

Good news/bad news in Canada

A study in contrasts

By Peter Lown



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Recent events in Canada show two different jurisdictions heading in completely opposite directions.

The bad news relates to the decision of the federal government to remove all funding from the Law Commission of Canada; the good news surrounds the decision of the Ontario government to revive the provincial Ontario Law Reform Commission.

This is the second time that the federal law reform commission has been abolished or had its funding removed. The predecessor Canada Law Reform Commission was abolished in 1992. The Law Commission of Canada was reestablished in 1995 with an amended and renewed mandate. Much has been said by commentators and in the House of Commons Standing Committee on Justice about the politics of the decision to remove the funding of the Law Commission of Canada. The first federal commission was created by a Liberal government, and abolished by a Conservative government. The second commission was revived by a Liberal government and the decision to withdraw funding has been made by a Conservative government. Critical comment has also been directed at the cluster of initiatives and agencies from whom funding has been withdrawn, suggesting that these initiatives and agencies do not share the values of the current government.

Those are issues of partisan politics. Law reform does not involve itself in partisan politics. However there are some telling comments and representations made by various parties to the House of Commons Standing Committee on Justice. Law reformers should pay close attention to them. The Canadian Bar Association presented what is probably the conventional view of arguing for 'the existence

of a law reform commission grounded in the qualities of independence, accessibility, permanence, and comprehensiveness'.

The Federation of Law Reform Agencies of Canada, in its press release, referred to an 'indisputable... need for law reform in Canada... on an ongoing and continuing basis... Law reform is an important, and indeed essential aspect of good government. Experience has clearly demonstrated that the kind of independent, nonpartisan consultative and transparent law reform work carried out by independent law reform agencies simply cannot be done within government'.

Many law reform agencies may not consider that their independence, funding, relevance or *raison d'être* would be questioned. However, I draw your attention to the remarks of the Federal Minister of Justice when he appeared before the Commons Standing Committee on 6 November 2006. The decision to remove funding from the Law Commission was made in the context of the government's priority of improving the justice system, and in particular making Canada's streets and communities safer. Programs were to be reviewed to ensure that every taxpayer dollar spent achieves results, provides value for money and meets the needs of Canadians. Savings were to be achieved in any of four areas including eliminating programs that were not providing value for money, cancelling non-core programs, redirecting unused funds, and achieving financial efficiency.

How did the Law Commission fare in the government's assessment? It appears that it was not unique, not needed and not efficient. On a general basis the Minister indicated that the Law Commission did nothing that was particularly unique or that could not and was

not being carried out by other institutions. The commission produced only one report in 10 years at the request of the government. Since the commission did much of its work by contracted research, it was a mere conduit to those sources of research. Those sources would be equally available to be retained by the Department of Justice as much as being retained by the Law Commission of Canada. There is no need for a standing organisation to exist to deal with the contingency of requiring independent research. The Minister stated that the department could and would maintain direct relationships with research individuals and organisations and 'does [not] need an interlocutor like the Law Commission of Canada to do this'. Later, in response to questions, the Minister indicated that he could receive independent advice from tenured law professors, bar associations and from his own department where he had 'found there is a high degree of independence among the Justice Department lawyers'. Both the current Law Commission of Canada president and the immediate predecessor made spirited presentations indicating how the Commission had been faithful to its mandate, produced work of value, and built significant networks in the 10 years of its existence. All of these initiatives and networks would be lost with the decision to remove financing. So too would be the broad consultative group which had provided information and suggestions for different projects, and the momentum of critical thinking and research which the Commission had developed.

All of these comments were made in the context of a decision that was taken swiftly with little or no intention of reconsideration. But they raise two vital questions. First, is there a need for independent advice on the maintenance and improvement of the legal system? If so, who should and who can provide it? Second, how does a law reform agency respond to the question: 'What have you done for me lately?' How did the concept of an adequately resourced agency, working independently of government but responsive to government priorities get so cross threaded?

For more information, the details from the study of the effects of the abolition of the Law Commission of Canada by the Standing Committee on Justice and Human Rights at the 28th meeting on 1 November 2006 and the 29th meeting on 6 November 2006 can be viewed at: <http://cmte.parl.gc.ca/cmte/CommitteeList.aspx?Lang=1&PARLSES=391&JNT=0&SELID=e21_&COM=10474>.

A most interesting twist occurred on 23 November 2006 when the Standing Committee recommended that the government continue funding the Law Commission of Canada at the 2005–06 level. Stay tuned.

In the province of Ontario, plans are well developed for the revival of the Ontario Law Reform Commission. A creative symposium was held on 30 November 2006 to discuss topics such as: the role of a Law Reform Commission; ensuring relevancy; measuring success; methodology; and criteria for project selection. Planning is proceeding with caution and patience. The goal is to reestablish what was an important instrument of change in the Ontario legal system, and to create a modern, relevant and responsive commission that will bring forward recommendations to improve the administration of Ontario's justice system and enhance access to justice. And the further goal is to ensure that the Commission is not subject to the whims of the government of the day or the threat of loss of funding or closure.

The experience in Ontario since the closure of the Commission clearly demonstrates that the essential work of law reform—maintenance, rationalising and modernising the law—does not occur without a body specifically mandated to do it. It occurs only sporadically as a by-product of other activities, even with the best of intentions, and not at the rate and reliability of a dedicated law reform agency. However, no law reform agency can rest on its laurels, or it risks being overtaken by other agendas such as short-term cost-cutting or short-term political gain. Like it or not, justifying the value added by independent law reform agencies is a constant task.

On a practical note, all was not completely lost when the Commission officially closed on 15 December 2006. All of the publications and papers of the Commission will be transferred from the existing website to the website of the Federation of Law Reform Agencies of Canada at <www.law.ualberta.ca/folrac>.

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