation may, like assembly instructions for an electric fan, or like a recipe for a cherry cheesecake, provide suggestions about a structure for apprehending a task and a method for pursuing a purpose. It may even, like a list of New Year's resolutions, or like the mass or the *seder*, offer us a ritual to reflect upon our duties to ourselves and others. But neither legislation, nor instructions, nor ritual, in themselves directly control behaviour.[40]

The statement that law cannot control behaviour, though often made, is in my submission an over-simplification of complex subjects. The Alberta *Matrimonial Property Act*, for one example, gives the courts power to re-distribute between spouses on matrimonial breakdown the economic benefits realized during marriage. The legislated existence of that power influences some spouses with greater shares of matrimonial property to negotiate agreements in order to avoid adjudicated re-distributions. Other spouses let the courts decide. In either case, the statutory objective is achieved, whether or not the statute has influenced conduct. The Alberta *Expropriation Act*, for another example, provides that an expropriator cannot obtain possession of the land being expropriated until it has made an offer of an advance payment. This influences expropriators to make offers in cases which they cannot settle. Few, if any, of the Alberta reforms referred to in the recital given above depend for their effectiveness on a mere legislative prescription.

Certainly law is a blunt instrument and there are many things it cannot do. But there are things that it can do. A reasoned belief that a change in legislation can, in a proper case, cause the law to affect people more fairly and efficiently is not at all misplaced. Legal rights affect people who have them and people who are subject to them, and, as demonstrated by the recital given above, a reform of the law can rectify the way legal rights affect people.

In my submission, the recital of changes in the law consequent upon the Alberta law reform process — and similar recitals can be made with respect to the other provinces with law reform commissions — shows that changes in the law made under the provincial law reform process have conferred real benefits on real people. Some specific changes have benefited great numbers of people. Some have benefited the few who become involved with some aspect of the law. But few changes, if any, have been made for reasons of elegance or doctrinal purity.

The recital, in my submission, is a litany of success, not failure. Possibly some of the reforms given in the recital would have occurred anyway, but what we do know is that they did occur and that they arose out of the law reform process. The recital demonstrates, in my submission, that the public interest has been greatly advanced by the law reform commissions and that the public interest will suffer greatly from the discontinuance of some of them.

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[40] Macdonald, *supra* note 1 at 853.

I repeat, however, that the fact — as I believe it to be and as I believe the recital given above shows — that the provincial law reform commissions have performed well and in the public interest in the areas in which their skills are useful does not imply that other kinds of reforms should not be made by other agencies.

3. Areas in Which Provincial Law Reform Commissions Have Operated

I have referred above to the common law background of the provincial law reform commissions and to their consequent pragmatic, rather than theoretical, approach. This background has not, however, precluded some of the commissions from going beyond reforms of statute law and procedure.

I will give some examples. ALRI's first report recommended the establishment of a scheme for compensation of victims of crime. ALRI has done a good deal of work in dispute resolution, including what is generally referred to as alternative dispute resolution. It has on hand a project on administrative procedures. The Ontario LRC conducted major projects in court organization, Sunday observance and artificial human reproduction. The Manitoba LRC did an extensive study on the regulation of professions and occupations. These projects, and possibly even such projects as the reform of the law relating to matrimonial property, extend into areas that would not have been forecast by the promoters of the provincial law reform commissions as things which the commissions would do, but they are still capable of being dealt with by legal means.

Not all provincial law reform commissions have taken so expansive a view of their functions. One has said forcefully that "[l]awyers, as lawyers, probably have little more to contribute than other citizens in the resolution of pressing social issues,"[41] and has, working within that limitation, found ample scope for an admirable body of work. But, in my view, a law reform commission, acting on the basis of legal knowledge, identification of issues, investigation of facts, and ascertainment of social opinions and values, can make a significant contribution to questions which involve a high degree of social policy, whether by making specific proposals or by assembling in comprehensive and comprehensible form what has to be considered and the range of possible answers.[42]

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[41] Law Reform Commission of British Columbia, *Annual Report, 1974 (Report 19)* (Vancouver: LRC B.C., 1974) at 5-6.

[42] The English Law Commission, for example, issued one report which, rather than making recommendations, "[marked] out the boundaries of the field of choice" for divorce law reform (U.K., Law Commission, "Reform of the Grounds of Divorce: The Field of Choice" (Law Com. 6) (Cmnd. 3123 (1966)). ALRI also has, on occasion, left policy choices open without recommendation: *e.g.*, Institute of Law Research and Reform, "Age of Majority," Report 4, (Edmonton: Institute of Law Research and Reform, 1970); retention of the Guarantees Acknowledgment Act in Institute of Law Research and Reform, "Statute of Frauds and Related Legislation," Report 44 (Edmonton: Institute of Law Research and Reform, 1985) at 33-42; and Institute of Law Research and Reform, "Minors Contracts," Report 14 (Edmonton: Institute of Law Research and Reform, 1975).

4. Criteria of Success

There is no official set of criteria for evaluating the success of law reform commissions. However, I propose a set of values one or more of which a law reform proposal may promote and which may accordingly be made the foundation of such criteria. The list is based on a list developed by an English academic[43] through an analysis of the values which were in fact applied by the nineteenth century English law commissions, the Law Revision Committee and the Lord Chancellor's Law Reform Committee, but they are the sort of values that common law reform-minded lawyers are likely to apply and to have applied, whether in the nineteenth or the twentieth century, and whether in England or in Canada.[44] Obviously, some of these values are overlapping and some may come into conflict in a specific case — a law that conforms to current morality, for example, may not be fair or just — but they seem to me at once to provide a basis for judgment and a basis of understanding what the provincial law reform commissions have been doing.[45]

They are as follows:

(1) The law ought to be fair or just.

(2) The law ought to treat everyone equally.

(3) The law ought to satisfy current human interests.

(4) The law ought to maximize individual freedom.

(5) The law ought to conform to current morality.

(6) The law ought to be understandable.

(7) The law ought to be enforceable.[46]

In my submission, a proposed change in the law which causes it to reflect one or more of these values to a greater extent than does the existing law is presumptively valuable and can be called a "reform." However, a cost-benefit analysis is necessary

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43 F.E. Dowrick, "Lawyers' Values for Law Reform" (1963) 79 L.Q.R. 556.

44 The same academic analyzed the values of non-lawyers on Royal Commissions in the UK after the Second World War and concluded that they were much the same, though with more emphasis on the "individualistic ethic and the "axiom of distributive justice" (F.E. Dowrick, "Laymen's Values for Law Reform" (1966) 82 L.Q.R. 497).

45 I suppose that I am here speaking magisterially, but the reader can at least check this statement against the recital of Alberta law reforms given above.

46 Professor L.C.B. Gower, one of the first members of the English Law Commission said ("Reflections on Law Reform" (1973) 23 U.T.L.J. 257) that "we placed great weight on convenience, intelligibility, avoidance of needless expense, and on what we thought would make people happy because they would regard it as just" (at 268). They placed little weight on elegance except to the extent that it promoted intelligibility and simplicity. Although different in detail, this approach is animated by a spirit similar to that of Professor Dowrick.

before a final assessment of a proposed change can be made. Will the proposed change, by promoting one value, subordinate another? What other costs, tangible or intangible, will it bring with it? Will the expected benefits clearly outweigh the likely costs? This is the kind of testing to which law reform proposals should be subjected, and the reader is invited to apply it to the list of Alberta reforms recited above. In my submission, although the provincial law reform commissions have not escaped the universal limitations imposed by human fallibility, their work passes any reasonable test.

It is true that several of the provincial law reform commissions have been discontinued or cut back below an effective critical mass. However, viewed objectively, the surprising thing is that any provincial government has ever tolerated an institution one of the principal functions of which is to engage in work that the government is not interested in; the independence of which is likely to lead it to give advice that the government finds unpalatable; and which is substantially outside the control of the government. That some governments continue to tolerate them and that others did so for many years is an indication of the strength of the underlying idea. It may be hoped that the constituency of reform-minded Canadian lawyers, which still exists, will be able to persuade governments that, despite all these things, institutions should be re-established or fully re-activated to perform functions similar to those which the law reform commissions have performed in the public interest.

IV. PROFESSOR MACDONALD'S PROPOSALS FOR THE RECOMMISSIONING OF LAW REFORM COMMISSIONS

Professor Macdonald's article goes on to give his ideas about the future of "expert Law Reform Commissions." His statement that the future as he envisions it is "somewhat analogous to that envisaged by the federal government in the *Law Commission of Canada Act*"[47] suggests that the ideas propounded in his article are of relevance to the operations of the new Law Commission. I will therefore comment briefly.

A. WORK OF A RECOMMISSIONED LAW REFORM COMMISSION

1. Research

In Professor Macdonald's view, a recommissioned law reform commission's research should primarily be concerned with the following two things:

(1) Justice. Here a recommissioned commission "should primarily be concerned with the diverse ways of imagining and generating just institutions."[48]

(2) Questions of law and society, in which it "should primarily be concerned with processes of social ordering by and through which law is deployed in everyday

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[47] Macdonald, *supra* note 1 at 869, note 159.

[48] *Ibid.* at 875.

> life."[49] This category is presumably chosen because of the concept of law adopted by Professor Macdonald, which includes "informal normativity": "citizens are constantly making law and reforming the law by their daily practices and by their accumulated understandings of the social rules by which they live."[50]

The first category, justice, is framed in abstract terms, but presumably would take into account existing institutions and their practices, though that may be an instrumentalist view. I do not see how the second would work. First, the researchers would have to know what is meant by "law" in this context, that is, the law which is deployed in everyday life, of which no clear concept is advanced, but which appears to be the product of "unofficial legal systems."[51] Then, the researchers would have to identify the deployed law and determine how it is deployed. Then, they would have to identify the processes of social ordering through which it is deployed.

All of this seems to me very nebulous. If it is achieved, there would then be a question of what is to be done with the work product. If it leads to any conclusions as to how the social ordering or the deployment might be better effected, those conclusions could not, under Professor Macdonald's view of things, be translated into formal law. However, "negotiating [the myriad of unofficial legal systems that engage ordinary citizens on an everyday basis] is as much a part of the mandate of an expert Law Reform Commission as considering official law."[52] That raises a question as to what such a commission's output would be.

2. Output

Professor Macdonald does not say much about output. Clearly, a recommissioned commission would rarely recommend the enactment of legislation, so such recommendations would not constitute much of its output.[53] Sometimes, projects would be undertaken "to broaden processes of consultation" with communities, which does not seem to contemplate output, and "to recast approaches to legal regulation in identified areas," which would presumably be reported in some way.[54]

Professor Macdonald's complaint about unregenerate law reform commissions is that they presume that "the highest type of law, and the only type which is worthy of the efforts of experts, is law that is made explicitly by an official body such as the legislature or its delegates."[55] I have given reasons for disagreeing with this statement. But, if proposals for legislation are virtually ruled out and no alternative way of affecting legislated and judge-made law is contemplated, will legislated and judge-made law become the only type of law which is *not* "worthy of the efforts of experts?" It

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49 *Ibid.*
50 *Ibid.* at 866.
51 *Ibid.* at 875.
52 *Ibid.* at 875.
53 *Ibid.* at 872-73.
54 *Ibid.* at 872.
55 *Ibid.* at 851.

seems to me unlikely that this result is intended. It seems to me more likely that even a recommissioned commission would consider legislative change to be one way of reforming law, but that is by no means clear from the article.

An alternative output mentioned in the article is "a thoughtful non-instrumental discussion" which could serve a valuable educational role for Ministers and concerned constituencies.[56] The reason for providing such a discussion is that "[g]enuine felt necessities are the product of uncertainty, an absence of information, or a lack of perspective."[57] Reaching Ministers is difficult enough, given that the pressure of business compels them to rely for most purposes on "executive summaries" prepared by officials. But effectively informing the public or a segment of it about social ordering and the deployment of law in everyday life, much less conveying to them suggestions for improvements in social ordering or in their daily practices, is, I think, beyond the powers of a small institution.

One Canadian law reform commission did attempt large-scale interaction with the public. Although the Law Reform Commission of Canada did not have the breadth of mandate suggested for a recommissioned law reform commission by Professor Macdonald's article, it nevertheless had a strong feeling that law reform was not for lawyers alone and that community participation was to be sought: law reform was to involve a "reciprocal educative function." Without a broad consensus, the LRCC thought, an effective ordering of social relations could not be achieved; with changes in public attitudes it could be. The Commission saw a significant part of its role as being to educate and be educated.

However, the LRCC's efforts, through the circulation of study papers, news media coverage and distribution to special interest groups failed to generate the necessary enthusiasm. So did the establishment of an Ottawa study group convened by the Commission to study, comment on and criticize the Commission's work: the quality of criticism was good, but the average attendance was thirteen. The Commission then started a project to involve the public by putting books in public libraries and schools. However, none of this was successful enough to justify continuing it.[58] Of course, it does not necessarily follow that a new commission could not overcome the problems which defeated the old one, but the example does suggest the need for great attention to practicality.

One reference to output in Professor Macdonald's article troubles me. It is this: "Any successful effort at law reform will be at least bivocal, and will offer diametrically opposed conceptions of the just, each waiting to be called forth in support of adjudicative results depending on the temper of the times."[59] This seems to me to

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56 *Ibid.* at 872.

57 *Ibid.*

58 See LRCC First Annual Report, 1971-1972 at 4, 20; Third Annual Report, 1973-1974 at 7; and Fourth Annual Report, 1974-1975 at 8; M.L. Friedland, "The Work of the Law Reform Commission of Canada" (1972) *The Law Society Gazette* 58; and W.F. Ryan, "The Law Reform Commission: Some Impressions of a Former Member" (1976) 25 N.B.L.J. 3.

59 *Supra* note 1 at 876 [emphasis added].

suggest that a law-reform proposal should offer two conceptions: X is just; and X is unjust; and should then leave an adjudicator to decide which conception is in accordance with the temper of the times. "X" may be procedural — an adjudicator should hear both sides — or substantive — an adjudicator should apply black-letter rules strictly (as differentiated from aiming at subjective fairness) — but in neither case does it seem to me that a law-reform proposal should provide conflicting conceptions.[60] A law reform proposal which no longer suits the temper of the times can be changed, but a law, formal or informal, that gives two diametrically opposed conceptions as having validity at the same time can hardly be helpful.

I may have done injustice to this passage because of the difficulty I have in penetrating the thought encapsulated in it. But, while I can concede that "universalistic and univocal claims of transcendent justice,"[61] if made, are not tenable, I cannot see how adjudicative processes, formal or informal, will be helped by a law reform which says two diametrically opposite things at the same time, or how that will help to reform the law, however that term is understood.

V. CONCLUSION

Professor Macdonald's proposals for recommissioning law reform and law reform commissions appear to me to be too vague and amorphous to be capable of implementation, which may be an instrumentalist view. However, as noted above, Professor Macdonald suggests that the federal government intends that a "somewhat analogous" proposal may guide the new Law Commission of Canada. If so, it is to be hoped that the commission will be able to identify a practical set of functions and carry them out, as I think that it should be common ground that the expenditure of the commission's resources should have some social utility.

I would not expect any province to provide resources to a law reform commission to engage in a venture along the lines suggested by Professor Macdonald. I therefore do not think that his proposals relate to the future of provincial law reform commissions.

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60 Of course, a proposal might well make a statement that leaves it open to an adjudicator to tailor the adjudicative response to the circumstances.

61 Macdonald, *supra* note 1 at 876.