ALBERTA INSTITUTE OF LAW REFORM

40TH ANNIVERSARY DINNER

TUESDAY, 3 JUNE 2008

FACULTY CLUB, UNIVERSITY OF ALBERTA

EDMONTON, ALBERTA, CANADA

LAW REFORM ALBERTA STYLE - WORDS OF WISDOM

The Hon Justice Michael Kirby AC CMG

A SPECIAL PRIVILEGE

It is a special privilege for me to be invited to address this occasion, which marks the 40th Anniversary of the establishment of the Alberta Institute of Law Reform.

I chaired the Australian Law Reform Commission when it was established in 1975. The Alberta Institute had then been operating for seven years. I came to know the Founding Director, Dean Wilbur F Bowker QC and his successor Bill Hurlburt QC. I am a link to those far-off days. I am glad that on this visit to Edmonton, I have had the privilege of meeting judges, lawyers and academics who are supporters of the Institute and many of whom have been involved in its activities.

Perhaps you have invited someone from another country to this occasion in order to give a perspective that those close to the Institute may not be able to offer. I gladly do this because of my respect for the Institute and my affection for its founders.

I have already given an address in the Law Courts in Edmonton concerning the past, present and future of the Institute. I was warmly welcomed to the courts by Chief Justice Alan Wachowich. The judges of the Court of Appeal have honoured me with a dinner. At lunch I met the current officers and staff of the Institute. I later had the privilege to attend, and address, a unique conference in which law reformers sat down with public officials from the government of Alberta to discuss ways in which their work might be better related, in the common service of the people of Alberta.

In these remarks, my programme optimistically declares that I will offer a few "words of wisdom". Adopting a literal interpretation of that brief, I have decided to identify words that best describe the mission, the achievements and challenges of the Institute during its first forty years. As I discovered when I identified my "words of wisdom", for each such word there is an antonym. In the work of law reform, things are rarely straight-forward.

WORDS OF WISDOM

Gratitude and renewal: Reflecting on the achievements of the past forty years, we should feel gratitude. That gratitude springs from the dedicated predecessors who worked at every level of the Institute over forty years, many of whom have come to this dinner to share in the occasion, to think of the past and to anticipate the future.

All of us who have worked in law reform must also be grateful for the opportunity that that experience afforded to us personally. In fact, I believe that working in a law reform agency, however it is organised, is a life-changing experience. For those of us brought up in the tradition of the common law, which is a problem-solving approach to legal doctrine and practice, institutional law reform demands of us a new and conceptual approach. We have to see law in its totality. We are obliged to perceive particular problems within the mosaic of legal principle. We are forced to consider proposals not solely as they solve a particular issue; but as they contribute to the unity and harmony of the entire law. Certainly, my time in the Australian Law Reform Commission (ALRC) entirely changed the way I looked at law and considered legal problems in the courts. I would be surprised if it were not the same with those who have worked in the Alberta Institute.

We can also be grateful that governmental and professional support for the Institute indicates a common commitment to the orderly renewal of the legal system, which is every citizen's right. Not all

societies or governments or organisations of lawyers have that commitment. Yet, I believe it is an attribute of the rule of law itself.

A feeling of gratitude is thus appropriate and natural at a celebration such as this. And with the gratitude comes a commitment to renewal of the Institute, to its continued success and to the unique tripartite relationship between government, the legal profession and universities which is the secret of success of the Alberta Institute for Law Reform. Gratitude and renewal therefore go hand in hand.

Excitement and realism: The present age, indeed the four decades since the Institute was founded, have been times of amazing change and development in the law. Some of the changes have come about because of changes in social attitudes and legal values. Many have come about as a result of the dynamic impact of new science and technology upon the law.

There might be some who would view a major project to review the Rules of Court in Alberta as tedious and somewhat unexciting. Yet if we reflect upon the *laissez-faire* attitude that existed in the courts forty years ago and contrast those attitudes to the contemporary commitment to greater efficiency, good time management and proper case control, we can observe the needs for change in court rules that make the project highly relevant, practical and significant for access to justice. In truth good court rules enhance the use of new technology; tap the new

skills of organisational efficiency; and enhance the attainment of justice in the formal institutions of decision-making.

A special reason for excitement in Canada is the ever-present threat of abolition of a law reform agency. The Canadian federal Commission has been abolished twice. It is surely not without significance that, following the abolition of the oldest of the Canadian law reform agencies, that of Ontario (and of the British Columbia Law Reform Commission) the revived institution that has now been established in those two Provinces has substantially followed the tripartite arrangement of the Alberta Institute. A commitment to the law reform agency from government, from the legal profession and from academe makes it so much harder to abolish. Moreover, this tripartite engagement itself reflects a commitment to the success of the endeavour from the three vital players whose participation can mean the difference between success and failure in a law reform agency.

Unthinking excitement would be pointless and uncongenial to most lawyers. Wisdom lies in realism about the limitations of a body established and funded in this manner; about the resources devoted to such a body; and about the real commitment of the law-making process to implementing its law reform ideas. From the outset, the Alberta Institute has been a highly realistic body - realistic about its own capacity to tackle law reform problems. Realistic about the limitations imposed by its resources and structure.

Efficiency and sensitivity: Some of the limitations arise from the necessity of the Institute to rely on a small group of dedicated lawyers, most of them working part-time and as volunteers. In other branches of the law, the actors can demand compliance with severe time limits. For example, Ministers can insist that a Bill is prepared, for presentation to Parliament in a specified time. Courts can fix the date for argument of cases and can adopt procedures to ensure the prompt delivery of decisions. Clients can insist that the Bar deliver prompt opinions. But law reform agencies, particularly with a small resource base, are often dependent on the goodwill and generous participation of busy legal practitioners.

Sometimes a project on, say, aspects of criminal law or the complex law of privity of contract may demand the most precious resource of time to consider the problem and to produce convincing proposals for improvement of the law. Law reform bodies must generally fix their own agendas. Yet those agendas must be sensitive to the competing demands for the prompt delivery of proposals in an environment where there are limits on the burdens that can fairly be placed on hard-pressed staff and members of the agency and on those who are consulted about the tentative proposals for reform.

Efficiency in the product of law reform has been a hallmark of the Alberta Institute. So too has sensitivity to the burdens that can realistically be placed on those who have assisted in its endeavours.

Urgency and patience: It is natural for law reform bodies to have a sense of urgency about their programme. After all, if an agency is committed to removing injustice from the law, every day's delay is a burden upon those who are subject to the unreformed law.

When a law reform report is completed, it is natural that those who have worked on it will expect the same urgency to be displayed by officials and politicians. Yet sometimes competing priorities (occasionally no apparent priority at all) occasion delays that can be very frustrating to those who have examined the law in question and concluded that identified reforms are needed. I do not doubt that this has sometimes been the experience of the Alberta Institute.

Events in Australia have taught that sometimes it is necessary to exhibit patience. The ways of law reform are often complex. Occasionally good law reform ideas come to pass in indirect ways or after very long intervals of time.

In Australia, possibly the most fascinating report of the ALRC was the one written on the *Recognition of Aboriginal Customary Laws* (ALRC 31, 1986). No report of the Australian Commission attracts so many hits to the Commission's website. Yet the legislative proposals in that report have never been enacted by the Federal Parliament. This does not mean that the work on the report was wasted. Commentators have suggested that it was the study of Aboriginal customary laws in that report that contributed to the change in the *Zeitgeist* of Australian

attitudes to Aboriginal law. Certainly, the decision of the High Court of Australia in 1992 in *Mabo v Queensland* (1992) 175 CLR 1 was written in the midst of the widespread public debates about the recognition of Aboriginal law and custom that followed ALRC 31. The *Mabo* decision reversed more than a century of common law denial of recognition of Aboriginal land rights in Australia. I would not say that the ALRC report was the only, or even the main, stimulus to that decision. But the report may have contributed to the intellectual environment in which the decision became possible.

Law reform therefore works in mysterious ways. The ALRC report on *Unfair Publication: Defamation and Privacy* (ALRC 11, 1979) proposed to replace individual State defamation statutes with a single national law which adopted innovative procedures and remedies. In the past two years, new and uniform defamation laws have been agreed and enacted in Australia. Whilst they did not adopt all of the ALRC proposals, many of the reforming ideas find reflection in the new laws. Law reformers, it seems, must be patient and persistent.

The Alberta Institute of Law Reform has demonstrated a proper combination of urgency and patience. It is part of its winning formula of success.

Independence and cooperation: Another field in which the Institute has been successful has been in the skilful way in which it has maintained its intellectual independence but developed a methodology

of cooperation with officials and the political branches of government. This is by no means an easy path to tread.

Early in the life of the ALRC, I conceived of means by which the Commission could work much more closely with the Federal Attorney-General's Department, in order to ensure that its proposals would sail quickly into law. A very wise federal public servant, Sir Clarrie Harders, Secretary of the Federal Attorney-General's Department, warned me of the vital need to keep a correct balance in this respect. If a law reform agency becomes too close to officials or to politicians, it runs the risk of losing its autonomy and intellectual integrity. Sir Clarrie told me that the ALRC was useful to government precisely because its independence and means of reaching out for assistance in the legal profession and the community, meant that it could tap voluntary support for legal developments that a Department of State could never procure. It was a good lesson that I never forgot.

Because of its tripartite structure, the Alberta Institute has faced different challenges. But I believe it has retained throughout an intellectual independence of action whilst at the same time drawing upon its structure and composition. This too has been part of the secret of its success.

Pride and scepticism: On a 40th Anniversary celebration such as this, it is therefore natural for all those who have taken part in the work of the Institute, to feel a large measure of pride. Pride in the survival of the

Institute; in its endurance over four decades of remarkable change; and in the achievement of many sound proposals for reform that have passed into the law of this Province. Pride in the service of so many devoted officers, and especially Peter Lown QC who is a continuing link to the days of the foundation.

Yet any reflection on the achievements of the past can only remind us of the central lesson that each generation, and each decade, will face new and unexpected challenges. It is these that produce the ongoing need for law reform, for no reform proposal is ever set in stone. Attitudes and social needs change. Moreover, perceptions of justice change over time. In both of our countries such changes have occurred in relation to the legal rights of indigenous peoples; the legal rights of women; and the legal rights of racial, sexual and other minorities and others. Constantly we must retain a healthy scepticism about our capacity to perceive injustice accurately. Moreover, if we did not perceive the injustices that affected indigenous peoples, women, ethnic, sexual and other minorities in the past, what are the perspectives of injustice that we do not perceive today that our successors, forty years from now, will see and resolve to repair and reform?

A PERSONAL REFLECTION

I conclude these remarks with a personal reflection which is also one about reform of the law. I hope that it is not inappropriate to the occasion to intrude such a personal viewpoint. It is on a subject that has

been divisive in the past, both in Canada and Australia. I know from my reading that it is a subject that has divided citizens and courts in Alberta, and indeed the lawmaking process in this Province and nation. I mention it because it has given me a clearer understanding, than I might otherwise have had, of the way in which unreformed law can sometimes occasion a sense of injustice, of inequality and of discrimination among citizens who feel that they are undeserving of second class treatment by the law of their own country.

I have mentioned the treatment by the law of sexual minorities. My own life's experience has brought me face to face with perceptions of injustice in the way the law has dealt with these issues. For the entire life of the Alberta Institute of Law Reform, I have shared my life with my partner, Johan van Vloten. Over that time I have witnessed changes of the criminal laws that formerly stigmatized and punished sexual minorities in Australia. I witnessed the reforms that came about in ultimate consequence of the scientific research of Alfred Kinsey and his successors; the report of Sir John Wolfenden; and the changes to the law that came first in Britain and Canada and later in Australia.

Reforming these criminal statutes was one thing. But extending equal treatment under law for this minority has not been an easy road. In Australia, although I am a constitutional office-holder, my forty year relationship is not recognised for the purpose of my judicial pension. Legislation to change this has recently been introduced into the Federal Parliament following a change of government. But its passage is not

assured and it has overt and covert opponents. Some opponents say that, in some way, equalising the financial entitlements of me and my partner endangers the institution of marriage. No doubt you have had similar debates in Canada.

Observing these debates, and the refusal in Australia even to contemplate a proposal for civil unions, by that name for same-sex couples, naturally draws attention to the way in which you, in Canada, have addressed this issue - in part in the courts and in part through legislation.

Canada is a special country and a special society. It has consistently been a good international citizen. It has resolved the vision of respect for the equality of its homosexual and bisexual minorities, in a particular way. Doing so, it has naturally attracted the attention of many far from here who aspire to similar respect and equality in the laws of their own country. Equal justice under law should not be an empty slogan. In Canada, this special country of diversity and freedom, you have given to countless millions in other lands the most precious gifts: hope and example. Hope that laws will one day be reformed. And an example of a society that flourishes and grows in respect for all of its citizens, when that happens.

I could not leave your presence without explaining why to me, law reform is not simply a theoretical construct. It is a practical challenge and a moral obligation based in the right of every citizen to have the

benefit of social rules founded ultimately in respect for equality, diversity and human dignity.

So I have crossed the Great Ocean and the towering mountains to come to this occasion. I have done so to honour the memory of Wilbur Bowker, who was a mentor. I have done so to honour Bill Hurlburt, a friend of thirty years. And to honour Peter Lown for his twenty years service. I have done so to praise the Alberta Institute of Law Reform and to express confidence in its future. And I have done so to pay a personal tribute to Canada, a special land of equal justice, of which its citizens can be truly proud.

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