# A Case for the Reinstatement of the Manitoba Law Reform Commission

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## I. INTRODUCTION

### A. Purpose of Paper

THE PURPOSE OF THIS PAPER is to make a case, in the public interest of Manitobans, for the reinstatement of the Manitoba Law Reform Commission (L.R.C.) to its former modest budget.

That case is not complex.

Keeping the law in step with the changing interests and values of society is a function that is an integral part of good government. Experience has shown that the ordinary machinery of government is unsuited to performing the law reform function unaided. Experience has also proven that a receptive government, with the advice and assistance of a productive law reform commission, can accomplish much in the field of law reform.

Since 1970, the Manitoba Law Reform Commission has performed an extensive law reform function for Manitoba with distinction. It will continue to do so. However, recent cutbacks in its budget will enable it to perform only a sadly truncated function. The Commission now has no legal staff. It has only a completely inadequate amount of money to contract out the work that its legal staff has done in the past. It therefore depends almost entirely upon volunteer efforts to enable it to carry on the law reform function. However, volunteer efforts, in the long run, are simply inadequate to provide in sufficient quantity the pains-

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*Editor's Note*: It should be pointed out that this paper represents only the author's views, it having been requested by the Editor-in-Chief of the *Manitoba Law Journal* on the latter's own initiative and responsibility, with no authority from, reference to, or approval by either the Manitoba Law Reform Commission or the Alberta Law Reform Institute.

taking research, consultation, and policy analysis and development that are essential to the adequate discharge of the law reform function.

## B. Plan of Paper

Part II of this paper is about law reform and law reform commissions generally. It makes a number of points. First, because good laws are an essential aspect of good government, the maintenance of a suitable set of laws is a responsibility of legislatures and governments. Second, many laws are unsuitable when adopted or become unsuitable when the social circumstances and social values on which they are based change; such unsuitable laws need to be reformed so that they will work fairly and efficiently. Third, the ordinary machinery of government lacks the capacity to identify and rectify the areas of the general law that come to be in need of reform. Fourth, what is needed is a partnership in which the function of one partner—a law reform commission—is to advise about law reform, and in which the function of the other partner—a government and legislature collectively—is to assess the proposals made by the first partner and implement those found satisfactory, either as the law reform commission makes them or with changes.

Part III is about the Manitoba Law Reform Commission specifically. First, it describes the origins and subsequent history of the Commission. Second, it outlines the structure and work methods of the Commission. Third, in conjunction with Appendix A,[1] it summarises the work of the Commission and the effect that that work has had on the law of Manitoba. Fourth, it gives reasons for an assessment that the Commission's work, in partnership with a receptive Legislature and Government, has conferred much net benefit on the people of Manitoba.

Part IV sets out in summary form the case made by Parts II and III for the reinstatement of the Commission to its former modest budget and consequent high productivity.

Part V concludes the paper by making a more general point. Several provincial governments, in order to cut provincial expenditures, have terminated law reform commissions or drastically reduced their funding without any significant assessment of the harm thus done to the public interest. It is time for reform-minded people, who believe that this rush to the bottom has been a mistake, to nudge the pendulum back. These reformers must point out to governments that keeping the law in step with social needs is a necessary and integral part of good government and that a law reform commission is an important component of any plan for achieving that end.

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[1] *Infra* at 245. Appendix A is the real evidence on which this paper is based. A reader who wishes to get an impression of the depth and breadth of the Commission's impact on the law of Manitoba should direct their attention to Appendix A.

## C. Position of the Author

I do not speak as a Manitoban. My only standing to speak is conferred by an invitation from the Editor of the *Manitoba Law Journal* to prepare a paper about the Manitoba L.R.C. I do speak from a background of 30 years of experience with the Alberta counterpart of the Manitoba L.R.C., having participated in the creation, management and work of the Alberta Law Reform Institute from its inception to the present day. During that 30 years I have necessarily come into frequent contact with the Manitoba L.R.C. and seen much of its work. It has been apparent to me from the beginning that the Commission, including its staff, were and are able and devoted public servants and that their work has been practical and useful in the public interest. The work I have done in order to write this paper has confirmed me in that opinion. I hope that this paper contains enough factual and analytical material to enable readers to form their own just conclusions.

# II. Law Reform and Law Reform Commissions

## A. Why Law Reform Commissions?

### *1. Why Law Reform?*

Laws[2] affect everyone in society, often profoundly. The law as a whole should regulate human behaviour and provide a framework for human activity in ways which are suitable to the society in which it operates. Laws should accordingly have regard to the values which contemporary society thinks important and to the changing circumstances and conditions in which that society finds itself. It is important that laws be fair, just, efficient comprehensible, enforceable, insofar that they treat everyone equally, maximise individual freedom, and conform to current societal values.[3]

But the legislators, judges, and administrators who create laws are always subject to human frailties and must almost always act upon inadequate information. Inevitably, therefore, they create some laws which are unfair or inefficient when they are adopted. For example, *The Statute of Frauds*, which was intended to alleviate existing evils, was so badly designed that it brought about undesirable side effects. As times, customs, and values change, other laws,

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2 In the term "laws" throughout this paper I include judge-made laws, laws laid down by statute and regulation, and the practices, procedures and sometimes policies of administrators and institutions, and "law" has a similar scope.

3 This list of values, in my opinion, underlies the work of law reform commissions in general. For the development of the list, see W.H. Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Edmonton: Juriliber, 1986) 264–296. Note that the conformity to current societal values does not mean that the law must enforce morals or that it should not recognise individual and minority rights.

which were appropriate when adopted, become unfair or inefficient because they are designed to carry out or conform to the superseded customs and values.

Other examples are the married women's property statutes of the late 19th century.[4] These laws, by allowing women to own property, alleviated the great (though previously accepted) social wrongs created by the common law doctrine of marital unity. By the 1960s, these statutes were considered deficient because they did not give to spouses, most commonly women, the right to share in the economic benefits flowing from the marriage relationship. To take more obvious examples, it would be too much to expect that the judge–made common law handed down by past generations will deal adequately with such subjects as aerial trespass, electronic surveillance, and surrogate motherhood; and it is also too much to expect that judges can always successfully adapt old principles to such new circumstances.

It follows from these propositions, which seem to me to be self-evident, that there should be some mechanism for bringing about the reform of law so that the law will conform to societal values and operate successfully under current circumstances and conditions.

### *2. Who Should be Responsible for Law Reform?*

Within its constitutional area, a provincial legislature is responsible to the people of the province for the good government of that province. The condition of the province's law is an aspect of good government. If a new law is needed, it is within the legislature's area of responsibility to enact it. If an existing law is unjust or otherwise unsuitable, it is within the legislature's area of responsibility to change it. Under our form of responsible government, the responsibility for initiating action in a legislature devolves in large part upon the executive branch of the government, headed by the cabinet. This includes the responsibility for initiating new laws. It also includes the responsibility for initiating changes to unjust or otherwise unsuitable laws.

Except for a limited area within which courts can do so, no one but the legislature and the executive can effect reforms in the general law. No one but the legislature and the executive is responsible for the good government of the province. Law reform, inescapably, remains a governmental function.

As I have already said, some of yesterday's laws are not responsive to the wants and needs of today's society. They may have been responsive to those wants and needs when adopted, or perhaps not. Today's legislature and executive are responsible for today's laws. Ensuring the responsiveness of law to societies wants and needs is a fundamental part of good government. While legis-

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[4] See, for example, *The Married Women's Property Act*, S.M. 1875, c. 25. For a succinct but thorough account of the Manitoba legislation, see Manitoba Law Reform Commission Report 65, *The Married Women's Property Act* (Winnipeg: Queen's Printer, 1985) at 3–9.

latures and executives may delegate powers, they cannot pass the ultimate responsibility on to anyone else.

It is, of course, for legislatures and executive governments to decide how to discharge their collective responsibilities. They are not under any legal obligation to give any specific weight to any one responsibility or to adopt any specific means of performing it. The most that this paper can do is to give reasons, which in my submission are good and adequate, for the statements that the reform of the law is an important governmental responsibility; that maintaining an independent and productive law reform commission is one effective means of discharging part of that responsibility; and that, in the particular case of Manitoba, the truncating of the Manitoba L.R.C.'s function will leave the legislature and government of Manitoba with no adequate means of discharging their responsibility.

### *3. Possible Agencies of Law Reform: Courts, Legislatures, Governments, and Administrators*

If I am correct in saying that there should be a governmental mechanism for bringing about law reform, the next question is whether the ordinary machinery of government in a broad sense of that term—courts, legislatures and the executive—includes such a mechanism.

Courts make law. Occasionally they engage in law reform. The decision of the British House of Lords in *Donoghue* v. *Stevenson*,[5] for example, brought about a major reform of the law of torts. But courts are established to adjudicate; the changes they make in the law are usually incidental to the adjudication of specific disputes. Courts are not established for the purpose of reforming the general law. The judicial method is not a reforming method. Generally speaking—though the interpretation of the *Canadian Charter of Rights and Freedoms*[6] may be an exceptional case—the courts apply existing law and principles to specific fact situations, and make new law only interstitially and incrementally. Even if they were so inclined, they usually do not have enough information to venture on general reforms of the law. They recognise that law reform is for legislatures.[7]

Legislatures enact reforms of law. However, a legislature does not usually have the capacity to initiate and devise reforms of the law in any sustained way. For originating law reforms, a legislature customarily relies on the executive

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5 [1932] A.C. 562 (H.L.).

6 Part I of the *Constitution Act*, 1982, being schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

7 For a recent authoritative delineation of the restricted function of the courts in law reform, see *Winnipeg Child and Family Services (Northwest Area)* v. *D.F.G.*, [1997] S.C.J. No. 96 (Q.L.) at paras. 18–20, per McLachlin J., speaking for herself and 6 other members of the Supreme Court. For a more extensive discussion, see Hurlburt, *supra* note 3 at 436–447.

branch of its government, working under the control of ministers who have the support of the legislature. But experience has shown that even the executive branch does not have either the will or capability, in a sustained and systematic way, to look for areas of law that are not working properly, to work up appropriate solutions, to consult those interested and to decide upon the appropriate remedies.

If a government does engage in law reform, the reforms are likely to be *ad hoc* reforms which are perceived as important by those who control the political process or which have somehow managed to claim their attention amidst a sea of competing claims. The dominant purpose of executive governments is to devise and implement policies which satisfy the criteria of the political process, not to revise the body of the general law so that it will function better for those affected by it.

Administrators create much law. Subject to judicial review, they can change much of what they create, particularly with respect to practices, procedures, and policies. Their dominant purpose, however, is to perform the administrative tasks set by government within the framework of existing law, not to change the existing law.

The ordinary machinery of government, even in its broadest sense, is therefore not designed or geared to find and act upon areas of law in which the law is unsuited to the conditions in which it applies. Usually legislatures and governments will act to reform law only if for some reason—ideology, the calculus of votes, or the respectability of proponents of a proposal—the situation meets the criteria of the political process for action. If there is a job of law reform to be done which is not wholly dependent upon the exigencies of the political process, some self activating mechanism must be devised to do it.

### *4. Law Reform Mechanisms*

How should a government discharge its law reform responsibility? There are a number of ways in which it could do so and in which governments have done so. They can, as they have all too often done in the past, merely react to pressures on an *ad hoc* basis. Yet experience has shown that if law reform is no one's business, no one attends to it. A government can entrust the supervision of some areas of law—a business corporations statute, for example—to government departments. But that expedient leaves much law unreviewed and its effectiveness is dependent on a continuing will to reform that does not always exist. A government can establish a separate law reform unit within a law minister's department. Because this expedient provides separate machinery it is more likely to satisfy than either of the previous ones, but it still depends on the ap-

proval of a minister for the initiation of reform projects and may give rise to turf problems between departments.[8]

In my submission, law reform machinery should be *separate from* ordinary departmental machinery in order to realise the advantages of consistent attention to law reform and experience in the development of appropriate law reform proposals. Further, law reform machinery should be *independent of* the government in order to realise those advantages and keep it free from the ideological and partisan considerations that bind agencies of government.

Law reform commissions claim to have that independence. It may seem illusory. Many Canadian commissions, including the Manitoba L.R.C., have been appointed entirely by their governments. Some, including the Manitoba L.R.C., have been required to accept references from their governments. Others, not including the Manitoba L.R.C., have been required to have their programmes approved by their law ministers.[9] All have been funded in large part, and many have been entirely funded, by their governments. All have been dependent on their governments in some respect or other for the implementation of their proposals.

But the independence of law reform commissions is not illusory. No doubt the commissions, in choosing areas of law to work in and in working up proposals, take into account the degree of likelihood that their governments will implement the proposals, as resources expended in producing law reform proposals are likely to be wasted if the proposals are not implemented. The commissions nevertheless exercise a high degree of independent judgment in identifying laws that are in need of reform and in developing proposals for reform. This is, in my submission, a good thing: it is not in the public interest that a government hear only what it wants to hear.

The considerations discussed in this part of the paper lead to the conclusion that there should be a law reform commission or something like one so that the identification of laws requiring law reform and the development and prescription of remedies for the deficiencies of those laws will not be entirely constrained by the ordinary exigencies of governments and the political process.

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8 These are general statements. I have not analysed the experience of the Law Reform Division of the New Brunswick Ministry of Justice, an analysis which would have to be undertaken if the establishment of an intra-government law reform agency were to be seriously proposed.

9 S.M. 1970, c. 95 [hereinafter "the 1970 Act"]. In 1990, the 1970 Act was repealed by the present *Law Reform Commission Act*, C.C.S.M. c. L95 [hereinafter "the 1990 Act"]. Under the 1970 Act, the Manitoba L.R.C. could not retain consultants for specific projects without the Attorney General's approval, but that requirement was removed by the 1990 Act.

## B. The Law Reform Commission's Place in the Reform Process

Independence of the kind and to the degree described does not give a law reform commission undue power. A commission can only propose. Its government can accept, reject, ignore, or vary. If a commission can influence a government's decisions, it can do so only by the quality of the commission's proposals.

The relationship of a law reform commission to its government is one of an adviser. The commission proposes changes in law or in the operation of legal and governmental institutions. The commission cannot effect these changes. Government, its institutions, and agencies, can and do decide whether to accept a commission's advice and implement its proposals. The machinery of government sets up hurdles that a law reform commission's proposals must surmount if they are to be implemented.

If legislation or other governmental action is involved, a law reform commission usually sends its report to a minister. Ministers ordinarily refer law reform reports to their officials, tell what the proposals are and to assess their merits and political acceptability. Officials do not have the final say, but they are the usual advisers of ministers, and the disapproval of officials is likely to influence ministers. So, officials are generally the first hurdle for a law reform commission proposal.

Ministers rarely, if ever, pore over law reform commission reports. Ministers are much more likely to consider brief summaries of proposals and advice given by officials. Ministers may take positive views of law reform commissions or they may not. Ministers may feel that the existence of unimplemented proposals prepared by a public body with public money is a reproach, or they may not. Ministers' preferred posture may be activism, or it may be inertia. Ministers may want to improve things, or they may want to avoid the risks inherent in doing anything. A proposal may run afoul of a minister's ideological bent or it may seem too insignificant to justify action. The existence of actual or potential opposition may suggest that votes will be lost if action is taken. The sheer pressure of business may put a law reform proposal too far down the ministerial agenda to be reached. Ministerial inertia or opposition is likely to be fatal to a law reform proposal.

If a proposal surmounts the official and ministerial hurdles, and if it involves legislation, it may require approval of the governing party's caucus, and it will likely require the approval of the cabinet. Here again, inertia or ideological opposition may prove fatal, and the calculus of votes may suggest inaction over action.

If minister and cabinet are favourably disposed to a proposal made by a law reform commission, there is still a question of whether a place can be found on the government's legislative schedule. The department involved may have used all of its legislative slots. The government's legislative schedule may be crammed, or it may want to terminate a session as quickly as possible.

Finally, if a proposal does get to the legislature, there remains a risk that it will encounter opposition and fail to secure passage.

So, the attitudes of officials, ministers, and legislatures are of the utmost importance. If officials, ministers, and legislatures are interested in having law changed to meet the needs of the times, law reform commission proposals, or a satisfactory proportion of them, are likely to be implemented; otherwise, proposals are prone to gather dust. In considering the work of the Manitoba L.R.C. and the implementation of its proposals, it must be remembered that law reform commission proposals must be sound of wind and limb to surmount the various hurdles described above and that even good proposals are not necessarily implemented.

This account discloses inefficiencies in the law reform process: good proposals, developed by the application of resources provided by the taxpayer, are sometimes not implemented. Some of those inefficiencies could be alleviated. But the first imperative is that law reform must be conducted within the context of Canadian democratic institutions. A partnership is needed in which the function of one partner—a law reform commission—is to advise about law reform, and in which the function of another partner—a government and legislature collectively—is to assess proposals made by the commission and to implement those that stand up to examination, either in the form in which the commission makes them or with changes. The partnership will not work, however, unless the adviser–partner can work within a supportive atmosphere with adequate resources. Then the partnership enables a legislature and government to discharge their law reform responsibilities within the democratic context.

## C. Scope of the Law Reform Process

The law reform process that I have described is not designed to solve all social ills and indeed cannot do so. Proposals of law reform commissions are based on legal research, legal and policy analysis, advice and representations from those affected by the law under investigation, and sometimes on advice from other disciplines. The law reform process is oriented toward law as well as legal and governmental institutions and their operation. Its most common output is legislation, statutory or delegated. Alternatively, law reform may result in official action.

Because of these limitations, the law reform process does not customarily get at or relieve against fundamental social problems. No doubt a provincial law reform commission could be asked to investigate and provide solutions for a problem such as that of poverty. No doubt it could make a valuable contribution in that area, but that is not the sort of thing the commissions do or are expected to do. Sometimes, therefore, law reform commissions are criticised on

the grounds their reports relate only to law and that they do not address fundamental problems which law cannot solve.[10]

Provincial law reform commissions were established to assist in reforming law. Their process is designed to achieve that end and no other. They function within their capabilities. Criticism based on the fact that they do only what they are designed to do is, in my submission, misconceived.

There is enough for law reform commissions to do within their appropriate function. Law and law reform affect the legal relations of individuals, organisations, and governments. So do the operations of legal and governmental institutions. Reform of law and of legal and governmental institutions is important: it advances real interests of real people. That there are things that the law reform process cannot do misses the point. If jobs need to be done that fall outside the law reform process, different processes should be adopted for doing them. The law reform process does not exclude the establishment of other processes for other purposes.

## III. THE MANITOBA LAW REFORM COMMISSION

### A. Origins[11]

*1. Establishment of Provincial Law Reform Committees and Commissions.* Canadian law reform commissions evolved from a more primitive form of law reform agency which may conveniently be called "law reform committees." Law reform committees were the first permanent law reform organisations in Canada.[12] The Canadian law reform committees were patterned after similar English committees.

The first of the English law reform committees, and the first permanent law reform body to emerge in either England or Canada, was the Law Revision Committee, established in 1934 by the English Lord Chancellor "to consider how far, having regard to the Statute Law and to judicial decisions, such legal

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10 See, for example, J.N. Lyon, "Law Reform Needs Reform" (1974) 12 Osgoode Hall L. J. 421 and R.A. Samek, "A Case for Social Law Reform" (1977) 55 Can. Bar Rev. 409. See also R.A. Macdonald, "Recommissioning Law Reform" (1997) 35 Alta. L. Rev 831. *Cf.* W.H. Hurlburt, "The Origins and Nature of Law Reform Commissions in the Canadian Provinces: A Reply to 'Recommissioning Law Reform' By Professor R.A. Macdonald" (1997) 35 Alta. L. Rev. 880.

11 A similar account appears in Hurlburt, *supra*, note 10 (1997 reply) at 885–887. Both are derived from Hurlburt, *supra* note 3 at various passages.

12 The Uniform Law Conference of Canada, originally the Conference of Commissioners on Uniform Provincial Legislation, was established in 1918 and has performed a law reform function. The purpose of the Uniform Law Section, however, is to promote uniformity or harmonisation of provincial laws, and its reform function is incidental.

maxims and doctrines as the Lord Chancellor may from time to time refer to the Committee require revision in modern conditions." The Committee's members were appointed by the Lord Chancellor. It dealt with such prosaic things as the survival of actions, contribution between tortfeasors, and the recovery of interest in civil proceedings. The Committee, however, 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 second body, still in existence, called the Lord Chancellor's Law Reform Committee.[13]

Noting the examples of the Law Revision Committee and the Lord Chancellor's Law Reform Committee, Canadian lawyers persuaded their provincial law ministers to establish law reform committees in Ontario (1941 and 1956), Nova Scotia (1954), Saskatchewan (1958), Manitoba (1962), and Alberta (1964).[14]

Essentially, the law reform committees were informally appointed part-time volunteer groups of lawyers, academics, and sometimes judges. They had little or no administrative assistance or legally trained staffs to assist them with research, consultation, or drafting of proposals. Their proposals resulted in useful reforms, but those reforms were strictly limited in quantity and to subjects that volunteers could cope with unassisted.[15]

The existence and work of the law reform committees led to two conclusions:

*(i)* that a law reform organisation of lawyers could do useful law reform work, that is, make useful proposals for reforms of the law, but

*(ii)* that the need for law reform transcended what a part-time volunteer group with little administrative and legal support could accomplish.

To remedy the deficiencies of law reform committees, reform-minded lawyers managed to procure the establishment of a law reform commission in On-

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13 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. These Committees were less well known in Canada and therefore were not influential examples for the establishment of Canadian law reform committees.

14 For an account of early law machinery in Canada and the establishment, work, accomplishments and capabilities of the Canadian law reform committees, see Hurlburt, *supra* note 3 at 169–178.

15 Manitoba's committee was rather more successful than some other law reform committees because of the active advancement of the committee's work by the Chief Legislative Counsel, but it was not successful enough to satisfy the perceived need for law reform.

tario in 1964; and reform-minded lawyers in the United Kingdom procured the establishment of the English and Scottish Law Commissions in 1965.

The examples of the Ontario and English commissions, together with the examples of the English and Canadian law reform committees, led to the establishment of the other Canadian provincial and federal law reform commissions. Between 1964 and 1971, Ontario, Alberta,[16] British Columbia, Manitoba, Nova Scotia, Prince Edward Island, and Saskatchewan established law reform commissions. So did the federal Parliament. The Australian states, and the Australian Commonwealth followed suit in 1973.

The principal characteristics of the law reform commissions were: establishment by statute or other public instrument as agencies outside of and independent of the usual government machinery; intended continuity (protected by the founding instrument); government appointment, usually in whole but sometimes in part; government funding; and full-time legal and administrative staffs.[17]

### *2. Establishment of the Manitoba Law Reform Commission*[18]

Manitoba established a law reform committee in 1962. In 1967, Lord Scarman, the Chairman of the English Law Commission raised with the Attorney General of Manitoba and leading Manitoba lawyers the possibility of establishing in Manitoba an agency similar to the Law Commission. In 1968, a Legal Research Institute was established at the University of Manitoba. Although there was originally some thought that that Institute might act as a law reform agency, it remained a strictly research agency. Then, in 1970, a joint committee of the Canadian Bar Association (Manitoba Branch) and the Manitoba Bar Association recommended the establishment of a full-time law reform commission modelled upon the Ontario L.R.C., with a full-time chairman and assistant, secretarial support, and access to academic and practitioner resource personnel. After some discussion of the possibility of the establishment of a law reform commission for the western provinces, it was decided that one should be established for Manitoba. All political parties in Manitoba appeared to be in favour of the idea.

*The Law Reform Commission Act* of 1970[19] established the Commission. Its chairman and chief research officer were appointed in that year, though the membership of the Commission was not completed until February 1971.

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[16] The Alberta Law Reform Institute (originally the Institute of Law Research and Reform) was not established by statute and would not normally be called a commission, but it is generally included in the class of provincial law reform commissions.

[17] There have been exceptions to this list of characteristics, but the statement is generally correct.

[18] This account is based on P. Thomas, "The Manitoba Law Reform Commission: a Critical Evaluation" (1975) 2 Dalhousie L. J. 417. See also, Hurlburt, supra note 3 at 233–234.

## B. Structure and Purpose

### *1. Structure*

Legally speaking, the Manitoba L.R.C. is a body corporate composed of not less than five and not more than seven commissioners appointed by the Lieutenant Governor in Council.[20] Practically speaking, a fully functioning law reform commission includes its staff: to function at a high level of productivity, it needs full-time legal and secretarial staff. Initially, only the Chairman of the Manitoba L.R.C. spent his full time with the Commission, supported insofar as legal matters were concerned only by a part-time Executive Director. Over the years the Commission's establishment increased, though modestly, so that its 26th Annual Report, 1996–1997, disclosed a full-time legal staff membership of an Executive Director, two full-time, and one part-time legal counsel.[21] In addition, the Commission could retain expert consultants for specific projects—though until 1990 it could not pay them without the approval of the Attorney General.

The Commission has always operated with a modest budget. In 1987–1988, the year the Commission was reactivated after a temporary eclipse, its budget was $360 000, partially offset by a grant of $100 000 from the Manitoba Law Foundation. In 1995–1996, its budget was up to $446 400, reduced to $424 600 for 1996–1997.[22]

### *2. Membership of the Commission*

The Manitoba L.R.C.'s commissioners have always been appointed by the Lieutenant Governor in Council. The 1970 Act said nothing about qualifications. The 1990 Act requires the inclusion of a Queen's Bench judge, a member of the Faculty of Law, University of Manitoba, a non-government lawyer, and a non-lawyer.

The Commission was unique in that, until 1979, three of the seven commissioners were non-lawyers, and there has always been at least one non-lawyer

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19 *Supra* note 9.

20 The 1970 Act required 7 members. In practice this was reduced to 5, and the 1990 Act made the present provision.

21 Justice F.C. Muldoon served as full-time Chairman. Professor C.H.C. Edwards, Q.C. served as almost full-time Chairman until 1986. Since Professor Edwards' reappointment, the Chairman, or President as he became under the 1990 Act, has served part-time only. Interview with C.H.C. Edwards, Q.C. (10 October 1997).

22 Manitoba L.R.C., *Twenty-fifth Annual Report 1995/96* (Winnipeg: Queen's Printer, 1996) at 19; *Twenty-sixth Annual Report April 1996-June 1997* (Winnipeg: Queen's Printer, 1997) at 67.

commissioner.[23] The initial arrangement was made because the New Democratic Party Attorney General, in office when the Commission was established, wanted the Commission to demonstrate a cross-section of viewpoints and wanted members with records of voluntary service, policies continued by the Conservative Party Attorney General who succeeded him.[24] The three non-lawyers appointed in 1971 included a school principal, a journalist, and the chairman of a university's department of philosophy. The present non-lawyer member is the Hon. Pearl McGonigal, a former Lieutenant Governor of Manitoba.

The participation of non-lawyers appears to have benefited the Commission. First, lawyer members have said that the influence of lay members has tended to keep the Commission from being immersed in lawyers' law. Second, the presence of non-lawyers has required lawyer members to communicate in more generally understandable language and to provide more generally understandable reasons for legalities, where such reasons exist. Third, it has raised for discussion fundamental questions that might otherwise have been overlooked.[25] The values applied by non-lawyer members are not significantly different than those applied by lawyer members.[26]

### 3. *Statutory Duties and Functions*

Section 6 of the 1990 Act, which repeats s. 5(1) of the 1970 Act, gives the Commission a broad legal mandate:

> The duties of the commission are to inquire into and consider any matter relating to law in Manitoba with a view to making recommendations for the improvement, modernisation and reform of law.

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23 Dr. Hans Mohr, a sociologist with a background in criminology, was for a time a member of the Law Reform Commission of Canada, and the Nova Scotia Law Reform Commission includes non-lawyer members. These developments came later.

24 Interviews with the Hon. A.H. Mackling and Hon. G.W.J. Mercier (April 1983). See Hurlburt *supra* note 3 at 235.

25 Paraphrase of interviews with R.G. Smethurst Q.C. and Justice F.C. Muldoon (March & April 1983), and D.T. Anderson, Q.C. (October 1997); and see Thomas, *supra* note 18. See also Hurlburt *supra* note 3 at 235–236.

26 An English academic analysed English royal commission reports and law reform committee reports in the 19th and 20th centuries and concluded that the values applied by non-lawyer members were much the same as those applied by lawyer members, though with some differences in emphasis: F.E. Dowrick, "Lawyers' Values for Law Reform" (1963) 79 L.Q.R. 556 and "Laymen's Values for Law Reform" (1966) 82 L.Q.R. 497. It seems reasonable to expect that these findings are of general application, and the work of the Manitoba L.R.C. does not disclose any apparent tension between values of the lawyer-members and the non-lawyer-members of the Commission.

Section 6 then gives some non-limiting particulars that are themselves extremely broad: getting rid of outdated or inconsistent laws; improving the administration of justice; reviewing judicial and quasi-judicial procedures; and "[t]he development of new approaches to and new concepts of law in keeping with and responsive to the changing needs of society and of individual members of that society." Essentially, the Commission's mandate is, after study, to propose ways to make law better for everyone, and not to become hidebound in the process.

*4. Expectations*

The initiative for the establishment of the Manitoba L.R.C. was largely a lawyers' initiative (although the Commission has not been a lawyers' preserve). The Commission was an evolutionary development from the Manitoba Law Reform Committee, other provincial law reform committees, and the English precursors of those committees. The Commission was therefore grounded in a pragmatic common-law tradition.

The inference to be drawn from this background and from the early history of the Manitoba L.R.C. is that those who promoted the establishment of the Commission did not expect that it would generate intellectually-appealing but grandiose schemes for change. Justice F.C. Muldoon, though speaking as President of the Law Reform Commission of Canada after his departure from the chairmanship of the Manitoba L.R.C., appears to have reflected the Manitoba L.R.C.'s approach when he said,

> In planning the New Jerusalem, my predecessors on the Law Reform Commission [of Canada] paid no attention to the creaking hinges on the gates and the loose cobblestones in the streets. I think that the proper balance for a law reform commission is the big things and the little.[27]

That is not to say the promoters of the Manitoba L.R.C. thought the Commission would be confined to proposing narrow changes to black-letter law. Rather, they thought the Commission's approach would be practical—not abstract or doctrinaire. Instead, it would have to do with legislation and judge-made law, legal and governmental institutions, and practices and procedures. As will be seen, the Commission has realised those expectations. [28]

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[27] The People's Law Conference, *The People's Law: What Canadians Want from the Law.* (Ottawa: The Conference, 1983) at 145.

[28] This paragraph is based on the present author's rather free interpretation of what was said and done when the Commission was being established and on the context of circumstances which prevailed in Manitoba and the other provinces at the time.

## C. The Perils of the Commission

From 1970 until 1986 the Commission functioned effectively. A hiatus in the chairmanship from the summer of 1977, when Justice Muldoon left the chairmanship to take up the position of Vice-Chairman of the Law Reform Commission of Canada, until July 1979, when Professor C.H.C. Edwards took up the chairmanship, hampered the Commission's work.[29] The number of commissioners dropped from seven to five in 1983. These were the major operational difficulties faced by the Commission during that period.

At the end of 1986, Professor Edwards left the chairmanship to return to the Faculty of Law. The Commission was then reduced to four part-time members, a situation that continued until December 1987.

Then, in December 1987, the Government notified the remaining commissioners that their appointments were terminated and proceeded to replace them with senior civil servants, the stated purpose being to save $250 000 per year. It became apparent that the Government's intention was to wind down the Commission—the new commissioners were merely caretakers to accomplish the winding down.[30] Essentially, the Commission was subverted by the legal fiction of appointing officials who were to act as liquidators rather than to carry out the Commission's statutory duties "to inquire into and consider any matter relating to law in Manitoba with a view to making recommendations for the improvement, modernisation and reform of law."

This action met criticism from the legal profession, the Faculty of Law, members of the public, and the media. It was reversed after an election in which the Pawley Government was defeated and the Filmon Government took office. At that time three of the four displaced commissioners were re-appointed and the fourth, who had left the province, was replaced. In addition, Professor Edwards was re-appointed as Chairman.[31]

The new Filmon Government went further. The Attorney General referred to the continued existence and independence of the Commission as a matter of

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29 Manitoba L.R.C., *Seventh Annual Report* (Winnipeg: Queen's Printer, 1978) at 3–4; *Eighth Annual Report* (Winnipeg: Queen's Printer, 1979) at 3.

30 See the report of a meeting between the Attorney General and officials with the officers of the Manitoba Bar Association in January 1988: Manitoba Bar Association (1988) 19 *Headnotes and Footnotes* 4.

31 This account of the subversion and reestablishment of the Commission is based in part on the Commission's *Seventeenth Annual Report 1987–88* (Winnipeg: Queen's Printer, 1988) at 1–2. The Commission noted wryly that during the hiatus the Legislature had implemented the recommendations in four Commission reports (*Breach of Promise to Marry*, *The Human Tissues Act*, *Jactitation of Marriage*, and ss. 33–34 of *The Wills Act*), and it noted also its understanding that the government was implementing many of the recommendations contained in the Commission's, *Report on Administrative Law, Part I: Procedures of Provincial Government Agencies* (Winnipeg: Queen's Printers, 1984).

priority, meaning that the Commission would be protected from the kind of subversion by indirection from which it had just been rescued. The Commission, by its formal Report 70, made recommendations intended to strengthen the independence of the Commission. The Government accepted the recommendations and promptly enacted *The Law Reform Commission Act*,[32] which contained the safeguards recommended by the Commission. It also legalised the existing composition of the Commission by providing that the Commission should consist of not less than five and not more than seven commissioners.

But that was 1990. In March 1997, the Government declared its intention of shutting down the Commission and obtaining the repeal of *The Law Reform Commission Act*. It introduced a Bill 22 into the Legislature to achieve the repeal.

The Minister of Justice gave this explanation:

> The issue of the Law Reform Commission is not a question of being dissatisfied with some of the product that has been put out by the commission. It is simply a question of limited resources and where one puts the resources. It was a decision of this government that more money be directed to areas of community involvement and public safety, and in that context the money had to come from somewhere, so we made certain decisions.[33]

After protests, the Government recoiled from that extreme position. It substituted Bill 58 for Bill 22, which deleted the safeguards it had caused to be enacted in 1990, and it agreed to provide a small amount of funding for the Commission. The result left the Commission in legal existence but with resources too scanty to retain the staff which is an integral part of a fully-productive law reform commission. The Commission is reduced almost to the effectiveness level of a law reform committee, though with some financial resources.

On the second reading of Bill 58, the Minister said:

> The purpose of this bill is to preserve the commission and allow it time to investigate other sources of funding and ways of operating to deliver its services at a reduced cost. Future funding for the commission from the government will be by way of grants, and commission staff will not be civil servants. ... I am pleased that we have been able to preserve the commission, offer it the opportunity to look for other sources of funding and other ways to carry on its mandate.[34]

To an outsider, it appears that Manitoba has over the last 10 years subjected a respected and useful public institution to a modern-day Perils-of-Pauline adventure, with the protagonist at this moment rescued from actually falling from the cliff, but insecurely suspended from it and with limited room for action. This paper—or rather the accomplishments of the Commission as recited in this pa-

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32 S.M. 1989–90, c. 25.

33 Manitoba, Legislative Assembly, *Debates and Proceedings*, (26 May 1977) at 3280.

34 Manitoba, Legislative Assembly, *Debates and Proceedings*, (11 June 1997) at 4783.

per—will, in my submission, demonstrate that reinstating the Commission and restoring its full function, budget, and powers is very much in the public interest of Manitoba.

## D. The Work of the Commission

### *1. Introduction*

The general statements made in Part II of this paper apply to Manitoba: law stands in continual need of reform to ensure that it operates justly and efficiently under current circumstances; it is the Legislature and the Government which are responsible for law and consequently law reform; law reform will be neglected unless special machinery is set up to pursue it; the machinery should be separate from and independent of the other machinery of Government; a law reform commission is an example of machinery that can help the Government do its job.[35]

Before the Canadian provincial law reform commissions were established, the above propositions remained theoretical and abstract. They were based on sound analysis, but they were unproven in fact. The experience of those law reform commissions in general, and the experience of the Manitoba L.R.C. in particular, have changed all that: the work of the Commission is to assess—there is no need to rely on theory and abstractions. I will turn to a description of the Commission's work, commencing with its work method and moving onto its accomplishments.

### *2. Description of the Work of the Commission*

#### a. Work Method

A law reform commission necessarily works on a project-by-project basis: it is not possible, even if it were desirable, to try to reform all the law at once. A law reform commission project usually goes through a number of stages:

*(i)* identification (by commissioners' knowledge and experience, by suggestions from the public or affected groups, and by references from the commission's law minister) of a rule or area of law which may, upon examination, prove to be in need of reform;

*(ii)* research and initial analysis;

*(iii)* consultation;

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[35] The only other available examples are the law reform committees and *ad hoc* committees and commissions, many of which have done excellent work but which are not suited to an ongoing law-reform process.

*(iv)* deciding whether reform is needed, and, if it is, developing appropriate proposals for reform; and

*(v)* preparation of a report containing proposals for reform, which may have proposed draft legislation attached, or give reasons why reform is not needed.

A commission necessarily works in a methodical way to bring to bear on the project not only its own knowledge, experience, and skills, but also the relevant information, analyses, and views of others. If a commission failed to do so, not only would it be unable to satisfy itself of the appropriateness of its proposals, but it would be unable to satisfy its government and legislature that they should pay any attention to the proposals. The political process is able to act on the basis of current unexamined feelings and without much thought about the consequences of what it does, but a law reform commission, since it can work only by persuasion, does not have that luxury.

That is why a law reform commission must at the beginning of a project engage in careful research—usually legal research, but sometimes empirical research as well—and skilled analysis. In most cases, a commission must tap the knowledge and experience of others through an extensive consultation process which is really a continuation of the research process. When law, facts, and relevant views have been ascertained, a commission can have a reasonable assurance that it has sufficient knowledge and a broad enough understanding to devise a solution. By using its skills and experience a commission can efficiently put the solution forward as proposals for legislation or other government action.

The careful, patient, and often unexciting work of research, analysis and consultation requires dedicated people with high levels of skills. Except for small projects, it is beyond the capacity of an unsupported part-time group that meets periodically, however dedicated the members of the group may be. In my submission, the experience of the law reform commissions has confirmed the conclusions drawn from the experience of the law reform committees, that is, that a volunteer group can do law reform work up to a high standard, but only within a limited scope and in small amounts. To do more requires expert assistance. Some of that expert assistance can be obtained under contracts with academics and practitioners, but is limited in amount by the commission's financial resources and the amount of volunteer labour it can enlist. There is no long-term effective substitute for a capable and dedicated full-time legal staff.

The Manitoba L.R.C. has in general worked along the lines set out above. Up to 30 June 1997, it had published 98 formal reports and recommendations.[36]

At its inception, however, the Commission evolved an additional system, unique to itself, of "informal reports," which have not necessarily gone through

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[36] The reports are listed in Manitoba L.R.C., *Twenty-sixth Annual Report April 1996–June 1997* (Winnipeg: Queen's Printer, 1997) at 67–81. The 39 informal reports referred to below are listed there as well.

all of these stages, but have been made informally to the Attorney General and reported in the Commission's annual reports. While some of these informal reports are about narrow points—for example, a recommendation for the correction of an error of syntax made in s. 51 of *The Queen's Bench Act* in the 1970 revision of the Manitoba statutes—some are about much more substantial things—such as a recommendation that all matrimonial jurisdiction be conferred on a County Court judge as a local judge of the Queen's Bench in the Eastern judicial district.[37] It may be inferred from the list that the Commission issues informal reports when it is satisfied that the subject matter is within its legal skills and experience and that the need for a recommended reform is obvious. It appears that they are most commonly used when the Attorney General has asked for advice. Up to 30 June 1997, the Commission had issued 39 informal reports, so that the total number of reports issued to that date, formal and informal, is 137.

**b. Work Done**

It is difficult to summarise in reasonable compass the work that the Manitoba L.R.C. has done over more than a quarter of a century. In Appendix A, I try to give some impression of the scope of that work by giving capsulised descriptions of reports and recommendations. I suggest that the reader who looks through Appendix A with some degree of attention will be driven to the conclusion that the Commission's work, through the co-operation of a receptive Government and Legislature, has had an extraordinary effect on the law of Manitoba and on the interests of the public of Manitoba.

I will, however, include here a list of some of the more important and substantial effects that the law reform process, of which the Commission is a part, have had on the law of Manitoba. This list is restricted to implemented recommendations.[38] It is as follows:

*(i)* Administration of Justice

- Amalgamation of the Queen's Bench, County Courts, and Surrogate Court into one court of general trial jurisdiction.
- Addition of a Small Claims Division to the Provincial Judges Court.
- Protection of the independence of provincial judges.
- Strengthening of the arbitration process for Manitoba disputes by the adoption of a modernised *The Arbitration Act*.
- Removal of post-arrest pre-trial detention facilities from police control.

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[37] Informal reports 3B and 3A respectively, reported in Manitoba L.R.C., *Third Annual Report* (Winnipeg: Queen's Printer, 1974) at 8.

[38] See Appendix A, *infra* at 245, for more information, including implementation vehicles.

### *(ii)* Administrative Law

- Guidelines for administrative agencies for the balancing of fairness, efficiency and accuracy, with procedural requirements. (Partly implemented through government policy).

### *(iii)* Civil Rights

- Eligibility of Aboriginals for jury service.
- Provision of a definition of death for legal purposes, providing security for patients and a rational ethic for employment of life-preserving machines.
- Safeguards provided for the exercise of seizure powers under revenue statutes.
- Encouragement of voluntary donation of human tissue and provision of safeguards.

### *(iv)* Civil Wrongs and Remedies

- Abolition of an estate's claim for loss of expectation of life, coupled with establishment of right to damages given for loss of guidance, care and companionship of deceased.
- Modernisation and simplification of the law of occupiers' liability.
- Repeal of the antiquated *The Seduction Act*.

### *(v)* Contracts

- Repeal of *The Statute of Frauds* and provision of modernised writing requirements for a few contracts, mainly land contracts.
- Abolition of action for breach of promise to marry.

### *(vi)* Creditors' Remedies

- Modernisation of various garnishment and execution exemptions.
- Provision for pre-judgment interest or compensation.
- Substantial revisions to mechanics' (builders') lien legislation.
- Provision for the periodic payment of damages.
- Repeal of *The Bulk Sales Act*.
- Reorganisation of wage recovery provisions into modernised statute.

### *(vii)* Criminal Law

- Changes in proposed legislation permitting default convictions for some provincial offences, including more stringent notice provisions.

### *(viii)* Disabilities

- Provision for special enduring and springing powers of attorney.
- Provision for advance health directives.
- Improved provision for detaining a person believed to be dangerous because of a mental disorder, with comprehensive scheme for admission, periodic review and release, and right to consent to or refuse treatment.

### *(ix)* Family Law

- Establishment of a regime of sharing on marriage breakdown or death of gains and acquisition made during marriage.
- Putting spousal and child support on a more comprehensible basis.

- Establishment of a central registry to provide adoption information by consent.
- Adoption of *The Family Relief Act* that benefits only dependants.
- Giving an abused spouse a right to sue the abuser for damages.
- Provision for the restoration of children, subject to safeguards, to custody lawfully awarded in other provinces.

### (x) Highway Traffic

- Reorganisation of *The Highway Traffic Act* for coherence and comprehensibility, together with reforms such as safeguards against seizure powers and charging owners with others offences and abolition of guest passenger provision.

### (xi) Insurance

- Changes in fire insurance legislation to protect rights of assured.

### (xii) Limitation of Actions

- Provision of extended limitation periods for children and persons under disability.
- Application of six-year limitation period to both title and detention of chattels.

### (xii) Mortgages

- Giving mortgagors a right to receive a discharge on prepayment of mortgage given to mortgagor.

### (xiii) Municipal Law

- Amelioration of sweeping posers of entry, inspection, etc., given to City of Winnipeg.
- Requirement of disclosure of financial interests of municipal councillors.

### (xiv) Private International Law

- Abolition of domicile of dependency of married women and the revival of domicile of origin on abandonment of domicile of choice, and providing for a new domicile of children and mentally incompetent persons.

### (xv) Professions and Occupations

- Establishment of educational requirements for applicants for real estate sales and brokerage registration.
- In relation to professions and occupations, adoption of a new costs and benefits approach to granting exclusive rights to names and titles, exclusive rights to perform services, and powers of self-regulation (partly implemented by government policy)

### (xvi) Property

- Legislation providing that, in the absence of specific provision, a surface owner owns sand and gravel.
- Abolition of the right to acquire a prescriptive easement, requirement of registration of existing prescriptive rights. Q.B. power to discharge or vary unreasonably restrictive prescriptive easements and order compensation.
- Abolition of rules against perpetuities and accumulations.
- Liability for damages for filing a *lis pendens* without reasonable cause.

- Abolition of the rule in *Shelley's Case*.

*(xvii)* Succession

- Provision for internationally recognised wills.
- Validation, with safeguards, of wills signed without all required formalities, and validation of gifts to witnesses.
- Significant reforms of intestate succession.
- Validate designations of Retirement Plan Beneficiaries.
- Establishment of the right of a specific beneficiary to the proceeds of a deemed gift.

*(xviii)* Trusts

- Replacement of the rule in *Saunders* v. *Vautier* by a statutory scheme permitting variation of trusts.
- Substitution of a "prudent person" rule for *Trustee Act* list of permitted investments.
- Validation of non-charitable purpose trusts.
- Authority to trustees to consider non-financial or "ethical" criteria in addition to traditional criteria, without abandoning traditional goals.

Some important proposals of the Commission have not been implemented.[39] A proposed Bill of Rights, for example (though prepared at the request of the Attorney General), was not adopted. Given the important interests involved and the difficulties inherent in many subjects, the failure of some proposals to survive the hurdles set up by the law reform process is not surprising. Given that other proposals face the opposite danger of apathy, the non-adoption of some minor proposals is not alarming either.

### c. Assessment of Law Reform Accomplished as a Result of the Commission's Work

The work of the Manitoba L.R.C., as outlined in Appendix A, and as briefly highlighted above, is remarkable for volume, content, and effectiveness. I think that any attentive and objective observer is likely to come to the same conclusion. The important thing to note is how much has been done by a receptive Legislature and Government, assisted by a productive law reform commission, to make the law of Manitoba fairer and more just, more efficient, and more responsive to the circumstances, interests, and values of society today.

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[39] For a complete list, see Appendix A, *infra* at 245.

# IV. THE CASE FOR REINSTATING THE COMMISSION

## A. Making the Case

### *1. Underlying Considerations*

The Manitoba Government has decided to make a drastic reduction in the funds allocated to the Manitoba L.R.C. In June 1997, the information of the president of the Commission was that the Commission's total budget allocation for the future would be $50 000.[40] At that level of funding, assuming that no change has occurred in the meantime, the Commission must rely on virtually unsupported voluntary service provided by the commissioners, supplemented by such expert legal help as the practising and academic branches of the legal profession may provide free of charge or within a minimal budget. Essentially, this reduction has the effect of a decision that the law reform function performed by the Commission does not at this moment justify a public expenditure of some $400 000 to $450 000 per year.

That decision is within the Government's purview. A law reform commission does not enjoy *Charter* protection against deprivation of life or budget. A law reform commission has no entrenched right to the fairness which its law reform proposals try to secure for others. Except as constrained by legislation—and the 1990 constraints were removed from *The Law Reform Commission Act* by Bill 58 of 1997—it is for the Government, supported by the Legislature, to decide how to raise and allocate tax money. The question, therefore, is whether there is a case which should be put to the Government for the reinstatement of the Commission, something which is still possible, though difficult, but which will become more difficult with the passage of time. In my opinion, there is such a case, and it is very powerful. I will try to develop the case.

One difficulty is that, in the nature of things, it is impossible to point to any specific effect that the truncation of the Commission's work will have. It will not have any effect on today's law. It will have an effect on tomorrow's law, but that effect, though it may be expected to be both substantial and prejudicial to the public interest, will not be evident. The effect will merely be that some laws that might have been reformed will continue to inflict injustice or inefficiency on those who are affected by them. The deficient laws will draw the complaints, not the lack of a law reform commission to devise better laws. Negative consequences will not be traceable, except hypothetically, to the lack of Commission resources. The case for the reinstatement of the Commission depends upon a calculus, the benefits side of which is the probability of future advantages that, however real they may be, cannot be seen or quantified today.

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[40] Submission by C.H.C. Edwards, Q.C., President, on behalf of the Manitoba Law Reform Commission to the Standing Committee on Law Amendments (24 June 1997).

Indeed, even the assessment of the value of law reforms already accomplished is beyond the skills of the bean-counter. It is not possible to assess in dollar terms the benefits to spouses and to society of a fairer matrimonial property regime, or the benefits to litigants and to society of having one trial court instead of two, to take two examples from the long list of achieved reforms set out in Appendix A. It is even more difficult to assess in dollar terms the benefits to various segments of the public of Manitoba that will flow from the future work of an adequately funded Commission. Part of the case for the reinstatement of the Commission is that any objective application of judgment to the past and present work of the Commission must necessarily lead to the conclusion that the value of the benefits received from it has far outweighed the costs of realising those benefits in the past; and to the further conclusion that it is highly probable that the benefits of the work of a Commission reinstated to its budget and establishment will far outweigh the costs in the future.

A significant factor in the case for reinstatement is the very use that the Government has made of the Commission over the years. As noted in Appendix A, a substantial proportion of the Commission's project began with references from the Attorney General, including such matters of broad general importance as amalgamation of courts, independence of Provincial Court Judges and justices of the peace, reform of the *Elections Act*, conflicts of interests of elected officials, administrative procedures, and regulation of professions and occupations. Having the Commission available to carry out the referred projects at the least saved the Government substantial costs in completing these projects; and it may well have been the only way that the Government could have effectively achieved the important reforms that resulted from those projects.

### *2. The Case*

The case that should be put to the Government flows from the facts and analysis already given in this paper. Part of the case is general: the need for continuing law reform machinery to keep large parts of the law of any province in step with the times. Part of it is specific: the demonstrated value of the Commission's past work and the consequent expectation of the value of the work it should do in the future. The case may be summarised as follows:

#### a. General Propositions

*(i)* Laws are sometimes unsuitable when adopted and often become unsuitable with changes in social circumstances and values.

*(ii)* The making of laws, including maintaining their suitability, is an aspect of good government and is therefore a responsibility of legislatures and governments.

*(iii)* No adequate machinery exists within governments for maintaining the suitability of great parts of the general law which do not fall within the purview of political imperatives.

*(iv)* A government should provide such machinery. It is better that the machinery be separate from and independent of the usual machinery of government so that it will undertake work and give advice not dictated by political imperatives.

*(v)* An appropriate form for such machinery is a continuing advisory law reform commission appointed and funded in whole or in part by the government with resources sufficient to enable it to maintain a legal staff and obtain such legal and other assistance as is required to enable it to perform its function; indeed, no adequate substitute for a law reform commission has been devised and established.

**b. Specific Propositions**

The work of the Manitoba L.R.C., with the co-operation of a receptive Legislature and Government, has:

*(i)* demonstrated the correctness in Manitoba of the general propositions set out above;

*(ii)* resulted in a mixture of major and minor reforms in a wide range of legal areas that:

*(a)* are unlikely to have been effected, or as well effected, in any other way;

*(b)* have made the laws of Manitoba fairer and more efficient; and

*(c)* have conferred public benefits far in excess of the costs.

The evidence supporting these specific statements—I would say the proof of these specific statements—is the Commission's written product, which I have brutally summarised in Appendix A, particularly the great part of it that has been implemented by legislation and administrative and official action.

To put the case for restoring the Commission to its previous level of activity into one sentence: the work of the Commission has enabled the Legislature and Government of Manitoba to provide fairer and more efficient laws for Manitobans than they could have done without the Commission and, if the Commission is reinstated, will in all probability continue to do so in the future.

## B. Private Funding?

The second ministerial statement quoted above[41] contained the following sentence: "The purpose of this bill is to preserve the commission and allow it time to investigate other sources of funding and ways of operating to deliver its services at a reduced cost." This raises the question of whether the Commission can be funded by non-governmental sources to carry on a level of activity comparable to that of the last 26 years?

The first issue that arises is whether the Commission could maintain a comparable level of activity at substantially less cost. Its budget has always been modest: a staff consisting of an Executive Director, two full-time lawyers, and one part-time lawyer is not large in relation to the volume of the work turned out by the Commission, and the other expenditures shown by its 1996–1997 Annual Report[42] are modest. It is difficult to see how the Commission could, while remaining fully active, cut its costs by any amount which is significant in relation to the reduction in budget which has been made by the Government. Certainly, a budget of $50 000 will not allow the Commission either to retain an adequate legal staff or to pay outside consultants to supply the lack of an adequate legal staff. It will not allow the Commission to function at anything approaching the level of the last 26 years.

Costs can be cut by securing volunteer labour. The Commission is now doing this in part; commissioners have agreed to forego for the rest of this fiscal year the modest sums they were being paid. [43] Past experience suggests that public-spirited practitioners and academics will do volunteer work in the public interest. That is how the law reform committees were able to function. However, experience also shows that volunteer public-interest efforts are inadequate to do the necessary law reform job. That is why law reform committees were found wanting and why law reform commissions were established in their places. Volunteer efforts are simply not enough to sustain an adequate level of law reform activity.

The next issue is whether the Commission can find non-governmental sources of funding. In my submission, a law reform commission cannot accept funding from any individual, firm, or group that has or may have a personal or financial interest in the state of the law. A law reform commission is an adviser to its government; it is an adviser acting in the public interest. Any funding from a special-interest group would be incompatible with that status and would fatally compromise the Commission.

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41 *Supra* note 34.

42 Statement of Receipts and Expenditures, *Twenty-sixth Annual Report April 1996-June 1997* (Winnipeg: Queen's Printer, 1997) at 67 (Appendix D).

43 Interview with C.H.C. Edwards, Q.C. (October 1997).

Organisations of the legal profession may prove willing to provide a law reform commission with accommodation or other facilities. They may be willing to provide volunteer labour. They may even prove willing to provide a commission some money for a period of time. They are not, however, likely to be willing to fund a commission, in money or in kind, indefinitely or at the level of activity which is necessary if the Commission is to be effective. The legal profession itself may have a personal, professional or financial interest in the state of the law in a specific area.

Charitable or other public-interest organisations are not likely to be attracted to funding a statutory government agency to perform a government function. Nor is a public appeal for funds by a law reform commission likely to prove persuasive.

The Manitoba Law Foundation has in the past put up money for the funding of law reform. With declining revenues and increased competition for available funds it is unlikely to be willing or able to provide core funding for the Commission.

There is also a question as to whether a law reform commission has the resources necessary to engage in fund-raising and whether a statutory body which must include a Queen's Bench judge is an appropriate fund-raising vehicle.

In my submission, private funding of a law reform commission at an adequate level of activity is impractical and incompatible with the public-interest function of a law reform commission.

## V. CONCLUSION: A TIME TO NUDGE THE PENDULUM

FROM THE MID-1960S TO THE EARLY 1970S, law reform commissions were established throughout England and Scotland, Canada, and Australia. Today, though the English and Scottish Law Commissions and all but one of the Australian commissions remain, the only fully-functioning Canadian provincial commissions are the Alberta Law Reform Institute and the Nova Scotia Law Reform Commission, although the new Law Commission of Canada is just coming into full operation. The Ontario and British Columbia Law Reform Commissions have been effectively terminated; however the British Columbia Law Institute has been established as a non-governmental successor to the B.C. L.R.C. The Law Reform Commission of Saskatchewan operates at only a very low level of activity. As we have seen, funding of the Manitoba Law Reform Commission has been drastically cut. Does all this mean that law reform and law reform commissions are passing fads that have run their course?

In answering this question, it is necessary to start with a stark underlying reality: law reform is only possible, and a law reform commission will continue in existence, if its government is interested in keeping the law in touch with people's needs or, in the alternative, if the political price of discontinuing an existing law reform commission or not establishing one is more than the gov-

ernment wants to pay. Inertia, in the form of a habit of providing budgets from year to year, may protect a commission for a time, but not for too long. As the individuals who control the relevant levers of power change from time to time, there is always a risk that a previously interested government will become uninterested (and, of course, vice versa). The underlying situation is fragile, but that is a consequence of our notions of parliamentary democracy under which legislatures and governments control the law making and budget-providing processes. There is no legal mechanism that can or should protect a law reform commission against a hostile government.

Why then have Canadian provincial governments terminated some law reform commissions and drastically cut the funding of others? The reason given every time has been cost-cutting. It may be accepted that this is the real reason: it is easy for the financial managers of a government to compile a list of agencies to be cut without looking closely to see whether the public interest will suffer from the loss of all or most of their services. As financial stringency lessens, so should the rush of governments to the bottom.

There is no doubt a pendulum or bandwagon effect in such things. Financial situations change, and social priorities change. As an Australian judge and law reformer said in 1979:

> The thing ... which oppresses me most ... is that the whole history of seven centuries of law reform shows that there are only some times and some generations in which the whole community is receptive to law reform .... Unless we make the best use of all our energies in a co-ordinated fashion, the tide of public opinion will once again recede.[44]

However, the fact that the provincial law reform commissions have remained in existence for periods of more than 30 years, together with the high rates of implementation of law reform commission proposals, suggests that the notion of law reform has had strength in the minds of governments. The reestablishment of law reform commissions in Nova Scotia (1990) and federally (1996), where commissions had previously been terminated, together with the earlier reinstatement of the Manitoba L.R.C. in 1988, show that the termination or cutting back of a commission is not necessarily final.

There is always a constituency of individuals who see that unexamined law acts unfairly or inefficiently and think something should be done about it. That constituency transcends political party lines. In England, the Law Commissions were established by a Labour Government acting under the influence of Gerald Gardiner, a reform-minded lawyer, but Conservative as well as subsequent Labour Governments have continued them. In Manitoba, one New Democratic Government established the Manitoba L.R.C. and another tried to abolish it by indirection, while one Conservative Government continued it enthusiastically and another both revived it and cut it back. In other provinces, law reform

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[44] H. Zelling, "Law Reform in Retrospect—The Achievements" (1979) 53 Austrl. L.J. 745.

commissions have been established by governments with very different ideologies.

It is the constituency of reform-minded lawyers who brought about the establishment of the law reform commissions in the first place. It is the reform-minded constituency, lawyers and non-lawyers, who must keep alive, and keep before its governments, the notion that law reform is a necessary and integral part of good government. It is time for that constituency to exert itself again.

The ideas set out in this paper should form a sufficient foundation for the rejuvenation of the law reform movement. If they are not, they should be reworked until they are. The record of the Manitoba L.R.C. as described in this paper should be urged upon the Manitoba Government, and upon other governments as well, as an example of what can be accomplished by a receptive Government assisted by a productive law reform commission.

The fundamental objective should be to persuade governments, for the reasons already given in this paper, that keeping the law in step with social needs is a necessary part of good government and that a law reform commission is an important—and cheap—component of any plan for achieving that end.

# APPENDIX A

# Reports of the Manitoba Law Reform Commission and their Implementation

| Report[1] | | Recommended Action [2] | Implementation |
|---|---|---|---|
| No.[3] | Title | | |
| *Administration of Justice and Dispute Resolution*[4] | | | |
| 15 | Administration of Justice, Part I: Control of Post-arrest/pre-trial detention | Transfer control of post-arrest/pre-trial custodial facilities away from police control. | Administration of Winnipeg Remand Centre transferred to Province. |
| 19 | The Administration of Justice in Manitoba, Part II: Review of The Jury System | Eliminate exemptions, provide for random selection, and restore civil jury system. | S.M. 1977, c. 18. |
| 21 | The Administration of Justice in Manitoba, Part III: Consolidation of Extra-Provincial Judgment Enforcement | Extend to County Courts the power of discretionary review of judgments from non-reciprocating states. Enact a consolidated statute with all enforcement legislation. | Not implemented. |

*Continued.*

1 Reports marked with an asterisk (*) are identified in the Annual Reports as having been referred to the Commission by the Attorney General. Others, particularly matters dealt with by informal reports, may also have been referred.

2 For the columns entitled "Recommended Action" and "Implementing Legislation" the author has relied on the descriptions of reports given in the Commission's Annual Reports and on the schedule in Appendix E of its 1996–1997 Annual Report respectively.

3 The report numbers given in the "Report" column are the numbers assigned by the Commission. Cardinal numbers denote *formal* reports. Numbers such as 1a, 1b, 2a, and so on, denote *informal* reports. The initial number is the number of the annual report in which the informal report is described.

4 The classification by subject matter is the author's.

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| 52 | Structure of the Courts, Part I: Amalgamation of the Court of Queen's Bench and the County Courts of Manitoba | Merge Queen's Bench, Surrogate Court, and County Courts into one superior trial court of general jurisdiction as the Court of Queen's Bench, with a system of resident judges and judicial circuits, and with judicial centres throughout the province, but only one judicial district. | S.M. 1982–84, c. 82–85. |
| 55 | The Structure of the Courts, Part II: The Adjudication of Smaller Claims | Establish a Civil Division of the Provincial Judges Court with exclusive (subject to limited exceptions) jurisdiction to adjudicate (initially) claims up to $3 000. Provide pretrial services, including pilot mediation programme. Do not exclude any class of plaintiffs. Do not exclude legal representation. Initially, do not require statement of defence. Appeal to Q.B. on law and mixed law and fact. Make provisions as to evidence and procedure as per report. | S.M. 1985, c. 51. |
| 65 | Section 83 of *The Queen's Bench Act* | Repeal s. 83, which allows the reopening of a foreign judgment on its merits, unless the court finds a defence to be embarrassing or for delay. Other rules give sufficient protection. | S.M. 1986–87, c. 19, s. 12. |
| 72* | The Independence of Provincial Judges | Adopt measures to ensure independence, including: a nominating committee method of appointment, a discipline procedure that separates laying of charges from prosecution and adjudication, evaluation, a Chief Judge, immunity from law suits as per superior court judges, approval of Chief Judge required to an appointment of a judge to a commission of inquiry, salaries to be recommended by an independent committee on a negative resolution basis. | S.M. 1989–90, c. 34; S.M. 1994, c. 14. |
| 75* | The Independence of Justices of the Peace and Magistrates | Adopt measures aimed at ensuring the independence and impartiality of justices of the peace and maintaining public confidence in that office. | Not implemented. |

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| 85 | Arbitration | Adopt new model of arbitration statute restricting access to courts, providing procedural framework, expanding arbitrators' powers, and providing easier enforcement of awards. Provide for incidental matters as per report. | S.M. 1997, c. 4. |
| 1c | Amending Provisions as to Costs in Part II of *The County Courts Act* to avoid inconsistency with intent of this new legislation | Revise costs provisions to agree with intent; express costs provisions so as to induce use of small claims procedures. | S.M. 1972, c. 38. |
| 2a | Comments on draft Bill to Amend *The Jury Act* | Reduce exemptions from jury service to persons positively disqualified by statute and hardship cases. | S.M. 1972, c. 56. |
| 3a | Conferring of matrimonial jurisdiction upon a County Court Judge as a local Judge of the Queen's Bench within the Eastern Judicial District | Confer matrimonial jurisdiction on County Court Judge as local Queen's Bench Judge in Eastern Judicial District. | S.M. 1978, c. 28. |
| 3c | Conferring jurisdiction to extend time for payment of fines upon provincial judges other than those who imposed such fines | Amend *Summary Convictions Act* and *Criminal Code* to confer jurisdiction on a judge other than the fine-imposing judge to extend time for payment. | Originally shown as unimplemented. Later shown as "not applicable for provincial enactment." |
| 3e | Repeal s. 212 of *The Liquor Control Act* | Repeal section prohibiting ex parte trials in view of other statutes and *Criminal Code* permitting such trials. | S.M. 1974, c. 63. (Substantial acceptance.) |
| 4a | Inter-provincial Subpoenas. | Provide for compelling witnesses from one province to testify in another. | S.M. 1974, c. 63. (Substantial acceptance.) |
| 96 | Special Constables | Revise law to solve a number of problems relating to use of powers, lack of supervision, conflicts of interest, and lack of legal basis for appointment. | Not implemented. |

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| | | *Administrative Law* | |
| 58* | Administrative Law, Part I: Procedures of Provincial Government Agencies | Each of 61 provincial agencies, whose decisions affect rights or interests, should publish rules of practice and procedure. Establish a monitoring body with reporting requirement, and have that body review rights of appeal. | No legislation proposed. Implemented, in part, through government policy. |
| 69 | Report on Administrative Law, Part II: Judicial Review of Administrative Action | Adopt a *Judicial Review Act* providing for a broad discretionary locus standi provision and one procedure for judicial review, with comprehensive powers and relief against mistaken choices of procedure. Include domestic tribunals. | Not implemented. |
| | | *Animals* | |
| 93 | Animal Protection | Consolidate animal protection provisions in a single statute and enforce them in a co-ordinated fashion. Legislate, in specific terms, activities that will justify seizure, and clarify powers of enforcing agents. Increase penalties for those who mistreat animals. | S.M. 1996, c. 69. |
| | | *Civil Wrongs and Remedies* | |
| 8 | Section 45, *Offences Against the Person Act 1861* | Abolish immunity of person acquitted/convicted of common assault against civil action by or on behalf of the victim. | S.M. 1973, c. 13. |
| 9 | A review of the *Privacy Act* with proposed amendments to the *Criminal Code of Canada* | Do not change the *Privacy Act* (a progressive and valid exercise of Legislature's jurisdiction) despite proposed provision for punitive damages in *Criminal Code*. | No legislation recommended. |
| 11* | The advisability of *A Good Samaritan Law* | No demonstrated need for special protection for persons who render emergency aid. | No legislation recommended. |
| 35* | Estate claims for loss of expectation of life | Abolish an estate's claim for loss of expectation of life but amend the *Fatal Accidents Act* to provide that damages for wrongful death should include compensation for loss of guidance, care, and companionship suffered by claim, if deemed to have suffered such loss. | S.M. 1980, c. 5. |

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| 42 | Occupiers' Liability | Require an occupier to take reasonable care so that any entrant will be reasonably safe. | S.M. 1982–84, c. 29; S.M. 1984, c. 17, s. 28. |
| 78 | Tort Liability for Animals | Abolish the common-law rules of scienter and cattle trespass. Hold owners liable for damage caused by their animals, subject to reduction of liability where the victim brought the harm on himself or herself through fault or negligence. | Not implemented. |
| 9c* | *The Seduction Act* | Abolish the anachronistic common-law rule and repeal *The Seduction Act* with respect to both children and servants. | S.M. 1982, c. 10. |
| 15a | Section 300 of *The Liquor Control Act* | Repeal s. 300, which imposed liability on innkeepers who serve an intoxicated patron where there is danger of irresponsible or careless behaviour causing the patron's death, limited to $100–$1 500. Leave liability and compensation to the courts. | S.M. 1992, c. 32. |
| 20b | Replevin and the Need for Prior Possession | No reform of replevin required. | No legislation proposed. |
| 22a | Scope of Apportionment under *The Tortfeasors and Contributory Negligence Act* | Replace *negligence* with *fault or negligence* as grounds for reduction of damages so that Manitoba courts can develop this area of the law in the same way as the courts of other provinces. | Not implemented. |
| 98 | Stalking | Provide effective remedies for victims of stalking. | Not implemented. |
| | | ***Civil Rights*** | |
| 1 | Jury service for Registered Natives | Provide that Band Rolls be a source of jury lists so registered Natives can be summoned for jury service. | S.M. 1971, c. 32. |
| 16 | Definition of death | Provide a uniform definition of death for security and confidence of patients' and a rational ethic for employment of life support machines. | S.M. 1975, c. 5. |
| 25* | The Case for a Provincial Bill of Rights | Enact a *Manitoba Bill of Rights*. Model bill included. | Not implemented. |

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| 26 | Revision of Birth Certificates of Trans-sexual persons | Provide birth certificates for certifiably identified post-operative trans-sexual persons born in Manitoba, in conformity with the person's anatomical changes, chemical revisions, and social functioning. | S.M. 1982–84, c. 58. |
| 33* | Enforcement of Revenue Statutes | Limit seizure without warrant to instances where reasonable and probable grounds exist to believe it necessary to prevent the suppression or destruction of evidence, and require reporting of all such cases. Limit seizure under warrant to where a minister has reasonable and probable grounds to believe that a violation has occurred or is likely to occur. | S.M. 1985, c. 50. |
| 66 | *The Human Tissue Act* | Do not substitute a *strong contracting-in* provision for voluntary tissue donation on death. Do enhance the present system in a number of ways designed to increase donations, clarify and rationalise donations, and emphasise primacy of deceased's expressed wishes. Adopt a scheme of inter vivos donations restricting adult donations of non-regenerative tissues to transplant situations, providing for consent by *mature minors*, and prohibiting removal of tissue from persons who are incapable of understanding the nature and effect of the removal (except by reason of age). Deal with important collateral issues as per report. | S.M. 1987, c. 39, 57; S.M. 1989–90, c. 28. |
| 76* | Sterilisation and Legal Incompetence | The report explored the two irreconcilable positions emanating from opposing ideologies on the complex issue of whether legally incompetent people should ever have access to or be subject to non-therapeutic sterilisation, concluding that the government and Legislature are the bodies to make the choice between the positions. | No legislation recommended. |
| 8a | Section 5(1) of *The Social Assistance Act* | Extend mother's allowance to all single parents, whether male or female. | S.M. 1984, c. 17. |

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| | | *Contracts* | |
| 41 | *The Statute of Frauds* | Repeal *The Statute of Frauds*. Substitute a statute requiring few contracts, mainly dealing with land, to be evidenced in writing, with provision for enforcement if there is reliance or acts clearly indicating that a contract has been entered into. | S.M. 1982–84, c. 34. |
| 57 | *The Uniform Sale of Goods Act* | Adopt the Uniform Law Conference's *Uniform Sale of Goods Act* with some variations, but only when at least one other province does so. | Not implemented. (No province adopted *Uniform Act*.) |
| 59 | Breach of Promise to Marry | Abolish all actions totally based on breach of a promise to marry, but allow an action for deceit where there has been a bigamous or sham marriage. Deal with gifts in contemplation of marriage as per report. | S.M. 1987, c. 21. |
| 62 | Small Projects: Section 6 of the *Mercantile Law Amendment Act* | Continue the abrogation of the common-law rule that debt settlement arrangements could not be enforced for want of consideration, but clarify it to consider developments in the law. | S.M. 1992, c. 32. |
| 80 | Privity of Contract | Allow, with safeguards, a non-party to sue for a benefit conferred by a contract. | S.M. 1992, c. 32. |
| 82 | Pre-contractual Misstatements | Give a person induced to enter a contract by a false statement a primary remedy of damages rather than termination only, though termination should be available where damages are an inadequate solution. | Not implemented. |
| 86 | Covenants in Commercial Tenancies | Eliminate artificial distinctions between kinds of promises so all will benefit or obligate assignees of landlords or tenants; relate entitlement to sue to the right to receive benefits of a lease interest. Incidental matters as per report. | Not implemented. |
| 92 | Fundamental Breach and Frustration in Commercial Tenancies | Apply usual contract rules about fundamental breach and frustration to commercial leases. | Not implemented. |

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| 95 | Commercial Tenancies: Miscellaneous Issues | Abolish restrictions under *interesse termini*, abolish requirement to allow tenant to see title (available at Land Tittles Office), reform validity of lease not complying with agent's authority. | Not implemented. |
| | | ***Creditor's Remedies*** | |
| 2 | Summary Disposition of Builders' and Workmen's Liens | Provide as per report a mechanism or procedure for removing liens if lien does nothing to prosecute or release a claim, pending completion of Commission's major study. | S.M. 1976, c. 22. |
| 28* | Enforcement of Judgments, Part I: Exemptions under *The Garnishment Act* | Establish garnishment exemptions at 50 percent of the minimum wage for single persons and for a person with one or more dependants at 70 percent of the minimum wage (or, in the case of alimony or maintenance, 70 percent of disposable earnings). | S.M. 1979, c. 8. |
| 32* | Mechanics' Lien Legislation | Revise Act to avoid waivers of lien; reduce the holdback to 7.5 percent; completion to be defined as substantial performance; and other recommendations as per report. | S.M. 1981, c. 7. |
| 34 | Enforcement of Judgments, Part II: Exemptions under *The Executions Act* | Raise exemptions for furniture, furnishing and appliances, and for professional books, tools, etc. Provide a cost-of-living escalator for value limits. | S.M. 1980, c. 55. |
| 40 | Enforcement of Judgments, Part II: Exemptions under *The Judgments Act* (See Report 90 below.) | Change the homestead exemption to stay of execution or right of occupancy if residence is necessary for support of debtor and family, with power to impose terms governing payment of the debt. Remove the 160 acre exemption, and give the court discretion to determine how much land is included in homestead, with special considerations in rural property. | Not implemented. |

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| 44 | The General Register | When land titles system is computerised, establish a computerised General Names Index, and require all judgments and liens to be registered against specific land. In the meantime, require full names, enable the Registrar to require identification, and absolve the Assurance Fund in some cases. | S.M. 1987, c. 27 |
| 47* | Prejudgment Compensation on Money Awards: Alternatives to Interest | Give Queen's Bench and County Courts power to award prejudgment compensation on money claims, divided into a legislated real interest rate and an adjustable inflation rate. Enact legislation about interest on judgment debts if federal legislation repealed. | S.M. 1986, c. 39 (in principle); now *Queen's Bench Act* Part XIV. |
| 68* | Report on Periodic Payment of Damages Awards | Provide for discretionary awards of periodic payments of damages instead of restriction to lump sums, with safeguards and incidental amendments to legislation as per report. | S.M. 1993, c. 19. |
| 71 | *The Bulk Sales Act* | Repeal the Act. | S.M. 1992, c. 32. |
| 81 | Distress for Rent in Commercial Tenancies | Retain distress for rent of commercial premises with simplifications and improvements, including clarification of when and how landlord may enter, disallowing seizure of third-party goods, simplifying sale, and creating new statutory causes of action. | Not implemented. |
| 87 | Interim Payment of Damages | Give Queen's Bench discretion to order an interim payment of damages before judgment where liability is admitted or where satisfied defendant will be found liable and plaintiff is not contributorily negligent. | Not implemented. |
| 90 | Residential Exemptions from Judgment Execution | Raise residential exemption to $9 000 and increase periodically to amount necessary to obtain a mortgage on a single-family house. Apply to any property in which a debtor resides. | Not implemented. |
| 1a | Auto Engine Numbers in s. 11 of the *Bills of Sale Act* | Require inclusion of engine number, if any, in description of vehicle. | S.M. 1972, c. 81, s. 3. |

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| 9b | Section 7 of *The Payment of Wages Act* | Amend *Payment of Wages* Act to deal with problems relating to priority of wage claims over claims registered in Land Titles Office and under PPSA. | S.M. 1980, c. 57. |
| 17a | *The Wages Recovery Act* | Repeal *The Wages Recovery Act* (the provisions of which are not duplicated elsewhere being either outdated or of such limited use that their existence should not be prolonged), and harmonise the multifarious wages recovery provisions in Manitoba and consolidate them into a single statute. | S.M. 1992, c. 32. |
| 97 | Section 270 of the *Highway Traffic Act* | Repeal s. 270, which suspends drivers' licenses of uninsured persons who fail to satisfy court judgment. | Not implemented. |
| | ***Criminal Law and Procedure*** | | |
| 2c | Uniformity of Definition of Age as between *The Age of Majority Act* (MB) and the *Criminal Code and the Interpretation* Act (Can). | Under *Criminal Code*, the age of majority should be attained at the beginning rather than completion of anniversary to make it uniform with other federal and Manitoba legislation. | No provincial legislation recommended. |
| 11b | Provincial Offences Procedures | Make several changes in proposed legislation permitting default convictions to result where fines are fixed by regulation, including provisions to minimise impact by more stringent notice provisions. No recommendation as to whether the principle of default conviction provisions should be adopted. | S.M. 1982, c. 24. |
| | ***Disabilities and Minority*** | | |
| 14 | Special Enduring Powers of Attorney | Give a person authority to sign a power of attorney that will continue despite supervening disability. | S.M. 1980, c. 4. |

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| 29* | Emergency Apprehension, Admissions, and Rights of Patients under *The Mental Health Act* | Allow a law officer to detain and take to a psychiatric facility for assessment a person believed to be dangerous because of a mental disorder. Thereafter provide a comprehensive scheme for admission (with specified criteria), periodic review, and release. Also make provision for inmate's right to consent to or refuse treatment, vote, and communicate by post. | S.M. 1980, c. 62. |
| 74 | Self Determination in Health Care (Living Wills and Health Care Proxies) | Allow a person to give a health care directive to determine in advance, in case of supervening disability, health care decisions and the medical care to be administered to them, and to appoint another person to make health care decisions on their behalf. | S.M. 1992, c. 33. |
| 83 | Enduring and Springing Powers of Attorney | Provide special safeguards for makers of enduring powers of attorney and allow springing powers of attorney. | S.M. 1996, c. 62. |
| 91 | Minors' Consent to Health Care | A health care provider should not be subject to liability for following a minor's instructions if the provider believes in good faith that the minor has the necessary level of understanding. | Not implemented. |
| | | *Elections* | |
| 31* | Political Financing and Election Expenses | Provide for registration of political parties, constituency associations, and candidates; provide for whole or partial reimbursement of campaign expenses to registered candidates who receive 15 percent of the popular vote; disclosure of donations; limitations on advertising expenses; severe penalties. | S.M. 1980, c. 68. |
| 37 | Systems of Voter Registration | Retain door-to-door enumeration. System should be improved in various ways designed to improve information to prospective voters. Delete designations of sex and occupation. | S.M. 1980, c. 67. |

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| 39 | Controverted elections | Hold trial before one judge, not two, but with appeal to Court of Appeal. Eliminate procedural redundancies and anachronisms. | Not implemented. |
| 7a | *The Local Authorities Election Act* | A proposed amendment intended to facilitate re-count applications was not properly meshed in with the Act, and the Commission proposed a different amendment. | S.M. 1980, c. 48. |
| 24a | A Small Discrepancy between *The Elections Act* and *The Local Authorities Election Act.* | Harmonise monetary limits for candidates making donations to fund-raising groups in the two statutes. | Not implemented. |
| | | ***Evidence*** | |
| 56* | Medical Privilege | There should be no general medical privilege but there should be a discretionary psychiatric/ psychologist/ psychiatric-nurse privilege. The present law provides appropriate protection. Do not create a statutory medical privilege. Amend the *Mental Health Act* to give Queen's Bench discretion to order that psychiatric testimony in designated psychiatric facilities be given instead of existing absolute privilege. | General legislation not recommended. |
| 9d | Section 9 of *The Manitoba Evidence Act* | Prospectively abolish privilege conferred against admissions of adultery conferred by s. 9 of the *Manitoba Evidence Act.* | S.M. 1980, c. 26. |
| 94 | Confidentiality of Mediation Proceedings | Make mediators neither competent nor compellable witnesses, with safeguards, leaving parties and other witnesses subject to subpoena. | Not implemented. |
| | | ***Family Law*** | |
| 3 | Disposition of Maintenance Judgments in Land Titles Offices | Do away with the requirement of a no-appeal certificate where judge's order for permission to discharge a registered maintenance judgment has been made on application, by or with the consent of the judgment debtor. | S.M. 1972, c. 4. |
| 10 | The Abolition of Interspousal Immunity in Tort | Abolish immunity of one spouse for assault on or physical injury to other. | S.M. 1973, c. 12, c. 13, c. 23. |

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| 23 | Family Law, Part I: The Support Obligation | Legislate the right of children to receive, and the obligation of parents (including a spouse who has custody of the other spouse's child and a common-law spouse) to give, support with regard to the actual financial circumstances (though not if the child is beyond control), with the Province having a secondary obligation. Give the court broad incidental powers, including powers of variation. Legislate a reciprocal obligation of support between spouses, an at-home spouse to be considered a full economic partner; a right to receive financial information and to participate in decisions about spending spousal income and to reasonable clothing and personal allowances; and guidelines as to the amount of inter-spousal support, including the relative responsibility of the spouses for the marital breakdown. Legislate a right of an unmarried co-habitant to similar support if there is a child of the union or if the economic self-sufficiency of the applicant has been impaired. | S.M. 1978, c. 25. |
| 24 | Family Law, Part II: Property Disposition | Legislate a joint tenancy for marital homes acquired during marriage, subject to opting out. Legislate a deferred sharing of virtually all gains and acquisitions during marriage, subject to variation and opting out. Retain the *Dower Act* and the *Devolution of Estates Act*, with the surviving spouse's share increased to one-half. Retain the *Testators Family Maintenance Act*. Apply a will as if the deceased's divorced spouse predeceased the deceased. Abolish all inter-spousal gift tax and succession duties. | S.M. 1977 (2d Session), c. 12; S.M. 1978, c. 24; S.M. 1980, c. 7. |

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| 30* | Confidentiality of Adoption Records | Establish a central registry with power to release identifying information when adult adoptee (or minor adoptee with adoptive parents' consent) and biological parent agree. Incidental provisions relating to non-identifying information. | S.M. 1979, c. 22 s. 60; S.M. 1980, c. 41. Establishment of a post-adoption registry. |
| 36 | Improved methods of Enforcing Support Orders Against Real Property | Give the Queen's Bench power to order sale in case of default under support order registered at L.T.O. Register orders only under court determination, and against specific property only. | S.M. 1980, c. 54. |
| 38 | The One-Year Rule for Enforcement of Arrears in Maintenance | Abolish requirement that creditor justify maintenance/alimony arrears in excess of one year and substitute discretion to remit arrears if just and equitable. Allow defaulting parent to apply for remission, but only if order is justified having regard to child's best interests. | S.M. 1980, c. 21. |
| 60* | An Examination of *The Dower Act* | Substitute a deferred sharing regime like *the Marital Property Act* on death for the existing fixed share scheme, with provisions dealing with pre-death dispositions of assets. Make amendments to the homestead-protection provisions for flexibility and clarity in the protection of third parties. | S.M. 1992, c. 32. |
| 63 | *The Testators Family Maintenance Act* | Ensure that only those dependants who are in need of maintenance (not, for example, financially independent adult children) are permitted to share under the Act. Clarify that the purpose is to transfer a pre-death support obligation to the estate. Those entitled should include spouse, children, parents, divorced spouse who was entitled pre-death to maintenance, and children over 18 who have not completed education or are unable to earn a livelihood through illness or disability. Give the court guidelines as per report. | S.M. 1989–90, c. 42. |

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| 64 | *The Married Women's Property Act* and Related Matters | Repeal the archaic, complex and paternalistic provisions of this Act and substitute a general equality provision stating that a married person has a separate and independent personality and the same legal capacity as an unmarried person. Revise several other statutes that treat men and women differently, abolish the married woman's right to pledge her husband's credit, the action for alimony in a wife alone, and the presumption of gift where a husband buys property in his wife's name but not vice versa. | S.M. 1974, c.78. |
| 4b | Enforcement of Custody Orders | Provide method for restoring children, subject to safeguards, to custody lawfully awarded in other provinces. | S.M. 1975, c. 4. |
| 9f | The Term *Illegitimate* | Do not replace *illegitimate* with another term, but conduct a separate project concerning the status of illegitimacy with a view to its possible abolition. | No legislation recommended. |
| 10b | *The Marriage Settlement Act* | Repeal the Act requiring registration of marriage settlements on the grounds that few were registered and no searches were made. Do not extend the registration requirement to other spousal agreements. | S.M. 1980–81, c. 26, s. 22. |
| 11a | Parents Maintenance Legislation | Confine proposed parental support legislation to support of mothers and fathers who require assistance by reason of defined dependency and extend obligation only to adult children. No recommendation on policy question whether there should be an obligation to support parents. | S.M. 1985–86, c. 47, s. 34. |
| 14a | Jactitation of Marriage | Abolish the action for jactitation of marriage as being unnecessary. | S.M. 1977, c. 34; S.M. 1980, c. 19. |

| Report No. | Report Title | Recommended Action | Implementation |
|---|---|---|---|
| | | *Highway Traffic Act* | |
| 20 | *The Highway Traffic Act* | Reorganise the Act for coherence and comprehensibility, provide safeguards against abuse of powers to seize and detain vehicles and charge owners with others' offences, abolish guest-passenger provision, revise harsh and discretionary penalties (increase for driving under suspension), and provide reduced speed limits. | S.M. 1977, c. 34; S.M. 1980, c. 19. |
| | | *Insurance* | |
| 22 | Some Aspects of Fire Insurance Legislation in Manitoba | Change statutory provisions "which appear to be antiquated, impractical, inequitable, or appear to have deprived the insured of rights he otherwise would have enjoyed," including provisions relating to definitions of *insured* and *fire loss*. Provisions that allow insurers to extend intentional loss; effect of assignments of policies; application of money received under subrogation; notice of loss; limitations; relief from forfeiture; waivers; misrepresentations and non-disclosures; warranties; and authority of agents. | S.M. 1982, c.11, s. 1. |
| | | *Law Reform* | |
| 70* | The Manitoba Law Reform Commission: A Framework for the Future | Recommendations for legislation ensuring the continued existence and independence of the Commission. | S.M. 1989–90, c. 25 |
| | | *Limitation of Actions* | |
| 12 | Section 110 of *The Real Property Act*: the Immortal Manitoba Mortgage | Apply limitation periods to mortgages (previously applicable only to actions on covenant for payment of money). | S.M. 1974, c. 44. |
| 27* | Limitation of Actions: Time Extensions for Disabled Persons and Others | Extended limitations for children and disabled persons should apply to the *Fatal Accidents Act*, and should be reworded to ensure that action can be commenced at any time during infancy or disability. | S.M. 1980, c. 28. |

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| 5a | Limitation of Actions for the taking away, conversion, or detention of chattels | Apply a six-year limitation to title to chattels and actions for conversion or detention. | S.M. 1976, c. 41, s. 2–4. |
| 20a | Limitation of Actions Brought by the Crown | Make the *Limitation of Actions Act* apply to the Crown. | Not implemented |
| | | ***Mortgages*** | |
| 5 | Recommended Right of Mortgagors to Obtain Annual Financial Statements | Recommend right of mortgagors to obtain Annual Financial Statements. | S.M. 1971, c. 28. |
| 1b | (a) Prospect of Mortgagors' Relief from Provisions of s. 20(6) of *The Mortgage Act*<br>(b) Right to Have Mortgage Discharged Upon Payment in Full After Five Years | (a) No recommendation for relief from provision for payment after 5 years with 3 months penalty because of constitutional impediment.<br>(b) Give a mortgagor a right to a discharge of mortgage on prepayment with penalty interest | No legislation recommended. S.M. 1972, c. 37, s. 103(1). |
| | | ***Municipal Law*** | |
| 7 | Powers of Entry, Search and Seizure in *The City of Winnipeg Act* | Ameliorate City of Winnipeg's sweeping powers of entry, inspection, search, seizure, compulsion, licensing, city privileges, and immunity from liability | S.M. 1972, c. 93. |
| 46* | Conflict of Interest of Municipal Councillors | Require oral disclosure of councillors' financial interest, refrain from voting and withdrawal; record to be kept; councillors' interests in land to be recorded in public register and municipalities could require registration of certain other interests; disqualification penalty; municipality or elector to be able to apply to County Court; discretion as to penalties. | S.M. 1982–84, c. 44. |
| | | ***Plain Language*** | |
| 45 | A Simplified Mortgage Form | A simplified mortgage form is attached to the report as an illustration of what could be accomplished in the simplification of legal documentation. | No legislation recommended. |

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| | | *Private International Law* | |
| 53 | The Law of Domicile | Abolish the domicile of dependency of married women. Abolish the revival of the domicile of origin upon the abandonment of a domicile of choice. Make special provision for the domicile of children and mentally incompetent persons as per report. | S.M. 1982–84, c. 80. |
| | | *Professions and Occupations* | |
| 13 | Pre-licensing Education for Real Estate Agents in Manitoba | Require all applicants for real estate sales and brokerage registration to complete a practical and comprehensive course of studies. | S.M. 1975, c. 23. |
| 84* | Regulating Professions and Occupations | Adopt a new costs-and-benefits-to-consumers approach to granting exclusive rights to names and titles, exclusive rights to perform services, and powers of self-regulation as per report. Consider flexible regulation of different services. Determine entry and practice standards with reference to costs and benefits. Provide assessment standards. Confer self-government only where group demonstrates resources, commitment to principles, and action only in public interest with safeguards. Standardise disciplinary procedures and provide for active competence and ethics enforcement. Deal with incidental and collateral issues as per report. Apply standards to existing as well as prospective groups. | Not implemented. |
| | | *Property* | |
| 6 | Enactment of a *Mineral Declaratory Act* | Declare that where dispositions of minerals have been made without specific reference to sand and gravel, the surface owner owns the sand and gravel. Make provision about compensation for those who have acted to the contrary in the past as per report. | S.M. 1972, c. 34; c. 70, ss. 11, 15, 16. |

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| 48 | Prescriptive Easements and *Profits-a-Prendre* | Abolish right to acquire prescriptive easements. Require registration of existing prescriptive rights with relief if holder is unaware of the registration requirement. Give Queen's Bench the power to discharge any unreasonably restrictive easement or substitute a different right, with power to order compensation. | Not implemented. |
| 49* | The Rules Against Accumulations and Perpetuities | Abolish the rules against perpetuities and accumulations. Supplementary provisions to deal with complications. | S.M. 1988–89, c.4, s.58. |
| 54 | Certificates of *Lis Pendens* | Impose liability for damages on a person who registers a certificate of *lis pendens* without reasonable cause. Empower Queen's Bench to order an undertaking as to damages as a condition of allowing continuance of registration on application to vacate. Revise scope and form of certificate. | S.M. 1988–89, c.4, s. 58. |
| 62 | Small Projects: The Rule in *Shelley's* case, Permissive and Equitable Waste | Abolish the rule in *Shelley's* case. Revise the legislation to reflect more properly the scope of the intended application of the two types of waste. | S.M. 1992, c. 32. |
| 88 | Reselling Unused Cemetery Plots | Allow a cemetery owner to apply to resell a plot that has been sold but not used, with safeguards to protect the rights and dignity of the plot purchaser and family. | Not implemented. |
| | | ***Statute Law Revision*** | |
| 3b | Correcting Recent Error in s. 51 of *The Queen's Bench Act* | Correct error of syntax to give effect to intention of section. | S.M. 1974, c. 15. |
| 3d | Updating index to *Statutes of Manitoba* | Accommodate in loose-leaf continuing consolidation all amendments and indices to new Acts. | Indexing commenced; computer search of statutes now available. |
| 4c | Statutory Sums | Avoid fixed sums where feasible in favour of percentages. (Applicable in the result to only a handful of statutory sums.) | Various amendments to Manitoba statutes. |

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| 9c | *The Fire Departments Arbitration Act* | Tidy the cross-references between this Act and the *Labour Relations Act*. | S.M. 1980, c. 27. |
| | | ***Succession*** | |
| 17 | An International Form of Wills for Manitobans | Ratify international convention and amend *Wills Act* to provide for an internationally recognised will. | S.M. 1975, c. 6. |
| 43 | *The Wills Act* and the Doctrine of Substantial Compliance. (See Informal Report 22b below.) | Probate a will despite defect in execution, alteration, or revocation if it embodies testamentary intent. Save a gift to a beneficiary who has signed for the testator or as witness if no improper or undue influence. | S.M. 1982–84, c. 31. |
| 51 | *The Survivorship Act* | Abolish the presumption that the older person died first when survivorship is uncertain. Provide a number of presumptions, subject to contrary intention. The general rule would be that a person's property shall be disposed of as if the person had survived the other. A joint tenancy would become a tenancy in common. Provisions made for the operation of the Dower Act and insurance policies. | S.M. 1982–84, c. 28. |
| 61 | Intestate Succession | Increase the surviving spouse's preferential share from $50 000 to $100 000, unless the deceased spouse has separate children, etc. Special provisions for separated spouses and *de facto* spouses. Cut off claims at great-grandparents and their issue. Deal with advancement and survivorship as per report. | S.M. 1989–90, c. 43. |
| 67 | Sections 33 and 34 of *The Wills Act* | Amend s. 34 so that where a child, other descendant, sister, or brother of a testator, to whom the testator has made a gift by will, predeceases the testator, the spouse of the deceased person should not share in the gift, which should go to the beneficiary's descendants only. | S.M. 1987–88, c. 66, s. 25; S.M. 1989–90, c. 44. |

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| 73* | Statutory Designations and the *Retirement Plan Beneficiaries Act* | Amend the Act to ensure that designations of beneficiaries are valid despite non-compliance with the *Wills Act*. Amend the Act in other ways as per report, including protection of RRSP's from attachment, etc., in the same way that pension benefits are protected. | S.M. 1992, c. 31. |
| 9e | *The Wills Act* and Ademption | Provide that a beneficiary entitled to a specific bequest under a will receives the proceeds of sale of the asset if it is sold by the committee of the testator. | S.M. 1980, c. 7. |
| 22b | Section 23 of *The Wills Act* revisited | Following upon a court decision, amend s. 23 again to make it clear that it confers a general dispensing power and not merely a substantial compliance power. | S.M. 1995, c. 12. |
| 24b | Lapsed Residual Gifts in Wills | Lapsed residual gifts should form a partial intestacy rather than being divided among residual beneficiaries. | No longer required due to *Re Smith and McKay* (1994) 116 D.L.R. 4th) 308 (Man. C.A.). |
| 24c | Security for Administration of Estates | Abolish general requirement for security. Require security only in specified cases and where court deems appropriate. Court discretion to dispense. Require surety's bond only equal to sworn value of estate. | Not implemented. |
| | | *Taxation* | |
| 10a | Municipal Assessment of Personal Property | Personal property assessment under the *Municipal Assessment Act* was inequitable but abolition might cause difficulty in some cases. Recommended that a provincial committee consider consequential adjustments to real property assessment. Not proceeded with further. | No legislation recommended. |
| | | *Trades and Businesses* | |
| 4 | *An Act Respecting Billiard and Pool Rooms* Proposed Repeal | Repeal the Act. | S.M. 1974, c. 59, s. 8. |

| Report | | Recommended Action | Implementation |
|---|---|---|---|
| No. | Title | | |
| 11c | *The Remembrance Day Act* | Preserve the special status of Remembrance Day but substitute the restrictions on trade practices on the *Retail Business Holiday Closing Act* for those in the *Remembrance Day Act*. | Not implemented. |
| | | ***Trusts*** | |
| 18* | The Rule in *Saunders* v. *Vautier* | Replace common law rules about enforcement of trusts where only identified beneficiaries are interested with statutory scheme for variation as per report. | S.M. 1982–84, c. 38, s. 4. |
| 50 | Investment Provisions under *The Trustee Act* | Abolish *Trustee Act* default list of permitted investments and substitute *prudent person* rule. | S.M. 1982–84, c. 38. |
| 77 | Non-charitable Purpose Trusts | Allow the creation of valid non-charitable purpose trusts. | Not implemented. |
| 79 | Ethical Investments by Trustees | Allow trustees to consider non-financial or ethical criteria in addition to traditional financial criteria without abandoning the predominant goal of reasonable financial return and the traditional standard of prudence. | S.M. 1995, c. 14. |
| 2b | Relaxation of Limit of Number of Trustees under *The Trustee Act* | Increase the maximum number of trustees from four to eight for private, commercial, and pension trusts. | S.M. 1972, c. 60. |