LAW AND INSTITUTIONAL CHANGE

Wade MacLauchlan*

This essay reflects on the role of law in the process of institutional change. It also considers how multi-disciplinary research could contribute to a better understanding of law and its relationship to change. Finally, it addresses the possibilities for conducting such research in Atlantic Canada.

The 1990s will be a decade of dramatic institutional change. In New Brunswick in 1992, 43 school boards were amalgamated into 15 regional boards. In Newfoundland, the elimination of separate schools is under serious consideration. In Prince Edward Island, five school boards may be amalgamated into one. In Nova Scotia, "rationalization" is the watchword in higher education. Comparable changes have taken place, or are imminent, in the health care sector. For that matter, as we deal with ever more urgent fiscal imperatives, the changes to date in education or health care may turn out to be only interim cost-cutting measures compared to what is to come. On the question of Maritime "union," there is a commitment to more integrated regional administration.[1] The general expectation in the public sector is for downsizing and greater efficiency. There is a parallel expectation of more focused and more effective action.

The private sector is undergoing an even greater measure of institutional change. The offshore fishery has collapsed from overcapacity. The forestry sector cannot sustain its current scale. Agriculture supports fewer and larger producers, with trade liberalization looming as a major menace to dairy, poultry and egg sectors. Jobs and services are continually being scaled back by airlines and railways. These developments have implications not only for the immediate economic actors, but for institutions up to and including whole communities. At the same time as resource-based industries come to terms with excess capacity and a declining resource base, there are new opportunities in the service sector and in technology, communications and knowledge-based industries. These developments require new kinds of public and private institutions. The one thing that is certain is that change will continue. Restructuring, competitiveness, globalization and partnerships are the new imperatives. Innovation is in.

Law plays a critical role in bringing about dramatic institutional change, and many of the functions it serves are tough ones. Law provides the "force" in a civil society for the closure of hospital beds, the termination of employment, the

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*Dean of Law, University of New Brunswick.

[1]See *Standing Up to the Future* (Halifax: Council of Maritime Premiers, 1991), and *Challenge and Opportunity: A Discussion Paper on Maritime Economic Integration* (Halifax: Council of Maritime Premiers, 1991). I offer an overview of the changes that face administrative agencies in the region in W. MacLauchlan, "Four Patterns of Change: Legalization, Democratization, Privatization and Regionalization" (1992) 6 C.J.A.L.P. 47.

removal of old institutional forms, the closure of whole resource sectors, the bringing down of trade barriers, and the settling of priorities among creditors. Law has positive functions, such as the creation of new institutional forms, the establishment of compensation regimes, and the support of financing arrangements for new firms. Law furnishes arguments against change, claims such as security of tenure, professional autonomy or entrenched institutional independence. In some cases, law may be a source of ancillary claims to process, such as a right to be consulted or a right to have access to information. In the end, the claims to maintain the status quo are weak, and the role of law as an instrument of change is a tough one, so long as there is a political resolve to act.

The more interesting question concerns the role of law in conditions of less dramatic change, when institutions retain their essential format and mandate but must evolve to respond to continually changing circumstances and expectations. Even institutions that "survive" are subject to the general climate of fiscal restraint, changing markets, technological development, environmental and resource decline, and rising expectations for efficient and effective performance. The key difference is that these institutions do not typically have a new, or even a clear, mandate. A further difference is that existing "rights" such as security of tenure, professional and departmental autonomy within the institution, and the obligation to follow established processes of consultation and decision-making remain intact.

This "business-as-usual" scenario (that is, no dramatic change imposed from outside) begs the question: what role does law play in assisting or impeding change when the institution remains essentially intact? First, I should clarify what I mean by "law" in this context. Law includes, obviously, statute and common law, regulatory and administrative regimes, collective agreements and other contractual commitments, and, in the measure that it is relevant, the constitution. Perhaps more important, "law" includes institutional norms: expectations of consultation, claims of professional autonomy, claims to "departmental" autonomy within the institution, and established decision-making procedures and policies. Perhaps most important, especially in times of fiscal restraint and slowed growth, "law" includes processes and practices governing the allocation of resources. While I am open to reconsider whether this can properly be called law, a critical feature of institutional normativity and responsiveness to change has to be the hierarchies and expectations and competing world-views that exist among various disciplines and "professional" working groups within the institution.

It must be observed that we are talking about a fundamentally different kind of law in the "business-as-usual" scenario than in the "dramatic change" scenario. In the latter, law is dogmatic, commanding, largely exogenous to the institution, and "fresh," in the sense that institutional change is prompted by an explicit political choice. In the business-as-usual scenario, law begins with an old and probably ambiguous mandate. Moreover, its actual interpretation must come

about by established processes, and the institution must approve of, or at least accede to, any changes. The process of gradual change must account for inertia, for relational elements, and for effective communications, as well as for the need to make choices among competing priorities.

Several years ago, I prepared (for the now-defunct Law Reform Commission of Canada) a paper based on a review of one government department, the Pesticides Directorate of Agriculture Canada, and one independent agency, the Canadian Human Rights Commission.[2] Both agencies did change over time, and both evolved to adopt slightly revised orientations, or at least rhetoric. But change came much more slowly at the Human Rights Commission. What was striking about both contexts was the degree of uncertainty about the basic function required by the legislation. Neither pesticide risk assessment nor the enforcement of equality rights (the Human Rights Commission considered its primary function to be enforcement) lends itself to authoritative administration. The enabling legislation was in each case self-consciously vague. What may be surprising to some, and what is relevant as a reflection on the role of law in bringing about change in institutions, is that the biologists at Agriculture Canada responded better to conditions of uncertainty than did the lawyers at the Human Rights Commission. The biologists were prepared to convert their function into one of public relations and communications, whereas the lawyers continued to emphasize authoritative decisions through the complaint process.

The Human Rights Commission and the Pesticides Directorate both operated under what were essentially business-as-usual conditions. Neither was seriously menaced in terms of its ability to do the job. Like all elements of the public service, they regularly made choices about resource allocation. The Human Rights Commission, in particular, considered itself to be under-resourced. Resource allocation and budget-setting by the central government were the dominant factors in determining priorities and direction. The paper concluded:

> [There is] a staggering gap between law as practiced in the administration and law as conceived by the rule of law and the principle of legality. ... In some respects, the means of redressing this gap are orthodox, such as the proposal that Parliament be more clear in giving guidance to the administration. But, on the whole, the problem requires a radical solution, including a substantial shift of conceptual paradigms: from law that orders to law that guides, from law that dictates to law that cooperates, from law that prescribes to law that communicates.

The paper proposed a shift from "law that is dogmatic to law that is discursive,

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[2] *Law in the Administration: Practices, Processes and Perspectives* (October 1990). Because of the demise of the Law Reform Commission, the intended consultation and subsequent publication of this work never occurred. A cribbed version of the conclusions of the study appears as: W. MacLauchlan, "Le charactère intransigeant du principe de la légalité" in Morand, ed., *Figures de la légalité* (Paris: Publisud, 1992). The piece also appears in (1992) 5 C.J.A.L.P. 73.

communicative, relational and democratic." It also proposed that the values of predictability, fair decision-making and democratic responsiveness usually ascribed to Parliamentary supremacy can, and must, be enhanced by a move away from dogmatic law. It proposed that the value of effectiveness (which never was much of a concern of dogmatic law) must be pursued.

A major conclusion of my paper, a self-confessed think-piece, was that we simply do not have enough information, from any perspective, about the actual functioning of law in institutions. This brings me to the question of the prospects for research. First, I offer the following hypotheses: (i) communications are critical to the effective application of normative regimes in institutions, and to bringing about change; (ii) tight professional or disciplinary groupings impede change in institutions; and, (iii) performance-based incentives are conducive to change.[3] A fourth hypothesis concerns the autonomy of institutions. No institution functions by itself. The effect of new partnerships on institutional normativity should be explored, particularly in an era when cooperation between industry, government and universities, as well as international cooperation, are being promoted.

It is clear that any research to pursue these hypotheses must be interdisciplinary. No study of law in the administration can be productive unless it incorporates elements of communications, psychology, economics, sociology and administration. Such research must be truly interdisciplinary, not a multi-disciplinary hodge-podge. No single discipline has the right perspective, or the superior methodology. History has its place too; a critical perspective is change over time.

Is all of this likely to be so grandiose as to collapse under its own weight? Is it possible to assemble a project, devise a methodology, bring together the personnel, and gather sufficient information to produce viable results? Will so much time pass and so much change occur during the course of research that observations are valueless and conclusions outdated? One response is to develop action-based research projects. Rather than follow the methodology of hypothesis-observation-conclusion, researchers from various disciplines could cooperate with key actors in a public or private sector institution to develop new communications strategies, new arrangements breaking down disciplinary and professional separations, and new performance-based incentive schemes as pilot projects to be assessed through feedback and observation over a period of time.

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[3]The hypothesis concerning more entrepreneurial approaches is affirmed in Osborne and Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Addison-Wesley, 1992). The hypothesis concerning disciplinary turf in institutions is developed in Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* (New York: Basic Books, 1989).

There is also productive potential in comparative research. The work I did for the Law Reform Commission had the greatest promise in the comparison of an institution where lawyers were the dominant disciplinary group with an institution where biologists prevailed. There is a need for historical research. No action-based research can produce reliable conclusions without reference points in previous institutional processes and policies. Most private and public sector institutions have created substantial paper trails over the past several decades, including in some cases explicit self-assessments or external reviews. It should not be difficult to identify cases where base reference points could be reliably established.

As for whether such research can be profitably conducted in Atlantic Canada, we have no shortage of institutions facing conditions of change, both dramatic and evolutionary. These changes will be driven primarily by declining federal funding, by scaled back international and interprovincial trade barriers, and by the continuing development of an information-based economy. In Atlantic Canada, there is much potential for comparative research, with four provincial administrations and many local governments and agencies. In New Brunswick in particular, there is an explicit commitment to more entrepreneurial and less institutionalized approaches, and there is an experience of cooperation among government, industry and universities.[4] Perhaps most important, there is a commitment to stay, and to survive, meaning that there is a resolve to develop effective institutions and processes.[5]

A major challenge facing such research projects is to bring together researchers from different locations and from different academic disciplines. The challenge of bringing together researchers from different disciplines is not unique to Atlantic Canada.[6] As for people working in separate and comparatively small universities, that can be addressed by modern communications and technology, and by creative arrangements for collaborative work. A first step must be to assemble complete and up-to-date information about existing research.

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[4]See, for example the Premier's Round Table on the Environment, *Towards Sustainable Development in New Brunswick: A Plan for Action* (1992).

[5]The Premier's Round Table on the Environment produced a background document accompanying the *Action Plan* under the title *Sustainable Development in New Brunswick: Because We Want to Stay* (1992). I attempt to articulate the importance of the commitment to stay in W. MacLauchlan, *A Constitutional Commitment to Survival on the Margins* in McCrorie and MacDonald, eds., *The Constitutional Future of the Prairie and Atlantic Regions of Canada* (Regina: Canadian Plains Research Centre, 1992) at 152.

[6]The bringing together of researchers from diverse disciplines through a "university without walls" is the principal *modus operandi* of the Canadian Institute for Advanced Research. For a think-piece on innovation, technology and institutional change, see J. F. Mustard, *Innovation and Prosperity* (C.I.A.R., 1992).

We have to get past the point of treating law as a dogmatic and immutable phenomenon, enforced by authoritative central institutions. We have to be prepared for, and encourage, change in institutions. There is still much to learn about law and institutional change. May this collection of papers, and the discussions surrounding them, give impetus to that learning process.