

Please select the "Table of Contents" Bookmark to navigate this document.

THIRD ANNUAL REPORT

**THE LAW REFORM COMMISSION OF NOVA SCOTIA
FISCAL YEAR APRIL 1, 1993- MARCH 31, 1994**

The Law Reform Commission of Nova Scotia was established by the Government of Nova Scotia under the *Law Reform Commission Act*, in February 1991.

The Commissioners in 1991–1994 are:

William Charles, Q.C., President
Ronald Culley, Q.C.
Mr. Justice John Davison
Beverley Johnson, M.S.W.
Dawna Ring, LL.B.

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The work of the Law Reform Commission of Nova Scotia is supported by the Department of Justice of Nova Scotia and by the Law Foundation of Nova Scotia.

TABLE OF CONTENTS

	Page
A. Overview	1
B. The Law Reform Commission	
1. The Purpose	5
2. The People	7
a. The Commissioners	7
b. The Staff/Consultants	9
3. Financial Organization	10
4. Directions, Process and Activities	12
a. Directions 1993-94-95	12
b. Activities	13
c. Process	14
C. Law Reform	
1. The Law Reform Project	15
2. Communication and Consultation	18
3. Specific Projects	18
D. Detailed Project Descriptions	19
Appendices	
I. The <i>Law Reform Commission Act</i> and Order in Council	
II. Audited Financial Report for 1993-94 Fiscal Year	
III. Summaries of Project Recommendations, Public Commentary/Communications	

A OVERVIEW

The Law Reform Commission of Nova Scotia was created by the Government of Nova Scotia by an Order in Council which brought into force *An Act to Establish an Independent Law Reform Commission*, S.N.S. 1990 c. 17 (known as the *Law Reform Commission Act*)¹. This statute delineates the mandate and composition of the Law Reform Commission. According to the *Law Reform Commission Act*, the Commission is an organization made up of between five and seven Commissioners, an Executive Director and legal research staff. The Commission reports to the elected representatives of Nova Scotia through the Minister of Justice for Nova Scotia but it is not a government department. It is expressly designated as "independent", a fact which, however ensured, is essential to its effective functioning as an advisor to government communicating the law reform needs of Nova Scotia in a non-partisan manner.

The Law Reform Commission of Nova Scotia has now been in operation for three years and, although there were some delays owing to the lack of institutional infrastructure when the Commission was appointed², it is now fully functional both in terms of its operational and substantive work. As noted in the last two Annual Reports, the Commission has successfully undergone a transition whereby the Commissioners are able to focus entirely on matters of law reform policy with the Executive Director carrying out all administrative duties. This reflects the division of responsibility set out under the *Act* and has proved to be a good model for ensuring that Commissioners' time and expertise is used to carry out law reform work rather than institutional maintenance. The Executive Director provides interim administrative and financial reports to the Department of Justice and the Law Foundation as well as preparing the Annual Report with an independent financial audit as a means of ensuring that there is communication with the public and with the funding agencies supporting the Commission.

The Commission had, as one of its goals in the first year of full operation, the establishment of identity and credibility with the public, the media and the practising legal community and the government. The continued financial support of the Law Foundation and the Department of Justice, as well as the interest by the media and public communication, suggest that these goals have been met. This year has also seen an informal adoption by the government of Law Reform recommendations regarding reforms for the Enforcement of Maintenance Orders. The government has recently circulated a draft statute which is derived from one suggested by the Commission in its Final Report to government on the matter. This is traditionally one measure of the success of a Law Reform Commission, however, the Commission is of the view that its mandate also includes recommendations in many cases for institutional reform which are not necessarily directly translated into legislation. The issue of social change and the law reform role in that change is a significant aspect of reform and is part of recommendations and discussions.

¹The *Act* and the Order in Council appointing the Commissioners are reproduced in Appendix I. Over the last few decades, there have been several advisory law reform agencies created by governments in Nova Scotia that did not, for a variety of reasons, stay in existence. There had been no law reform agency in Nova Scotia for over a decade when the current Commission was established.

² In January 1992, after an extensive search an Executive Director was appointed by the Commission. For reasons relating to pre-existing professional commitments, she was unable to take up the position on a full-time basis until July 1992. Between 1991-1992 the Commission was managed by the Commissioners and the Legal Research Officer who began work in June 1991.

Law Reform Commission Annual Report 1993-1994

The educational function of the Commission's work, as well as its role as a facilitator of change, is also an important aspect of reform work. This is particularly the case where in many instances, recommendations for reform, while endorsed in principle, may not be possible to implement for a period of time because of the fiscal or institutional restructuring required. The fact that the government and elected officials review and may accept or endorse only some parts of law reform proposals, is a critical aspect of the overall law reform process. Law reform necessarily requires that the democratic institutions charged with responsibility for making laws consider all factors before they make the final judgement as to when and how change will occur.

The Law Reform Commission of Nova Scotia is distinctive in Canada because of its express independence, and because the Commission has chosen to carry out projects which are currently relevant to large sectors of the community and may be perceived as "difficult" areas. These are often areas of law which require a great deal of consultation and balancing of interests and as a consequence, do not immediately or easily result in legislation. As noted above, historically, the success of Law Reform agencies has been measured by the correlation between recommendations and legislation that is passed. However, the Law Reform Commission of Nova Scotia has already, in its short history, chosen projects which are challenging, and in one case has suggested that no new legislation is required. This reflects the importance the Commissioners have placed on ensuring that their recommendations are directed to creating actual reform or change in the legal system rather than simply adding to the law with no effective change being experienced. Indeed, if anything, the Commission's view is that where there is no corresponding allocation of resources or institutional reform to properly deliver the promise of the law then, although creating a law may have some educational value, it ultimately constitutes a disservice to the community. In addition, the Commission has focused on a cooperative and consultative approach to its research work. Where, possible every effort is made to ensure that the research carried out is made available to other agencies in both the governmental and non-governmental sectors to avoid duplication and to assist where other agencies have a similar interest in a research topic but may not have the resources to do the necessary research. It is the view of the Commission that its practice of creating public discussion and interest in the work of government and the legal system is a significant aspect of the contribution that law reform can make to developing a society which better addresses the needs of all people in the Province.

The working process of the Commission uses advisory committees, with specific project assignments for the Commissioners and staff. This project management strategy designed in 1992, continues to be a viable structure to enable Commissioner and resource personnel involvement with projects, whilst also accommodating the fact that the Commissioners have many other the extensive professional commitments. The Commission has actively involved and sought the advice of government personnel, the practising Bar and diverse community and interest groups throughout Nova Scotia. The Commission has also developed a proactive approach to media and governmental relations. In the last year, the Commission has produced and published Discussion Papers and/or other research reports on all projects and is now in the process of completing all or significant parts of the seven projects initially taken on in July 1992. As the projects have developed, each has evolved in slightly different ways with different time frames and in some cases, a reconsideration of the original

Law Reform Commission Annual Report 1993-1994

direction of the project. All of the changes are appropriate and indeed necessary for intellectual research which reflects integrity and openness to criticism and consultation as part of a principled approach to developing solutions.

The Commission had planned, once the initial projects were underway and at varying stages of completion, to take on one or two new projects per year as funds and staff time allowed. It was understood that some projects would take longer than others to complete and that the staff complement would not increase but rather schedules and staff time would be adjusted to balance the work on the projects. As will be noted in the project descriptions, the Commission's work on some projects has expanded to include research reports which have been available to other agencies as well as a decision to work on a project which was a logical "next step" to one project in existence. In addition, the Executive Director had suggested that once a public identity was established and the Commission had a number of documents available, the Commission staff would be devoting additional time to reform advocacy. To that end, the Commission has continued in its commitment to travel to regions of Nova Scotia and to make use of electronic communication to enable greater public exposure and it is hoped that even more consultation can be achieved in the next year.

The Commission work has now been of interest to, and is, influencing reforms at a national level. The Executive Director is Chair of a Committee at the Uniform Law Conference of Canada, charged with examining and making recommendations for provincial reforms to the jury system. In addition, the Commission's work on Administrative Law Reform, Violence in a Domestic Context, Adult Guardianship and Status of the Child has been of interest to people elsewhere in Canada, the United States and Australia.

The main concern of the Executive Director has been to design and manage the work of the Commission to ensure that, as much as possible it is done within the available resources and the time constraints imposed by a concern for consultation and information gathering. In order to carry out as much research as possible within its budget, the Commission has sought to develop cooperative projects where this fits within the existing research commitment of the Commission. This has ensured a good working relationship with other agencies in government and also provided an additional means of implementing and carrying out reform initiatives and ideas. The support and interest of various government departments and agencies in the province in commenting on or assisting in projects has been greatly appreciated.

Since its inception, the Commission has requested that the government of Nova Scotia consider appointing the remaining two Commissioners under the statute to more fully ensure a broad perspective which reflects the views of people whose needs differ significantly from the Anglo/Canadian culture and whose interests have not historically been considered in this society. Early in 1994, the Department of Justice advertised for applications from people interested in being on the Commission and the open appointment process is currently taking place in government. It is expected that in the next few months there will be several new Commissioners appointed. Three of the original Commissioners have had their term's renewed and two of the Commissioners terms have ended in 1994, although they are entitled to act until reappointed or replaced. The Commission has had an ongoing concern about financial stability as one of its two funding sources, the Law Foundation of Nova Scotia, has had to respond to significant demands for support and decreasing resources with which to

Law Reform Commission Annual Report 1993-1994

fill them. The Commission has been fortunate in the commitment of the Law Foundation and the Department of Justice to law reform in continuing to provide funds to support the Commission's work at a time in which there are many other important demands being placed on both agencies. However, despite this support, the Commission will be receiving 20% less support than its initial budget (developed in 1991) for the 1994-95 fiscal year with further decreases expected in the 1995-96 fiscal year. It is expected that the Commission can continue its work within the existing resources in 1994-95 but that a re-evaluation of the funding structure will be required in the next year.

As evident in the Project Discussion in Part C of this Report, the Commission has now planned its workload until the Fall of 1994. This is necessary to ensure proper allocation of Commissioner time, to allow time for consultation and also for fiscal planning. In 1992 the Law Reform Commission selected, started work on, and has now completed substantial portions of seven different projects. The Commission decided early in 1992 that in its first few years, it was important to establish an ambitious and diverse program of research as a means of broadening interest. It was understood that this would have more reform impact and service more needs in the Community than devoting all resources to one or two projects. It has been the experience here and elsewhere that a full Report can take between 18 months to two years and, in some cases up to five years to carry out completely. The initial strategy has been to put forward open proposals and ideas in Discussion Papers, especially oriented to encouraging discussion in the non-legal community. The Final Reports, which often contain draft legislation, while still widely distributed and intended to be accessible to the public, are also intended to provide the analysis necessary for lawyers and others who consider implementation of the recommendations.

The seven projects which the Commission had underway in July 1992 are discussed in detail in Part D to this Report, as well as an eighth project. The eighth project is an expansion of the Adult Guardianship project which was seen as requiring an additional area of research to provide a full package of reform recommendations on this topic to government:

1. Enforcement of Maintenance Obligations
2. Violence in a Domestic Context
3. Reform of The Law on Administrative Tribunals
4. The Jury in Nova Scotia
5. The Status of the Child
6. Advancing Human Rights
7. Adult Guardianship
8. Advance Health Care Directives

B. THE LAW REFORM COMMISSION

1. The Purpose of the Law Reform Commission

Under s. 4 of the *Law Reform Commission Act* the purpose of the Commission is to review the law and legal system in the Province and any matter relating to law in the Province and to make recommendations for the improvement, modernization and reform including recommendations for:

- (a) development of new approaches to, and new concepts to, law that serve the changing needs of society and of individual members of society;
- (b) clarification and simplification of the law;
- (c) removal of provisions of the law that are outdated;
- (d) improvement of the administration of justice;
- (e) review of judicial and quasi-judicial procedures.

The Commissioners, along with the Executive Director and the Legal Research Officer, have the responsibility for carrying out the research and making recommendations for law reform in Nova Scotia. Although the Commission reports to and is partly funded by the Department of Justice of Nova Scotia (formerly the Attorney General's Department), it has been organized to operate independently of government. The concept of independence as an important aspect of the Commission's identity, and the relationship between the Commission and the government has required reflection by the Commission in the last year as funding sources have diminished. The Commission's independence is currently achieved in several ways:

- Independence is legislatively guaranteed under its statute with the title of the Commission, an "Independent Law Reform Commission". This guarantee is given substance in the statute in that the Commission may choose its own projects and control its reform agenda, although the government may ask or refer a project to the Commission.
- Independence is also provided for financially with funding provided by government and the private sector (the Law Foundation).
- The Commission's budget is managed independently of the government's budget once the initial allocations are made.
- Finally, the Commissioners themselves are the decisionmakers

Law Reform Commission Annual Report 1993-1994

regarding policy and the recommendations for reform.

The current Commissioners are not employees of the Commission. They receive compensation under an Order-in-Council honorarium for services (per day) plus expenses incurred on behalf of the Commission. Currently only three of the five receive this compensation. Under the Statute four out of the potentially seven Commissioners are nominated independently of government (The Bar Society (2), the Judiciary (1), the Law School (1)).

The Commission has chosen as part of its mandate, the need to ensure that people who have not historically had a role in shaping the law are consulted with and that their needs and views are also taken into account. The work of the Commission is broad in its scope in that increasingly, the reform recommendations have involved considerations around the implementation of law as part of law reform and the administration of justice and not merely the statutes and regulations of the province.

One of the most important aspects of the work of the Commission is to discuss any possible changes in the law or administration of justice with people in Nova Scotia who will or might be affected by the law that is being reviewed. This is part of the way in which the Commission can find out whether the laws that now exist in Nova Scotia are truly serving the public or whether new or changed laws are needed. It is through this process of discussion and study that recommendations for reform which will better serve the needs of Nova Scotia can be made. The Commission consults as widely as possible with the public, individuals and groups with a concern and interest in specific reform projects. This means that one of the central concerns of the Commission will be to ensure that it is fully communicating with people who are or might be affected by changes. The Commission makes extensive use of the newspapers, radio and television to inform people about its research so that there is an opportunity for response.

Law Reform Commission Annual Report 1993-1994

2. The People

a. The Law Reform Commissioners

Under the statute, the Commissioners may be part-time or full-time and are to be drawn from various sectors to ensure expertise and representation. As noted above the Commissioners are not financially dependent on the Commission for salaries. It is expected that there will be additional and/or replacement Commissioners named in the Spring of 1994. The names and descriptions of the Commissioners including the sectors which nominate them are:

1. Two members of the Bar Society, appointed by the Bar Council of the Province (Dawna Ring, Ron Culley, Q.C.).
2. A Judge appointed after consultation with the Chief Justice appointed by the Governor in Council (Mr. Justice Davison).
3. One full-time member of the Faculty of Law at Dalhousie on the advice of the Dean appointed by the Governor-in-Council (William Charles, Q.C. He is currently the President of the Commission).
4. A person who is not a graduate in law appointed by the Governor-in-Council (Beverley Johnson, MSW).
5. The statute of the Commission envisages seven Commissioners, the final two people are to be appointed by the Governor-in-Council with no specific qualifications designated.

Professor William H. Charles, Q.C.

President

Aside from his work with the Law Reform Commission, Professor Charles, B.A., LL.B. (Dal.), LL.M.(Harv.), LL.M.(Mich.), is a member of the Faculty at Dalhousie Law School and was formerly Dean of Law at Dalhousie. Professor Charles is the President of the Commission. Professor Charles is also a member of the Alberta and N.S. Barristers' Societies and is Chair of the Environmental Control Council.

Mr. J. Ronald Culley, Q.C.

Commissioner

In 1972, Mr. Culley began private legal practice in the Province of Ontario. Since 1982, he has practised in the Province of Nova Scotia and is presently with the firm of Patterson Kitz in Halifax, enjoying membership in the Bars of both Provinces. His legal experience includes civil litigation and criminal law at both appellate and trial levels, plus commercial

Law Reform Commission Annual Report 1993-1994

and administrative tribunal advocacy.

Justice John M. Davison

Commissioner

Graduating with a B. Comm in 1956 and an LL.B. from Dalhousie in 1959, Justice Davison practised with the firm of McInnes Cooper & Robertson in Halifax for 28 years. In March of 1987, he was appointed to the Supreme Court of Nova Scotia.

Ms. Beverley Johnson

Commissioner

In addition to her duties as a part-time Commissioner, Ms. Johnson is Director of the Transition Year Program of Dalhousie University. A graduate of the Maritime School of Social Work, Ms. Johnson has had many years of professional experience in the areas of child advocacy and welfare, mental health, corrections and community development. She has been and continues to be involved in numerous professional and community based organizations including Board Member of Dartmouth Immigrant Orientation Association and the Nova Scotia Home for Coloured Children.

Ms. Dawna Ring

Commissioner

Graduating from Dalhousie University with a B.A.(Hon.) and an LL.B. (1980), Ms. Ring joined the firm of Flinn, Merrick. In 1984 she opened her own practice in the partnership of Buchan, Derrick & Ring, specializing in administrative law, human rights and employment law. She has been a member of numerous boards including tribunals under the Human Rights Commission and a volunteer with Bryony House.

b. Law Reform Personnel

There are three full-time staff people employed by the Commission, the Executive Director, the Legal Research Officer and an Office Administrator. Under the Statute, the Executive Director has responsibility for the management, direction, control and administration of the day to day operation of the Commission. In addition, both the Executive Director and the Legal Research Officer are actively involved in the substantive aspects of each project including the design of the research methodology, reviewing the research, editing and/or writing reports, dealing with media, and meeting with public advisors. Both staff lawyers are part of the Civil Service of Nova Scotia, under the Department of Justice. Under its Statute, the Commission is permitted to hire people on a consulting basis for its work. Since financial resources are not sufficient to take on the responsibility for more than the existing employees, the Law Reform Commission uses the services from time to time of legal researchers on short-term consulting contracts for specific research work on projects. This has ensured that there are a number of perspectives on every project. It has also enabled the Law Reform Commission to carry out a number of projects concurrently in its initial two years.

Law Reform Commission Annual Report 1993-1994

Law Reform Commission Annual Report 1993-1994

Dr. Moira L. McConnell

Executive Director

The current (and first) Executive Director started on a contract basis January 1992 as she had teaching responsibilities at Dalhousie until June of 1992. She began full time work in July 1992 under the Civil Service and will continue her appointment until her leave of absence from Dalhousie Law School expires. Dr. McConnell has a degree in English and History from the University of Victoria and an LL.B. from Dalhousie. She received her Ph.D. in Law from the University of Sydney (Aust.) in 1989 and was admitted to the N.S. Barristers' Society in 1990. As a full-time member of the Faculty of Dalhousie Law School, she has researched, taught and published in the legal areas of international trade, business, environment, re-productive control, constitutional law, international human rights, decisionmaking processes, and marine affairs. Dr. McConnell is also actively involved in various public service organizations, particularly in the cultural industries sector.

Ms. Anne Jackman

Legal Research Officer

Ms. Jackman is the Commission's full-time Legal Research Officer. She has a B.Sc.(Hon.) from Memorial University of Newfoundland and an LL.B. from the University of New Brunswick. She is in the process of completing her LL.M. at Dalhousie Law School. Prior to her work with the Commission, she practised litigation and specialized in family law at the firm of Patterson Kitz. Ms. Jackman works as a volunteer with the mentally-challenged and is also a member of public interest associations and her particular interest is public health law.

Consultants

The following people have provided or completed legal consultation to the Commission in the 1993-94 fiscal year: K. Carrigan (Status of the Child and Adult Guardianship Research); K. Hollett (Administrative Law Reference - Computer Database Research); Dr. S. Coughlan (Juries Project); C. Cogswell; (Spousal Assault); T. Goree (Human Rights research); A. MacIsaac (Human Rights Research); V. Paul (Status of the Child Research); B. Francis (translation); N. Bernard (translation).

Law Reform Commission Annual Report 1993-1994

3. Financial Organization

The Law Reform Commission was established in 1991 with a budget of \$300,000. In order to carry out the projects the Commission has committed itself to, the original budget of \$300,000 has not proved to be an overestimate. A specific strategy has been developed which as much as possible allocates resources, including Commissioner time, to substantive work on the projects. The Commission incurs very few costs aside from standard operational costs such as rent which are not related to one or more projects. A copy of the externally prepared audited statement is included as Appendix II to this project. It will be noted that the Commission was able to operate at slightly below the \$300,000 budget. This reflects the fact that most Commission work is done internally and the fact that where possible, every attempt has been made to carry forward resources in anticipation of the reduced funding available in the future. Although not set out in the *Act* which merely provides for financial assistance from the Legislature (to be drawn from the general revenue of the Province through the Minister of Justice) of Nova Scotia, there is an agreement that the Law Foundation of Nova Scotia will pay up to 50% of the Commission's budget (matching the contribution of the Minister of Justice where it has the resources). The Minister of Justice currently contributes \$150,000 to the Law Reform Commission and the Law Foundation, despite its declining resources committed itself to and did match this amount in the 1993-94 fiscal year. The Commission was also able to develop cooperative research proposals with the federal and provincial government which allowed for additional project-related work to be carried out.³ These amounts totalled \$16,300 received in 1993-94.⁴ The Law Foundation has indicated that because of the decline in its funding resources it will be in a position to support the Law Reform Commission to a maximum of \$100,000 as the need arises in 1994-95. The Nova Scotia Department of Justice has indicated that the Commission's budget will be reduced in line with the provincial government requirements of up to 5%. It is estimated that the budget for the Commission (1994-95) will be reduced by about \$60,000 from the original budget of \$300,000. The Executive Director, in consultation with the two funding sources, developed a budget in January 1994 of \$273,000 for the 1994-95 fiscal year which assumed a cash surplus from the 1993-94 year in the amount of \$27,000. The amount that has been carried forward by the Commission is in fact higher than that originally budgeted for, and as of March 31st, 1994, amounted to

³In late 1992, the Commissioners considered the issue of independence and concluded that funds could be received from Departments other than the Department of Justice even in the absence of external funding as long as the process of the Commission is respected by a Department wishing work to be done and as long as the project was seen by the Commission as part of its mandate. The Commission would require that the project be managed and run by the Commission although consultation and cooperation would occur with the relevant Department. It has been indicated to Departments when asked about this possibility that the matter should come through a Reference from the Minister of Justice, and further, since resources are already quite committed if the project was pressing, that it would require financial support other than through the Department of Justice.

⁴Of this as indicated in the Auditor's Report, \$7,000 is viewed as contingent as it is subject to approval by the Federal Department of Justice. If approved, the Commission will receive an additional \$3,000 in the 1994-95 fiscal year.

Law Reform Commission Annual Report 1993-1994

approximately \$55,500. This was partly the result of two reports being published early in the 1994-95 fiscal year rather than at the end of the 1993-94 year and the accumulation and conservation of funds carried forward each year from previous years as well as a waiver of fees by a Commissioner entitled to receive fees.⁵ The result of the surplus is that the Commission will have a working budget for the 1994-95 fiscal year of close to \$300,000, which means the budget has not increased or decreased since its creation in 1991.⁶ This budget covers all costs of the Commission including rent, salaries and publishing and distribution of Reports. This means that work on all projects can proceed as planned with some funds available for additional Commissioners' expenses and for one or more new projects in the next year as well as Reports in all projects.

In the 1994-95 fiscal year, the Commission will be publishing and distributing at least three Final Reports, as well as a Discussion Paper in two projects. Currently, all Discussion Papers and Reports are distributed to between 800-1000 individuals and organizations, including libraries across Canada. They are also provided free of charge to any person who calls or writes to the Commission. The educational effect of such publications, which are specifically targeted at a non-legal audience, is central to the effectiveness of the Commission, as it is the view of the Commission that generating public communication and debate is a significant feature of the Commission's work. If other Commissioners are appointed, costs will increase to account for the larger numbers, particularly if one or more Commissioners are from outside Halifax.

In terms of alternative long term funding the Executive Director has sought to develop the Commission's profile with the general public and to educate all government departments about the potential role in their work of the Commission. It is probable that the Law Foundation of Nova Scotia will not have resources in future years to fulfill its interest in funding the Commission. In light of this, the Commission has considered at length whether alternative government funding would be available and, if it is available, whether being solely funded by government would compromise the independence of the Commission. This was resolved to some extent in 1992 but as noted earlier, the issue will need to be reconsidered in the next fiscal year.

⁵The judicial appointment does not receive an honorarium. All other Commissioners are entitled to receive the amount stipulated in the Order in Council.

⁶ Since the Commission was not fully operating in the first year, it has carried forward a surplus each year. This year, the Commission's budget was comprised of \$300,000 in operating grants, \$22,754 carry-forward surplus from the previous years, \$16,300 in external projects funding and approximately \$2,000 in interest for a total of approximately \$341,000. The expenditures determined by the Auditor for this year amounts to \$293,479 including \$7,690 amortization with a \$55,553 cash surplus after salary related liabilities and year end adjustments are taken into account.

Law Reform Commission Annual Report 1993-1994

4. Directions, Process and Activities, 1993-94-95

a. Directions 1993-94-95

In the Overview it was pointed out that the Law Reform Commission of Nova Scotia has now been in operation for three years and fully functional both in terms of its operational and substantive work, for close to two years. The administrative process has been structured to allow the Commissioners to devote their time to the significant policy law reform matters they were specifically appointed to consider. A working process involving delegation to Liaison Committees and specific project assignments for the Commissioners and staff, project strategy, planning and management design approaches to implementing the law reform areas designated by the Commissioners, have assisted the Commission to carry out the maximum amount of legal research work possible, in light of the other extensive professional commitments of the Commissioners. The Commission meets usually on a monthly basis or as their professional schedules permit to make legal/policy decisions on the various projects

underway. In addition, each Commissioner may meet one or more times a month with an advisory group for a specific project he or she has special responsibility.

The Commission has asked the Government of Nova Scotia to consider appointing the remaining complement of Commissioners under its statute to more fully ensure a range of perspectives and to assist in meeting the workload of the Commission. These positions have been advertised and it is expected that there will be appointments in the Spring of 1994. In the 1994-95 Fiscal Year, the Commission hopes to travel more frequently to areas outside the Halifax region to obtain public input into its recommendations and to seek topics for new projects. The main issue, however, for the staff and Commission will be completing all projects that it started in 1992, including a very broad Reference was given by the government dealing with administrative law reforms in the province. In addition, the Commission will take a role in commenting on other federal and provincial initiatives and documents with other agencies of government interested in reform.

b. Activities

In addition to the consultation and communication work on specific projects, the Commission personnel and the Commissioners are actively involved in raising the awareness of law and law reform of Nova Scotia. This has involved meetings with the media, preparation and widespread distribution of a public information brochure about the Commission and its work in the English, French and Mi'kmaq languages. The Executive Director has provided information briefings to Ministers and governmental personnel as the government has changed its structure and personnel. The materials are intended to explain the role of the Commission and to discuss all projects. The Executive Director and the Legal Research Officer and the Commissioners have also met with the various community leaders to discuss ways in which comments can be obtained for information and made available to law reform projects. The Executive Director and the Legal Research Officer have been involved in speaking engagements and educational sessions with many different sectors of the community. The use of advisory groups involving people who represent agencies or people who have an interest in the subject of a project has also assisted in

Law Reform Commission Annual Report 1993-1994

circulation of information about the projects as a means of communication of issues and potential reforms through other community agencies. In the 1993-94 fiscal year there were several research briefs prepared as part of larger projects that the Commission was working on. These research briefs, while not formally "published" or distributed, are available to other agencies to make use of in carrying out their work. For example, a research paper was prepared which discussed the legal recognition of caregiving (custom adoption) practices of the Mi'kmaq people in Nova Scotia as part of the Status of the Child research. This will ensure that the research work that the Commission carries on is used as a general information resource to the community and government. In addition, the Executive Director and Legal Research Officer actively participate in other law and policy related organizations in the province and in Canada to ensure that there is communication of information and sharing of resources regarding work being done in Nova Scotia and elsewhere.

c. Process

The general process of the Commission is reflected in the following outline and in the Project Descriptions which follows in Part C. This process is still evolving but to date has adopted, for the most part, the following pattern:

- ***Project Selection:***

The Commission selects a general topic for reform based on public submissions, comments from the Bar, judiciary, media and government. The Commission uses its own criteria to determine priorities for eventual selection.

- *Project Design:*

Staff prepares some preliminary research into the size and cost of a project to see if it is useful, viable and how it will relate to other work in the community.

- *Research/Advisory:*

If a project is taken on, a Research Brief will be prepared for a Liaison Committee (comprised of one or more Commissioners, the researcher and the Executive Director), setting out some possible issues. These are presented to the Commissioners in the form of a Research Brief, with proposed recommendations for reform. Generally these recommendations are developed through specific consultations and advisory meetings between the liaison committee, affected people in the community and in the government.

- *Discussion Paper/Consultation:*

Once the Commissioners have determined their initial position on the various issues, a Draft Discussion Paper is prepared for public distribution. This is reviewed by the Commission as a

Law Reform Commission Annual Report 1993-1994

whole then is circulated to between 500-1000 people. The Commission has recently become accessible electronically and its papers will be available on electronic networks. The Commission has a practice of providing a copy of the Discussion Paper to affected departments before it is released publically to enable the Department to respond in an informed way to the media. The Discussion Paper is specifically designed and written to ensure public communication with the non-legal public. A summary of the Paper is translated to the French and Mi'kmaq languages. There is usually a period of several months to allow for public response. During this time there is media communication to ensure public discussion as well as meeting with interest groups to provide information. For the most part, the Commission has focused on the electronic media for reasons related to 1) cost; 2) accessibility (most people watch or listen to electronic media); 3) many people have literacy problems or do not respond to "legal" documents.

- *Final Report/Recommendations:*

The public submissions and comments are reviewed by the Commissioners and a Final Report with recommendations and if it is appropriate, draft legislation is provided to the Minister of Justice and affected Ministers. It is also publically distributed.

The Commission has actively involved and sought the advice of government personnel, the practising Bar and diverse community and interested groups through Nova Scotia. The Commission has also developed a pro-active approach to media, governmental and academic relations. This has involved presentation of papers at conferences and exchange of information with other law reform and policy agencies. The central concern has been to try to seek a balance between research efforts and the need to ensure Reports are published and ideas are available for use while issues are being debated and the work is likely to be considered by decisionmakers.

Law Reform Commission Annual Report 1993-1994

C. LAW REFORM PROJECTS 1991-1994

1. The Law Reform Project

The Executive Director and the Commission have actively adopted strategies to enable the Commission to carry out the task of law reform which has three main components:

1. Research
2. Consultation and Communication
3. Practice

Increasingly, there is a need to recognize the plurality of "Canada" and the diversity of people and values this involves. Correspondingly, this diversity and the commitment to equality places responsibilities on the social, political and legal structures. Many of the laws in Canada are based on a British model of political relationships which reflects a limited degree of participation by other than a narrow group of people. This means that laws, which supposedly reflect the entire community's values, tend not to reflect its actual constitution. That is, law, much of which in Nova Scotia is derived from 19th century British laws, does not reflect the participation of women, or ethnic, racial or linguistic communities (other than English and to a lesser extent, French).

Law reform, at whatever level of government, must now be based on broad consultation which explicitly discusses and considers the views of people who have not traditionally had any input into the formulation of the law. This is even more critical because the constituents of the lawmaking body in Canada, legislators and judges and senior administrators, are still, for the most part, drawn from the sector of the community which has historically formulated the laws and legal system.

An important role, then for any law reform agency, is to legitimate and give voice to the validity of pluralism and to provide models for law and legal writing which reflects this approach. This is a challenging mandate particularly in the context of communities and which can be based on many characteristics such as ethnicity, religion, gender, age, ability, or sexual orientation. There is an obligation to actively seek this participation. Affirmative consultation requires a number of things. It means recognizing that the Law Reform Commission is not only a public service but is, through its very existence, part of the law reform culture and that the way in which it acts also causes changes. In the case of the Commission it has meant translation of proposals into other languages, and recognizing that Nova Scotians live in a society served by technology which necessitates the use of radio and television media. It has also meant understanding that legal issues must be explained in a way that enables people to participate in a reasonably informed way. For example, having a non-legal member of the Commission has been very helpful in reminding the lawyers involved with Commission of many of the assumptions held by people trained in the law.

Some of the considerations that come up during the Commission's discussion on law reform projects are drawn from the *Human Rights Act* of Nova Scotia, the *Charter of Rights and Freedoms* as well as the findings and recommendations of the of the Royal Commission on the Donald Marshall Jr. Prosecution. These include:

Law Reform Commission Annual Report 1993-1994

- * Is the law necessary?
- * Is there an implementation problem?
- * Has there been support or interest in reform in this area expressed by elected decisionmakers?
- * Is this an issue which is more effectively addressed by another agency and if so, why has this not taken place?
- * Are the laws sensitive to ethno-cultural concerns and differences?
- * Are there biases in the law or in the application of this law based upon race, religion, gender, sexual orientation, ability, age or other areas contrary to Human Rights laws?
- * If the laws are criminal or quasi-criminal in nature are the recommendations of the Marshall Commission being considered?
- * Does the law respect the right to freedom of religion?
- * Does the law consider a variety of religions or spiritual perspectives?
- * Do these laws specifically refer to marital status?
- * Are these laws applied differently to de facto relationships?
- * Is the language gender neutral?
- * Does this law apply differently to same-sex relationships?
- * Are the mentally and physically challenged affected by these laws?
- * Does this law affect First Nations persons differently?
- * Does provincial law apply at all in light of the federal *Indian Act*?
- * Does the law respect an individual's ethnic or national background?
- * Are language rights affected?
- * Are the interests of all age groups being considered?
- * Are there adequate protection for the rights of children or other vulnerable people?
- * Are there economic considerations/does this law treat people differently as a "class" because of income level?
- * Are there discriminations against individuals on social assistance or the homeless?
- * How does this law affect people who are incarcerated or institutionalized?
- * Does the law infringe upon an individual's freedom of association or freedom of expression?

In addition, the economic impact of implementing recommendations in an era of scarce resources is a legitimate and appropriate consideration for the Commission. Ultimately, the issue for the Commission is identifying whether the problem being considered is one which can be addressed through a change in the law or in the implementation of the law. It has become apparent in the various projects that one of the more difficult issues to identify in making recommendations for change arises out of the need to go beyond merely recommending adoption of the language or law which it is assumed will create the change. In order to make recommendations which will create real change, there is a need to identify areas in which change has not occurred and, assuming political will for change, to attempt to determine which fact is blocking the change and how this resistance to change can be addressed. In many cases, change does not occur simply through law or even resource allocation but is a combination of motivation, incentives, attitude, resources and identifying areas in which there is agreement about change. Without these underlying factors, the

Law Reform Commission Annual Report 1993-1994

passage of a law will cause some changes but, ultimately, will not create the change sought unless it is in accordance with the social values or needs of the time.

2. Communication and Consultation

In order to make an assessment of community needs, the Commission has devoted a great deal of time (and proposes to devote more time in the next year) to fostering communications with people who can provide the perspectives reflected in these questions. As much as possible every effort has been made to seek to include or consult with people who may be able to provide some advice as to how the existing law and proposed reforms might impact on the various communities and interests in Nova Scotia. In addition, the process of public distribution of proposals and effective communication with the media in Nova Scotia have helped to give substance to these goals. The need for ensuring that the initial assumptions about areas for law reform are correct is itself of importance. For example, in a project dealing with reforms to the administrative tribunal system in Nova Scotia, it became clear that before deciding what procedures might be useful it was necessary to develop a clear picture of the existing practices. Much of this information is not available in the legislation but requires extensive consultation and research. The empirical data collected in this manner is also useful to many other agencies in Nova Scotia who may have an interest in the results but are not organized in way which allows such research.

3. The Specific Projects

Over the period 1991 through the 1993-94 fiscal year end the Commission was able to organize and carry out a great deal of work on eight projects. The results of the organization and start up work have been apparent in the 1993-94 fiscal year. In 1992-93 one project was completely finished including Draft legislation. This legislation appears to have received initial support by the Department which would be responsible for implementing the legislation, although the legislation is still under debate. In 1993-94 there were Discussion Papers issued in three more projects as well as additional research studies carried out. The Final Reports for two of the projects (Status of the Child and Reforms to the Jury System) will be issued in the Spring of 1994. A Discussion Paper on a related topic will be issued on one project (Advance Health Care Directives) before the Final Report on the topic (Adult Guardianship) is carried out. It is expected that in the 1994-95 fiscal year, at least two more projects will be completed (Violence in a Domestic Context and Adult Guardianship) and Discussion Papers issued in the remaining two projects (Human Rights and Administrative Law Reference). In addition, the Commission may be in a position to take on new projects either on its own initiative or at the request of the Government of Nova Scotia.

The rest of this Annual Report contains a detailed discussion of each project. Copies of the Summaries of recommendations/suggestions published to date are found in Appendix III.

Law Reform Commission Annual Report 1993-1994

Completed Work:

- 1. PROJECT:** ENFORCEMENT OF MAINTENANCE OBLIGATIONS
- PERSONNEL:** W. Charles, B. Johnson, Mr. Justice Davison, A. Jackman, M. McConnell
- ADVISORY GROUP:** Judge Connie Sparks, Halifax Family Court
Judge Jim Williams, Dartmouth Family Court
Professor Rollie Thompson, Dalhousie Legal Aid and Dalhousie Law School
Kay Rhodenizer, Barrister and Solicitor
Doug Campbell, Barrister and Solicitor
- CURRENT STATUS:** Start date - July 1991
Discussion Paper July 1992
Public consultation July-September 15th, 1992
- PROJECTED STATUS:** Completed: Final Report Issued December 16, 1992

PROJECT COMMENTARY: Approximately 800 copies of the Discussion Paper and 500 copies of the Final Report were distributed and 26 written responses were received as well as extensive media commentary. The public communication strategy focused largely on electronic media coverage and news releases rather than newspaper advertising. This was part of a response to concerns about cost and about the high illiteracy rate in the Province. The Commission focused especially on media outside the metro area, a direction that was well received. Several days before the Paper was publically distributed and press releases sent, copies were sent to the funding sponsors, and to the relevant Minister (Community Services) to enable them to respond to press questions on release of the publication. Again, this strategy was well received and was reflected in the response of government to press inquiry.

The Commission chose to draft legislation to go along with this Report and much of the Final Report is devoted to annotation of this draft Act as well as textual discussion of recommendations as in the Discussion Paper.

In terms of substance, the recommendations set out in the draft Act and Report were based on a philosophical position which saw the failure of some people to fulfil their financial responsibilities to their families as a social wrong which could legitimately make a claim on the legal system to enforce. This view essentially answers the question of dealing with the interplay between custody, access and maintenance. The Commission's stance has been that, although the issues are emotionally linked for many people, its objective was to try to dis-entangle these problems to enable people to respond more usefully. That is, if an individual is unhappy with a custody decision it should be dealt with by a Court reviewing that decision and not by the person expressing his or her anger by withholding support from children or by forcing the family and society to incur further costs. Further, it was believed, based on experiences elsewhere, that an efficient maintenance enforcement system would provide savings to other

Law Reform Commission Annual Report 1993-1994

social assistance programs. In many ways this fits in with the issue of violence in the family, that is, finding ways to channel anger so that innocent people are not victims of anger that is misplaced. The response to the recommendations, which mainly focused on institutional adjustments to the legal system, has been, for the most part, positive from both public and government. The Final Report and Draft legislation was released December 16, 1992. The two Ministers Of Justice and of Community Services, subsequent to its release have indicated support for the proposals. Towards the end of 1993, the Department of Community Services issued a consultation document containing a Draft *Act* which was substantially similar to the one proposed by the Law Reform Commission. It is expected that the proposals will be adopted and put in place in the next year.

ONGOING PROJECTS:

1. PROJECT: VIOLENCE IN A DOMESTIC CONTEXT

PERSONNEL: D. Ring, C. Cogswell, D. Ginn, M. McConnell

ADVISORY GROUP:

There was widespread consultation with police and Transition Houses throughout the province, as well as specific consultations with police, medical and social workers and other individuals representing women who may encounter double jeopardy for reasons of race, language, ability or sexual orientation.

CURRENT STATUS: Start Date-December 1991
Discussion Paper distributed on March 29, 1993
Commission reviewed Autumn 1993

PROJECTED STATUS: Final Report expected Summer 1994

PROJECT COMMENTARY: The Law Reform Commission's Discussion Paper entitled *Violence, In a Domestic Context* dealt specifically with the legal response to spousal assaults. The Discussion Paper, based on province-wide consultation, identified fundamental failures in the way in which the legal system in Nova Scotia has responded to violence in a domestic context, most of which is experienced by women. The Commission's Discussion Paper sets out suggestions it is considering as to how the legal system can be made more effective for women who have been assaulted by their spouses.

The approach of the Commission to law reform for spousal assault was based on four fundamental principles: first, the most important priority of the legal system at all times should be the protection of assaulted women and their children; second, assaulted women should be treated with sensitivity and respect and provided with support services while going through the legal system; third, the legal response to spousal violence should take into account the various ethnic, racial and linguistic groups that exist in Nova Scotia; and fourth, assaulted women should not have to leave their homes or take legal action, other than asking for assistance, to

Law Reform Commission Annual Report 1993-1994

receive this protection.

The Commission's research and consultation led it to conclude that the main problems arise in the delivery of legal services, rather than any gap in the law. The Discussion Paper takes the view that spousal assault is violent behaviour which should always be treated as a criminal act and that the government has an obligation to ensure that the existing criminal law is fully and effectively enforced to protect women who have suffered from spousal assault.

The Commissioners felt that rather than create a non-criminal law, it would be more useful to focus on making the existing criminal law, which can deal potentially with every form of spousal assault, more effective. The real problems are in enforcement, attitudes, insufficient resources and education. The Discussion Paper encourage the Minister of Justice to work to ensure changes are made to the federal criminal law to make it more responsive to spousal assault. In addition to recommending more effective enforcement of the law, the Discussion Paper suggested that, rather than passing a new law, several provisions in existing provincial laws dealing with property and custody should be altered to support the right of the woman to remain in her home and to ensure that spousal assault is a consideration in custody and access decisions. It also sought public comment and advice as to whether health care workers should be required

to report spousal assaults, how child protection workers should balance the interests of children and the assaulted mother, and whether a special criminal court should be created.

This Discussion Paper from the Law Reform Commission of Nova Scotia, coincided with the release of a Discussion Paper on Domestic Violence prepared by a senior solicitor in the Department of Justice which proposed a model for a new non-criminal provincial law. This proposed law provides for various kinds of protective orders from the Supreme Court which can be applied for by people who have suffered from domestic violence.

The Law Reform Commission and the Department of Justice co-operatively issued the press releases on these Discussion Papers expressing the view that it was in the public interest to have available these two different approaches to changing the legal system to make it more effective as it would provide people with an opportunity to fully explore and compare different options. Since the Law Reform Commission is an independent Commission, its advice to government will continue to be based on its views and on the public responses it receives to its suggestions. Subsequently, the Commission received a number of comments on its document and has been working towards a Final Report. The Commission was interested in receiving the outcome of the Federal Task Force on Violence Against Women which was issued in the Fall of 1993 and also the provincial study which tracks domestic violence cases through the courts and justice system in Nova Scotia. It is expected that this report will be available late in the Spring of 1994. In addition, the Commission has been carrying out research into changes in international regulation of violence against women, including the International Declaration On Violence Against Women which Canada took a leadership role in developing. There have been model codes developed in the United States in 1994 which specifically address the family law questions which arise in domestic violence as well as proposed legislation in another province which differs from that proposed by the solicitor for the Nova Scotia Department of Justice. The need to develop an assessment of constitutional issues arising out of provincial legislation on this matter has been discussed at length and is expected that this, along with the issues relating to alternatives to incarceration and court structures, will be the subject of a discussion

Law Reform Commission Annual Report 1993-1994

with the Department of Justice in the Spring of 1994. It is expected that a Final Report will be issued in the Summer of 1994.

- 2. PROJECT: ADMINISTRATIVE LAW**
- PERSONNEL:** W. Charles, R. Culley, M. McConnell, K. Hollett
- ADVISORY GROUP:** Jeanne Fay, Dalhousie Legal Aid Services
Katherine MacDonald, President, Advisory Council on the Status of Women
Blair Mitchell, Chair, CBA, Administrative Law Section
Alison Scott, Senior Solicitor, Department of Justice
Barry Ward, Barrister and Solicitor
Allan Green, Q.C. Nova Scotia Utility and Review Board
Margaret A.M. Shears, Chair, Liquor License Board
Professor Dianne Pothier, Dalhousie Law School
Frank Richardson, NS Veterinary Medical Association
Lee Cohen, Barrister and Solicitor
Dr. Guy MacLean, Ombuds
Graham Steele, Solicitor, Worker's Compensation Board
Marshall Burgess, Solicitor, Department of Justice (Environment)
- CURRENT STATUS:** Start date: Reference in 1991
Decision to proceed July 1992
Survey and Premier's Letter distributed, Spring 12, 1993
Research Brief on Appointments prepared September 1993
Advisory Group meetings December 1993-Spring 1994
- PROJECTED STATUS:** Prepare Draft Legislation for Spring 1994
Prepare Draft Discussion Paper for Summer/Fall 1994

PROJECT COMMENTARY: In 1992 the Law Reform Commission of Nova Scotia started work on a project which was formally referred to it by the then Attorney General of Nova Scotia (now Minister of Justice) in July 1991. The Minister of Justice requested that the Law Reform Commission review the practice and procedures of administrative tribunals in Nova Scotia and consider whether there should be a law which:

- standardizes procedures for administrative tribunals;
- guarantees to the people appearing before these tribunals (basic procedural rights);
- simplifies administrative law regarding appeals; and
- ensures independence when these tribunals are required to make decisions which affects the rights and entitlements of people coming under their control.

As noted publically by the Minister of Justice early in 1993 this Reference is part of an overall move by the government of Nova Scotia to reform the law and legal system to ensure that it is

Law Reform Commission Annual Report 1993-1994

more representative and responsive to the needs of all people in Nova Scotia. The law reform project will facilitate the work of the government as a whole as these commissions and boards usually report, or are under the supervision of, the various departments. The terms of the Reference from the Attorney General came out of the 1991 *Court Structure Task Force Report*, which has resulted in the recent reforms to the court system in Nova Scotia. The Reference is also part of the strategy initiated through the Premier and the Clerk of the Executive Council to affirmatively encourage the participation of more people in Nova Scotia in the administration of the public affairs of Nova Scotia.

This project is one of the most relevant to all Nova Scotians that the Law Reform Commission has carried out and is also one of the most ambitious projects in its scope. Most people have very few encounters with the court system. Almost everyone is affected by the administrative system in some part of their lives whether it is the Workers' Compensation Board, Human Rights tribunals, the Labour Relations Board, employee and professional qualifications associations, marketing boards, hospital boards, rent review commission and boards making decisions on social benefits to name a few. There are between three and four hundred of these agencies, most of which are appointed by the government and operate under the authority of a statute or law. In many cases, the people serving on them receive an honorarium or a fee for their service but the work is generally regarded as voluntary public service. Despite the importance of these bodies, there is relatively little known about them, and practices vary from body to body.

The Law Reform Commission sent out a survey in April 1993 to these Agencies, Boards and Commissions under cover of a letter from the Premier encouraging cooperation with the Law Reform Commission's project. This data has been compiled as a research base to see which agencies would benefit from uniform procedures and to serve as data regarding the differing arrangements and composition of these Agencies. The preliminary results of this initial data collection was made available to the government to use in evaluating its approach to the administrative appointment process. In addition, the Liaison Committee provided research to the Clerk of the Executive Council regarding a range of criteria and institutional structures that could be adopted for appointments. The advisory group which is comprised of resource people drawn from different sections of administrative law practice for this project has had several meetings to discuss specific parts of the reference through the Fall of 1993 and early 1994. In addition, the project researcher (the Executive Director) has consulted with the Federal Department of Justice which is also in the process of developing a law for standard hearing procedures for Federally appointed Boards. The project itself is one which covers a wide range of legal issues, not all of which can be included in Draft legislation. It is expected that it will be possible to prepare and distribute a Discussion Paper on the reference in the Summer of 1994 which may include a Draft *Act* and/or a listing of principles underlying such an *Act*.

Law Reform Commission Annual Report 1993-1994

3. PROJECT: JURY SYSTEM

PERSONNEL: Justice J. Davison, S. Coughlan, M. McConnell

CURRENT STATUS: Start date - July 1992
Discussion Paper published May 1993
Public Consultation and Advisory Group meetings to December 1993

ADVISORY GROUP Thelma Costello, Executive Director, Courts and Registries
Susan C. Potts, Special Prosecutor, Public Prosecution Service
Heather Chandler, Jury Selection Officer
Professor Bruce Archibald, Dalhousie Law School
Chris Manning, Barrister
Justice J. Doane Hallett, NS Supreme Court, Appeal Division
Dean Jobb, Journalist and former Justice Reporter
Daniel Paul, former Executive Director Mainland Mi'kmaq
Thomas Macdonald, Chair, CBA, Criminal Law Section (N.S.)

PROJECTED STATUS: Final Report and Draft legislation May 1994

PROJECT COMMENTARY: In July 1992 the Law Reform Commission decided to examine the jury system in Nova Scotia to see what reforms it could recommend. The project was one recommended by the judiciary of Nova Scotia and others who were concerned that the selection process and compensation might have the inadvertent effect of narrowing the range of jury members to particular groups, a result which was a matter of concern from the point of view of juror impartiality and representativeness. Reform of the jury system is a topic which is currently under extensive review in other jurisdictions such as Ontario, New Brunswick and federally. The Commission has been given a great deal of information by the Ministry of the Attorney General in Ontario regarding the resource intensive project on the Jury they recently carried out. The Ontario project reviewed the operation of the jury system and is currently looking at issues such as representation and impartiality. A number of people for the resource groups were involved in some preliminary consultation in late November and again in January to assist in preparation of the Discussion Paper. A Discussion Paper was released in early May 1993 and the research and drafting for the Final Report began in early Autumn 1993. The Commissioners have reviewed the Draft *Act* and made recommendations for policies and changes to the legislation in light of submissions and documentary. The Final Report was close to completion at year end and should be released in May 1994. The Executive Director is also Chair of a Committee of the Uniform Law Conference of Canada which is seeking to develop principles which can be adopted by all provinces relating to provincial control over Juries. One of the central policy concerns was how best to ensure juries were more broadly representative of the Nova Scotia public. In its Discussion Paper the Commission has expressed the view that more inclusive source lists for jury service to ensure a more representative and random selection, computerization, as well as fewer exemptions from jury service will assist in achieving this objective. One of the issues that has arisen as a point of divergence in views for many people is the core issue of whether jury service is regarded as a privilege from which some people are excluded or a liability or civic duty which should be imposed as broadly as

Law Reform Commission Annual Report 1993-1994

possible on all members of society. It has been important to recognize that there is no uniform view on this issue and that to some extent the issue turns upon whether or not the person was ever likely to have been called upon to carry out juror duty. A more practical issue has also arisen with respect to the relationship between court reforms in the province - which largely reflect a process of centralization, and the definition of the community from which the jury is to be drawn.

4. PROJECT: HUMAN RIGHTS

PERSONNEL: B. Johnson, D. Ring, A. Jackman, M. McConnell

ADVISORY GROUP:

There has been a Round Table meeting and a meeting with the Human Rights Commission on this project as well as consultations with numerous individuals in connection with the racism research.

CURRENT STATUS:

Start Date July 1992
Round table Advisory Group meeting February 5 1993
Research paper completed and edited March 1994

PROJECTED STATUS:

Discussion Paper expected - Fall 1994

PROJECT COMMENTARY: Although the Nova Scotia *Human Rights Act* has been in existence for 25 years, discrimination is still very prevalent in our society. While recognizing that law alone cannot create these changes, further improvement to the *Human Rights Act* and its procedures is necessary to effectively combat discrimination. The process outlined in the *Act* is too time-consuming and cumbersome to effectively eliminate discrimination. A new approach needs to be adopted. During this year, the Commission has continued to obtain background information for its discussion paper. Two research projects were undertaken. There was a round table meeting. Meetings were held with the Human Rights Commission, various individuals and a meeting of an advisory group discussing problems with the *Human Rights Act* and its procedures. A recent review of the Human Rights Code in Ontario has presented a useful resource for this project. A discussion paper is expected in the Fall.

5. PROJECT: STATUS OF THE CHILD

PERSONNEL: R. Culley, M. McConnell, K. Carrigan

ADVISORY GROUP:

B. Etter, Registrar, Vital Statistics
Elizabeth Paul, Staff, MicMac Family and Children's Services
Estelle Theriault, Public Trustee
Alex Shaw, Solicitor, Director of Adoptions, Department of Community Services
Francine Comeau, Solicitor, Human Rights Commission
Joan Jones, Metro Community Law Clinic

Law Reform Commission Annual Report 1993-1994

Judge Robert Levy, Nova Scotia Family Court
Professor Rollie Thompson, Dalhousie Legal Aid
Laurie Rantala, Parent Finders-Nova Scotia
Wayne Cochrane, Solicitor, Department of Health

CURRENT STATUS: Start Date July 1992
Discussion Paper released end of May 1993
Public and Advisory Consultation June-Autumn 1993
Research on Custom Caregiving Practices January 1994

PROJECTED STATUS: Final Report and draft legislation is expected to be published in June or July 1994

PROJECT COMMENTARY: Work had been carried out on this topic in 1989 by counsel to the Department of Community Services, to see if the Uniform Law Conference *Status of the Child Act* could be adopted in Nova Scotia. Ultimately, nothing specific was implemented at that time and the Department of Justice has cooperated by providing the Commission with this earlier research. A Discussion Paper was published in May 1993 which set out some proposals for Reform and this project deals with the fact that the laws of Nova Scotia discriminate for some matters between children on the basis of the marital status of the child's genetic or biological parents. It was chosen as project by the Commission in 1992. The reason for this choice included the following considerations:

1. This law reform project was in keeping with the changing values and needs of society, especially with the increasing number of single parent, common law and same sex couples choosing to have children, as well as the increased availability of assisted conception technology.
2. This distinction is contrary to the *Charter of Rights*, Canada's Obligations under the United Nations *Convention on the Rights of the Child*, and probably if challenged, the *Human Rights Act*. This issue had already been identified by the Supreme Court in Nova Scotia.
3. Other jurisdictions in Canada had changed their laws or were in the process of changing them to adopt legislation compatible with reforms suggested in the Uniform Law Conference of Canada's Draft, Uniform Child Status Act.
4. Nova Scotia legislation is internally diverse in its treatment of the question. This makes it difficult for people to determine their obligations and rights.

The Discussion Paper concluded that a distinction between children based on the marital status of the parents is discrimination which should not exist in the laws of Nova Scotia. The project

Law Reform Commission Annual Report 1993-1994

required a discussion and ultimately a policy determination of what rights and obligations should flow between people on the basis of a genetic or biological connection. Traditionally, marriage and the term "parent" have been used to encapsulate social understanding of the nature of the rights and obligations that exist between people. Where these labels are not necessarily present but there is a biological connection between people then the question arises as to what, if any, rights and obligations should exist between these people. This situation is exacerbated in the context of assisted conception, a matter of increasing interest in the United States and Canada, where many couples, including same-sex couples, are choosing to be parents with the aid of technology. To ensure a more consistent approach to the subject the Discussion Paper proposed that a law along the lines of the *Act* proposed by the Uniform Law Conference of Canada, *Uniform Status of the Child Act* setting out a series of presumptions or tests for paternity would result in establishing the various rights and obligations which normally flow between child and parent as an approach which would ensure equal treatment.

There are, however, some significant practical issues relating to the law on adoption and inheritance which are being considered in discussion with an advisory group. In addition there were various other issues which are not easily resolved. For example, common law relationships are increasingly recognized for most purposes in Canadian society, e.g., division of assets, and in some cases, tax/pension/medical benefits. However, this is still not the case in all areas. What is the effect of recognizing children of common law parents as having a wider range of rights parents may not have between themselves? Similarly, same sex couples may also seek to adopt or have a child through assisted conception. These relationships still suffer from legal disabilities in society. What are the legal implications of according rights/obligations to children of this relationship where the partners in the relationship may not have these rights between themselves? It is consistent with the *Human Rights Act* that this be the case, since discrimination on the basis of sexual orientation is not permissible. There is currently debate about the acceptability of reproductive technologies and draft legislation which regulates rights in light of assisted conception implicitly accords the technology some validity. There are also issues in a provincial reform context arise out of the need to recognize caregiving or parenting relationships in the Mi'kmaq community which differ in concept from those currently recognized by law. There is little published information about this practice in Nova Scotia but, as part of the research work on this project, the staff of the Commission and a Consultant prepared a study of the legal recognition of these caregiving practices which can be used by other agencies. The Final Report containing draft legislation dealing with these issues is in the process of completion, reflecting the various submissions received on this topic. The Final Report will be timely as 1994 is the Year of the Family and it has been noted recently that the definition of the family has altered significantly in Canada in the last decade (*Canadian Families*, Vanier Institute 1994).

Law Reform Commission Annual Report 1993-1994

7. **PROJECT:** **ADULT GUARDIANSHIP**
- PERSONNEL:** Justice J. Davison, A. Jackman, M. McConnell
- ADVISORY** Wayne Cochrane, Solicitor for Department of Health
- GROUP:** Dr. Robert Elgie, Dalhousie Health Law Institute
 Bill Grant, Human Rights Officer, Human Rights Commission
 Professor Archie Kaiser, Dalhousie Law School
 Justice E. Roscoe, Nova Scotia Court of Appeal
 Estelle Theriault, Public Trustee
- CURRENT**
 STATUS: Start date July 1992
 Release of Discussion Paper September 1993
- PROJECTED**
 STATUS: It has been decided that the Final Report on this project should
 follow the Discussion Paper on the Advance Health Care
 Directives Project. A Final Report on the two projects is expected
 towards the end of 1994.

PROJECT COMMENTARY: This project examines the law as it relates to adult guardianship and, in particular, the *Incompetent Persons Act* of Nova Scotia. Consideration is being given to the approach to the issue taken by Alberta and Saskatchewan's *Dependent Adult Act* as well as the new legislative package in Ontario which include the *Substitute Decisions Act*, the *Advocacy Act* and the *Consent to Treatment Act*. The Department of Justice was also interested in this project and was about to commence research in this area, but has decided to await the Commission's Discussion Paper. An advisory group was developed representing a diversity of interests.

The Law Reform Commission's Discussion Paper considered and made proposals on a range of matters including the need for a new Draft *Act* dealing with adult Guardianship in Nova Scotia. Some of the issues which were proposed to be dealt with by the *Act* were:

- * Should the legislation contain a positive presumption of capacity?
- * What standard of proof should be required by the legislation?
- * Should a finding of "incapacity" be automatically reviewable?
- * Should a proposed guardian (or substitute decision maker) provide to the court plan of their ideas for providing support and assistance to the individual in need?
- * Should the legislation provide suitability criteria for the judge to evaluate the appropriate person?
- * Should the assessment of the persons needs and capacity be made before the court application for appointment of a guardian (or substitute decision maker) or after the court orders the assessment?
- * Should there be a test as to whether a person needs an assessment?
- * What if the person refuses to be tested?
- * Should a person subject to a "guardianship" application be entitled to a lawyer?
 Who pays for the lawyer?

Law Reform Commission Annual Report 1993-1994

- * Should the statute say the person is presumed competent to instruct counsel?
How does a person appeal an order?
- * Who should be served with notice of an application for guardianship?
- * Who are the next of kin?
- * What type of service should be required under the legislation?
- * What type of bonding should be required for an estate guardian?
- * Should the Public Trustee be responsible for monitoring private estate guardians?
- * Should an Office of Public Guardian be created to offer guardianship services to people who require personal guardianship but there is no suitable person available?
- * Should the Public Trustee receive notice of all applications for the appointment of guardians in the province? Is it appropriate for the Public Trustee to consent to treatment?
- * Should the Elections Act be amended to remove the voting exclusion for people who are mentally incompetent?
- * Should trust companies be considered "persons" who could be guardians of the person as well as the estate of an individual?

Through discussions with the advisory group it has become clear that further research on the use of advance health care directives other than those currently available under the *Medical Consent Act* may be needed (for example, "living wills" should be enforceable in Nova Scotia). It was decided to carry out consultation on Advance Health Care Directives before completing the Final Report on this project to provide a comprehensive recommendation to government.

8. PROJECT: ADVANCED HEALTH CARE DIRECTIVES

PERSONNEL: Justice J. Davison, W.H. Charles, A. Jackman, M. McConnell

ADVISORY GROUP: Harley Marchand, Canadian Cancer Society
Dr. William Hart, NS Advisory Commission on AIDS
Dr. Susan Sherwin, Dalhousie University, Philosophy
Penny Doherty, Alzheimer's Society
Rev. Judith Adam-Murphy, St. David's Church
Dr. Pamela Jarrett, Camp Hill Hospital
Roberta J. Clarke, Solicitor
Anne MacDougall, Schizophrenia Society of Nova Scotia
Jean-Pierre Galipeault, Self-Help Connection, CMHA-N.S.
Sarah MacKenzie, Canadian Pensioners Concerned

Division

CURRENT STATUS: Start date - November 1993
Research Brief Prepared and Advisory Group has met in January, March and April 1994.

**PROJECTED
STATUS:**

Advisory Group to meet in April and May
Discussion Paper to be released in July 1994

PROJECT COMMENTARY: This project proposes an alternative to Adult Guardianship. It considers how the law in Nova Scotia could be altered to allow adults to make decisions about their lives which will be complied with at a later date should they become unable to make a decision. There is legislation in several provinces in Canada including Nova Scotia which recognizes these directives. However, there are also many medical/ethical issues which arise in terms of the extent to which people can make decisions which will bind medical practitioners and others at a later date. The Advisory Group for the project includes a broad range of people with interest in the project including seniors, medical practitioners, lawyers, representatives of mental health consumers and also representatives of people with AIDS, Alzheimer, and Cancer who may be affected by the law in this area.

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