# FIFTH ANNUAL REPORT

## THE LAW REFORM COMMISSION OF NOVA SCOTIA
## FISCAL YEAR APRIL 1, 1995 - MARCH 31, 1996

The Law Reform Commission of Nova Scotia was established by the Government of Nova Scotia under the ***Law Reform Commission Act***, S.N.S. 1990, c.17. It began operation in 1991.

The Commissioners for 1995–1996 were:

William Charles, Q.C., Co-President
Ronald Culley, Q.C.
Theresa Forgeron
Jennifer Foster
Justice David MacAdam
Dawn Russell, Co-President
Dale Sylliboy

The Commission staff in 1995-96 were:

Moira McConnell, Executive Director
Anne Jackman, Legal Research Counsel
Philip Girard, Legal Research Counsel (started July 1995)
Marilyn Preus, (term replacement January - September 1995)
Nancy Johnston, Administrative Assistant
Marian Gillis, Financial/Library Resources Assistant (part-time).

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The Commission's home page and reports are found on the Chebucto Community Net at http://www.chebucto.ns.ca/Law/LRC/LRC-home.html or under Nova Scotia Government and Legislation.

**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**.

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# THE LAW REFORM COMMISSION OF NOVA SCOTIA
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## A. OVERVIEW OF THE LAW REFORM COMMISSION AND ITS ACTIVITIES

The Law Reform Commission of Nova Scotia was created by the Government of Nova Scotia by an *Act to Establish an Independent Law Reform Commission*, S.N.S. 1990 c.17 (known as the *Law Reform Commission Act).*[1] This law sets out both 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 public and elected representatives of Nova Scotia through the Minister of Justice for Nova Scotia but it is not a government department. The Commission currently has seven Commissioners who meet on a bi-monthly basis to review and make decisions on law reform recommendations. The seven part-time Commissioners come from differing sectors of the Nova Scotia community and their appointment process is set out in the *Act*. One Commissioner is selected by the Judges of Nova Scotia; three are community representatives selected by the Minister of Justice; two are selected by the Nova Scotia Barristers' Society and one person represents the Law School. Under the *Law Reform Commission Act,* one of the Commissioners must not be a lawyer. Currently, two of the Commissioners are not lawyers. The President of the Commission is chosen by consensus. The Commissioners, along with the Commission staff, are responsible for carrying out the work of law reform in the province. The Law Reform Commission is described as an independent advisory agency of government. The independence of the Commission, which is achieved through its Commissioner selection, its relationship to government and its funding structure, is essential to its effective functioning as an advisor to government communicating the law reform needs of Nova Scotia in a non-partisan manner. Similar law reform organizations operate in other provinces in Canada, the United States and many other countries.

According to the *Law Reform Commission Act*, the Commission's job is to review the laws of Nova Scotia and to make recommendations for improvement, modernization and reform. This may involve either formulating new ideas and approaches to law, or proposing ways in which existing laws and the legal system can be made clearer or simpler to better serve the needs of the general public. For example, the Commission seeks to ensure that the laws which it examines are consistent with the *Human Rights Act* of Nova Scotia and the Canadian *Charter of Rights and Freedoms*.

[1]The *Act* appointing the Commissioners is 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.

***Law Reform Commission Annual Report 1995 - 1996***

One of the priorities of the Commission is to discuss any possible law reforms and the effect these changes might have with the general public – this is how the Commission can find out if the laws that now exist are truly serving Nova Scotians, or whether new or changed laws are needed. The Commission actively consults persons or groups concerned with specific reform projects being undertaken by the Law Reform Commission. The Commission also makes use of various media including electronic communication and computer information networks to inform Nova Scotians about its research, and to give the public an opportunity to respond to suggestions for reform. It is through a process of discussion and study that proposals for reform can be made. The Reports of the Commission include summaries in English, French and Mi'kmaq and are freely available to the public either in published form or on the electronic information system, the Chebucto Community Net.

The Commission does not make law in Nova Scotia – this task is performed by the Government of Nova Scotia through the decisions of the political representatives in the Legislature. Law is also made through the decisions of judges and other appointed administrative decision makers in cases that come before them. The Commission's Reports and recommendations are formally presented to the Minister of Justice for Nova Scotia, who then discusses the Commission's Reports with the other parts of the Government of Nova Scotia.

While the Commission attempts to provide the public with accurate legal information and often assists members of the public in locating legal information or legal assistance either directly or through the Public Legal Education Society or the Barristers' Society of Nova Scotia, the Commission does not provide legal advice to any individual or organization and does not intervene in individual cases.

As of Spring 1996 the Law Reform Commission has completed nearly all the projects it took on when it started and has partially concluded several new projects taken on in the 1995 year. The projects that the Commission has undertaken cover a large range of concerns and areas of law. One of the projects is a Reference (a formal request) from the Government of Nova Scotia. The other projects were chosen from suggestions to the Commission by the public, the judiciary and the legal community.

The projects that have been taken on by the Commission deal with:

- Enforcement of Maintenance Obligations
- Reform of the Jury System
- Reform of the Laws Dealing With Adult Guardianship and Personal Health Care Decisions
- Reform of the Justice System Relating to Domestic Violence
- Comprehensive Reform of the Administrative Justice System

- Reform of the Laws Governing the Legal Status of Children Born Outside of Marriage
- Reform of the Law Dealing With Matrimonial Property Division
- Reform of the Law to Respond to Electronic Information Systems
- Reform of the Law and Practice of Mortgage Remedies.

The Commission usually prepares at least two publications during the course of a project. The first of these, the Discussion Paper, is intended to provide people who do not have legal training with information about the project. It sets out suggestions for reform that the Commission is considering in relation to the issue. The purpose of the Discussion Paper is to encourage people to consider and comment on the issues and the values and principles that the Commission is identifying as the basis for its proposed reforms. The staff of the Commission spend time with any individuals, groups or the media who wish to discuss the proposed reforms. The second document produced is a Final Report which is submitted to the Government of Nova Scotia for consideration. It contains the final recommendations of the Commission as well as more research and, in many cases, a draft law. The Commission's final recommendations take into account the responses it receives to the Discussion Paper. The Final Reports are intended to provide a basis for the Government to consider and adopt the reform recommendations. Since many of the Commission's recommendations may relate to changing an administrative system as well as passing a law, the reform proposals must be reviewed by the Government in light of its other responsibilities. To date the Commission has not engaged in active advocacy regarding implementation of its recommendations beyond providing the recommendations to the Government and members of the public. Instead, the Commission has taken the view that in a democratic system members of the public, governmental and non-governmental organizations and elected representatives of the public are best placed to encourage implementation where the Commission's recommendations are seen as serving their needs.

In addition to concerns relating to the particular legal issue under review, the Commission's projects also reflect equality/human rights concerns and concerns about improving access to justice for all members of the public. 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 Commission takes a broad approach to its work. Increasingly, reform proposals have involved considerations relating to the implementation of law, and not merely to changes in the statutes and regulations of the province.

## ***Law Reform Commission Annual Report 1995 - 1996***

**As of Spring 1996 the Commission has published:**

*Enforcement of Maintenance Obligations* (Discussion Paper,July 1992)

*Enforcement of Maintenance Obligations* (Final Report, November 1992)

*Reform of the Jury System in Nova Scotia* (Discussion Paper, May 1993)

*Reform of the Jury System in Nova Scotia* (Final Report, June 1994)

*Violence in a Domestic Context* (Discussion Paper, March 1993)

*From Rhetoric to Reality, Ending Domestic Violence in Nova Scotia*
(Final Report, February 1995)

*The Legal Status of the Child Born Outside of Marriage in Nova Scotia*
(Discussion Paper, August 1993)

*The Legal Status of the Child Born Outside of Marriage in Nova Scotia*
(Final Report, March 1995)

*Adult Guardianship in Nova Scotia* (Discussion Paper, September 1993)

*Living Wills in Nova Scotia* (Discussion Paper, November 1994)

*Adult Guardianship and Personal Health Care Decisions* (Final Report, November 1995)

*Agencies Boards and Commissions: The Administrative Justice System*
(Discussion Paper, February 1996)

*Matrimonial Property in Nova Scotia: Suggestions for a New Family Law Act*
(Discussion Paper, April 1996)

*Five (5) Annual Reports (1991-1996)*

## B. THE LAW REFORM COMMISSION

### 1. The Operation of the Law Reform Commission

- **The Law Reform Commissioners**

The Commission is now operating with its full complement of seven part-time Commissioners. In general the Commissioners try to meet every two months to make decisions on project and reform issues and to allow staff to proceed with expedition on project work. The Commissioners are drawn from various locations in Nova Scotia, a fact which adds some cost to the operation of the Commission but ensures that its views are more broadly representative of the public in Nova Scotia.

Under the *Law Reform Commission Act,* the Commissioners may be part-time or full-time and are to be drawn from various sectors to ensure expertise and representation. The Commissioners are not employees of the Commission. Under an Order-in-Council they receive compensation in the form of an honorarium for services plus expenses incurred on behalf of the Commission. Currently the members of the Commission come from various locations in Nova Scotia and only six of the seven receive this compensation. Under the *Law Reform Commission Act,* four of the seven Commissioners are nominated independently of government (the Bar Society (2), the Judiciary (1), the Law School (1)). Under the *Act* the President of the Commission is chosen by the Commissioners from among their number. William Charles was the President of the Commission from 1991-1995. In 1995 the Commissioners decided to have two Co-presidents. William Charles and Dawn Russell agreed to share the responsibilities for chairing meetings and working with the Executive Director and staff.

- **The Commissioners, 1995-1996**

Mr. William H. Charles, Q.C.
*Co-President (1991-1997)*
Mr. Charles has served on the Commission since its creation in 1991 and has been President by consensus since that time. Aside from his work with the Law Reform Commission, Professor Charles is a part-time member of the Faculty at Dalhousie Law School and was formerly Dean of Law at Dalhousie. He is also a member of the Alberta Law Society and the Nova Scotia Barristers Society and is involved in a number of employment, justice, and environment related agencies in the province.

Mr. J. Ronald Culley, Q.C.
*Commissioner (1991-1996)*
Mr. Culley was nominated by the Bar Council of Nova Scotia and has served on the Commission since its creation in 1991. 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 Palmer Hunt Murphy 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, as well as commercial and administrative tribunal advocacy.

Ms. Theresa Forgeron
*Commissioner (1995-1998)*
Ms. Forgeron is the Bar Council's representative nominated in March 1995. She is a resident of Sydney, N.S. and is in practice with the firm of H.F. MacIntyre and Associates. She has been involved in a number of community boards, a provincial government court reform study and has an extensive legal practice in the field of family law.

Ms. Jennifer Foster
*Commissioner (1994-1997)*
Ms. Foster was appointed by the Government to serve on the Commission in 1994. A resident of Blomidon, in the Annapolis Valley, she is a partner in Shoreside Consulting. As a former social housing administrator and municipal councillor she brings to the Commission a long standing involvement with public interest boards dealing with housing, poverty, education and health issues.

Mr. Justice David MacAdam
*Commissioner (1995-1998)*
Justice MacAdam was admitted to the Bar in 1966 and appointed to the Supreme Court of Nova Scotia in 1992. Prior to that he practised with the firm of Burchill MacAdam and Hayman.

Ms. Dawn Russell
*Co-President (1994-1997)*
Ms. Russell was appointed as the Law School representative and began serving on the Commission in September 1994. She is a full-time faculty member at the Law School and has recently been appointed Dean of Dalhousie Law School. Professor Russell teaches in the fields of corporate law and international environmental law of the sea. She has served on numerous community and public service boards in Nova Scotia.

Mr. Dale Sylliboy
*Commissioner (1994-1997)*
Appointed by the Government to the Commission in September 1994, Mr. Sylliboy is a resident of Truro. He is the Executive Director of the Community Legal Issues Facilitation Demonstration Project (CLIF), an organization working on improving communication between Mi'kmaq people and the justice system. In 1996 he was also appointed as a member of the National Parole Board.

- **Commission Staff**

In 1995-96 the Commission changed from its original structure of three full-time staff made up of the Executive Director, the Legal Research Counsel, an Office Administrator and a part-time assistant for its accounting and library needs and support staff relief. The change involved moving to a work sharing arrangement with the Executive Director sharing her responsibilities with a second part-time Legal Research Counsel for the Commission. In addition one of the Legal Research Counsel was on leave for part of the year and a term replacement worked with the Commission. A more flexible staffing structure has allowed the Commission to carry out more projects concurrently while still retaining sufficient staff coverage to ensure continuity in the administration of the Commission. This arrangement has been seen as beneficial to the specific project needs of the Commission and has allowed for more work to be carried out without increased costs in research staff. It will continue in the 1996/97 fiscal year.

Under the *Law Reform Commission Act,* 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 Counsel are actively involved in the substantive aspects of each project including the design of the project, reviewing the research, editing and/or writing reports, dealing with media, and meeting with the public. Under its *Act,* the Commission is permitted to hire consultants for its work. Since financial resources are increasingly limited the Commission has found that its alternate work sharing arrangements have proved to be a more useful and efficient method for carrying out a range of research projects. In the last three years as Commission projects have developed at different rates and there has been a reduction in the Commission budget, there has been less need for external legal services.

Dr. Moira L. McConnell
*Executive Director*
The Executive Director started on a part-time basis January 1992 as she had teaching responsibilities at Dalhousie until June of 1992. She was employed on a full-time basis between 1992 and July 1995. In July 1995 the Commission restructured some of its

employment relationships to better meet the needs and budget of the Commission and the needs of staff. Dr. McConnell reduced her work at the Commission through a job sharing arrangement and returned to teaching part-time. She will continue with this arrangement and her appointment as Executive Director until she returns to full-time teaching at Dalhousie Law School. Dr. McConnell has an LL.B. from Dalhousie University and articled with the Supreme Court of Canada. She received her Ph.D. in Law from the University of Sydney (Aust.) in 1989 and was admitted as a practitioner to the Barristers' Society of Nova Scotia in 1990. As a member of the faculty at Dalhousie Law School, she has researched, taught and published in the legal areas of international trade, business, environment, reproductive control, constitutional law, international human rights, alternate dispute resolution, and marine affairs. She is also one of the Coordinators of the Dalhousie Negotiation and Conflict Management Programme and a member of the Marine and Environmental Law Programme at Dalhousie Law School.

Ms. Anne Jackman
*Legal Research Counsel*
Ms. Jackman began working as the Commission's Legal Research Counsel in 1991. She has a B.Sc. (Hon.) from Memorial University of Newfoundland, an LL.B. from the University of New Brunswick and an LL.M. in health law from Dalhousie Law School. Prior to her work with the Commission, she practised litigation and specialized in family law at the firm of Patterson Palmer Hunt Murphy (then Patterson Kitz). Ms. Jackman is a member of several public interest associations. Her particular research expertise is public health law. From January-September 1995 Ms. Jackman was on a temporary leave of absence.

Professor Philip Girard
*Legal Research Counsel*
Professor Girard joined the Commission in July 1995 on a part-time work sharing arrangement. He obtained his LL.B. from McGill and his LL.M. from the University of California (Berkeley) and is in the process of completing a Ph.D. in history at Dalhousie. In 1995 he was called to the Bar of Nova Scotia. As a faculty member and former Acting Dean of Dalhousie Law School, Professor Girard has taught and published extensively in the fields of family law, property law and legal history.

Dr. Marilyn Preus
*Legal Research Counsel (Term appointment)*
Dr. Preus began working for the Commission in late January 1995 as a replacement for Ms. Jackman until her return in September 1995. Dr. Preus has a Ph.D. in genetics from McGill and a Bachelor of Civil Law and LL.B. from McGill in 1989. She was admitted to the practising Bar of Nova Scotia in 1992. Her primary interest is in the health law and bioethics fields.

Ms. Nancy Johnston *(Administrative Assistant)* has provided administrative support to the Commission from 1992 until her retirement in April 1996.

Ms. Marian Gillis has provided part-time financial and relief administrative assistance to the Commission since 1992.

- **Consultants**

The following people provided project related consultation services to the Commission in the 1995-96 fiscal year: Joseph Marshall (translator), Murdena Marshall, (translator), Nathalie Bernard (translator), Chris Majka (electronic information system consultation and archival work).

## 2. Finances

The Commission's accounts are audited independently at the end of the fiscal year. A copy of the Auditor's report is found at the end of this Report (in Appendix II).

The funding position of the Commission has been tenuous since its inception and remains so from year to year as its two funding sources, the Department of Justice and the Law Foundation, each encounter increasing demands from other concerns for their support. While this situation provides some difficulties for staff and the Commission in terms of long range planning, it can also be viewed more positively as a working example of a private/public partnership, which because of this structure helps to ensure the continued independence of the Commission. In addition, the need for the Commission to consider whether its work is seen as useful and relevant to members of the public and the Government provides a mechanism to ensure accountability for Commission project choices and operational efficiency.

Although there is provision for funding from the general revenue of the province under the *Law Reform Commission Act*, there is no specified budget. The Commission's budget at its creation in 1991 was set at $300,000 which covers all costs including staff salaries, Commissioners' fees, rental of offices, printing and distribution of publications, and telecommunications. Initially the Commission was funded on a shared basis (50/50) by the Department of Justice and the Law Foundation of Nova Scotia on the basis of an agreement between the two. The latter, despite severe financial constraint in the last few years, has continued to support the work of the Commission but in the fiscal year 1994-95 was forced to reduce the funding level to $100,000 instead of $150,000. The Commission budget has effectively been reduced to $250,000 annually despite normal increases in the costs of

operating, an increase in the size of the Commission (from five to seven Commissioners) and an increase in production and publishing. The Commission has been able to operate in this situation because of a large surplus generated in the first year of operation. By arrangement with the Law Foundation, the Executive Director has been able to carry this surplus forward into subsequent years. This has allowed the Commission to increase its output in spite of fewer resources. In addition various staff term leaves and changes in staff scheduling have enabled the Commission to operate within the lower budget.

In July 1995, after receiving the funding from the Department of Justice, the Executive Director projected that there would be a carry forward or "surplus" amount of between $20,000- $25,000 (the amount of the last instalment in the annual grant from the Law Foundation) at the end of the 1995-96 fiscal year. A similar situation had occurred in 1994-95, again owing to a combination of staff leave, publication timing and the surplus from prior years. The Commission reported this to the Law Foundation and indicated that the unused part of the 1995-96 grant ($25,000) would be required by the Commission to meet its budget in 1996-97. It was agreed that the Law Foundation would retain the $25,000 in its accounts, thereby generating interest for use on other projects and would, in effect, "carry over" the surplus into 1996-1997 for the Law Reform Commission. The Law Reform Commission has also adopted a practice whereby it requests its funding from the Law Foundation in the latter half of the fiscal year in order to maximize the Law Foundation's ability to generate interest on its funds. Consequently, the grant from the Law Foundation in 1996-97 will be an amount up to $125,000. In 1996-97 the Commission does not anticipate any surplus to carry into 1997-98 and the grant from the Law Foundation is not expected to be above $100,000 in that year. The Commission has made some changes to reduce operating costs and is in the process of reviewing its staffing structure to respond on a more permanent basis to the funding reduction which it will fully experience in 1997-98.

Aside from variations relating to publishing periods and Commission meetings, the costs of the Commission are, for the most part, fixed. From time to time the Executive Director has also been able to generate small amounts of project specific funding to enable additional work where related studies have been seen as useful or appropriate research for the Commission. Most of this funding has been in the form of reimbursement for the cost of having additional research done.

The Commission ended the 1995-96 fiscal year close to its projected 1995-96 budget, (less $25,000), with a small cash deficit ($2,787) owing to some unexpected staffing expenses and moving costs.[2]

[2] The Commission's audited expenses as of year end were $269,226 (plus $4,435 in amortization and a change in capital expenses of $18 relating to equipment). It had a prepaid expense in the form of a conference registration and accounts receivable in the form of a GST repayment and a final disbursement on a project from 1994 from the

As noted above, the Commission has not been required to experience the full impact of the 1994 budget cut because of the surplus carried forward from 1991 and various staffing arrangements, reduced workload, and term leaves which have made some additional funds available in each year. In 1996-97 the Commission is expecting funding in the amount of $250,000 plus $25,000 carried forward from 95/96. The Commission is also in need of replacement computer equipment. The Commission will have some funds available in this year to respond to this need, owing to a staff leave, however there will be little or no surplus in 1996-97. In 1997-98 the Commission anticipates $250,000 in funding available and, absent permanent changes to staffing arrangements, the Commission will experience a deficit. To date, the Commission has taken the view that its *Discussion Papers* and *Reports* should be freely and widely available to all members of the public and there should be no charge made for copies of them, as is the case in some other Law Reform Commissions. The Commission has also placed all its work on the Chebucto Community Net to provide additional inexpensive access. Its financial situation means that the Commission has to carefully evaluate costs on all projects to ensure that funds are in place. The uncertainty from year to year regarding funding does however create additional problems relating to whether longer term projects should be started as well as problems in terms of employer commitments to staff.

The issue of longer term funding has been raised in previous years and the Commission developed a position regarding the matter of government funding and independence. In March 1993 and again in December 1995 the Commission met with senior Government officials to discuss the operation and work of the Commission. The Commission was particularly concerned about the viability of longer term participation of the Law Foundation, an organization which supports a number of important legal initiatives in the Province. While sole funding from the government does not necessarily result in a lack of independence, there are obvious implications for credibility. However, experience to date has indicated that the independence of the Commission and its ability to actively communicate and advise from outside government, is an asset which is valued equally by the Government of Nova Scotia and by the public. These are all issues which will require resolution in the next year or two to determine the future of the Commission.

## C. IMPLEMENTING A LAW REFORM MANDATE AND STRATEGY

### 1. The Commission's Process and Strategy

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

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Federal Dept. of Justice. The Commission received income in 1995-96 of $256,027. It had funds available from the previous year of $10,430.

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.

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 opportunity to directly contribute to 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 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 reflect this approach. In particular, there is an obligation to seek participation and comment from all members of the public. This is a challenging mandate particularly in the context of diverse public communities which can be based on many characteristics such as ethnicity, religion, gender, age, ability, or sexual orientation. The Law Reform Commission is not only a public resource but it is also, by its very existence, part of the law reform culture. In the case of the Commission this has meant translation of proposals into other languages, and recognizing that Nova Scotians live in a society served by modern technology, a fact 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 non-lawyer members of the Commission has been very helpful in reminding the lawyers involved with the Commission of many of the assumptions held by people trained in the law.

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 by the government, 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 the 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 interests and as a consequence, do not immediately or easily result in legislation. 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. 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 Commission's work in the first few years tended to be in the area of equality and in family law. This reflects an assessment of what the current problems facing society involve. It also reflects to some extent a more philosophical view that socio-economic development will not occur in the absence of equality and a more effective system to address problems such as domestic violence. Issues such as personal autonomy, substantive equality and the role of the state in relation to these matters are at the heart of most contemporary public policy debates. The more recent projects chosen by the Commission deal with consumer protection in the context of electronic information and fairness in mortgage proceedings. The Commission is seeking to ensure that its law reform mandate also extends to other issues which may require reform such as commercial law practices which, although there is no organized constituency to advocate for change, may impact in a negative and costly way on individuals in Nova Scotia.

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The Law Reform Commission of Nova Scotia has now been in operation for close to five years. As noted in earlier reports, the Commission has been able to set up its infrastructure, create and develop its decision-making process and mandate, develop effective working relationships with the public, media, government departments, the practising Bar, academia, numerous interest/representative groups, and begin to develop linkages with under-represented communities in Nova Scotia. 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 consideration and use by decision makers while specific issues are debated.

The general process of the Commission is reflected in the following outline and in the Project Descriptions which follow in Part D. This process alters to some extent with each project, but to date has generally adopted the following pattern:

- ***Project Selection:***

  The Commission selects a general topic for reform based on suggestions received from the public, legal practitioners, judiciary, media and government.

- ***Project Design:***

  Staff prepare 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 an Advisory Group. The Committee is usually made up of the Commission's Legal Counsel assigned to the project and a number of members of the community including relevant government people, judiciary, lawyers, advocacy groups, with an interest and or expertise in the issue. This group meets to consider and identify issues and develop recommendations to the Commission. These are presented to the Commissioners in the form of a Research Brief, with proposed reform suggestions.

- ***Discussion Paper/Consultation:***

Once the Commissioners have determined their initial position on the various issues, a Discussion Paper is prepared for public distribution. This is reviewed by the Commission as a whole then is circulated to between 1,200-2,000 people. The Commission has recently made its work accessible electronically and its papers are all available on the electronic network (Chebucto Community Net). The Commission has a practice of providing a copy of the Discussion Paper to affected government departments before it is released publicly 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 meetings with and making presentations to interest groups to provide information.

- ***Final Report/Recommendations:***

  Comments on its suggestions in the Discussion Paper 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 publicly distributed to between 800-1,200 people.

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 *Canadian Charter of Rights and Freedoms* as well as the findings and recommendations of the of the Royal Commission on the Donald Marshall Jr. Prosecution regarding access to justice in Nova Scotia. 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 a 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 factors are blocking changes and how this resistance 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 passage of a law will cause some changes but, ultimately, will not create the results sought unless it is in accordance with the social values or needs of the time.

## 2. The Commission's Activities 1995-96-97

The Commission was pleased to see that its recommendations in the Final Report on *Enforcement of Maintenance Obligations* and the Final Report *From Rhetoric to Reality, Ending Domestic Violence in Nova Scotia* have been for the most part accepted by the government in the form of a new law and in the form of education, training, changes to practices and resource allocation to alleviate problems encountered in both of these areas. In addition the Commission understands that the government is in the process of considering changes to the jury system in Nova Scotia to address some of the concerns raised in the Commission's Final Report on *Juries in Nova Scotia*. The Commission also understands that the reforms it proposed in its Final Report on *The Legal Status of the Child Born Outside of Marriage in Nova Scotia* are of increasing interest to the government in that, in addition to fulfilling Nova Scotia's international responsibilities regarding children, the Commission's draft Act also responds to the Federal government's request for provincial law responding to legal issues arising from changes in reproductive technology. The Commission anticipates that the draft Act proposed in its Report will be the subject of legislative action in the next year. The Commission also published a Final Report on *Adult Guardianship and Personal Health Care Decisions*. There has been a great deal of interest in seeking legislative action on this Report by advocacy groups, particularly those representing the seniors community, although the Commission is not as yet aware of any government decision to respond to the Report more fully.

A lengthy Discussion Paper was published in February 1996 entitled *Agencies, Boards and Commissions: The Administrative Justice System in Nova Scotia*. Although this Discussion Paper was somewhat more challenging for people without legal training to review, the Commission has experienced a great demand for copies, particularly by members of the public and government involved in administrative agencies and boards. The Final Report including a draft law should ready in the late Fall of 1996. The Commissioners also decided that many of the equality issues it was concerned about in connection with its Human Rights umbrella project were addressed to some extent in all its projects. The Commission felt that to produce human rights specific papers would perhaps replicate the mandate of agencies currently charged with the responsibility for dealing with this issue and would not, absent a specific government request to carry out this work, be the best approach to reform in this area. In terms of more specific procedural concerns in human rights hearings, (eg. delay, fairness, access to justice etc.) the Commissioners felt that the law reform issues were more effectively addressed in the comprehensive report it was doing on Administrative Justice reform.

The Commission has also published a Discussion Paper in one of its new project areas, reform to the laws governing the division of matrimonial property. The Commission has

also carried out research and consultation in connection with its project on electronic data and the protection of personal privacy, where information is held in the private sector. Based on advice from the Advisory Group on the Electronic Information project, the Commission has decided to wait until later in the 1996-1997 fiscal year to publish a Discussion Paper in this area as a number of legal and policy issues would benefit from information as to action to be taken in other provinces. Research on the Mortgage Remedies Project began in April 1996.

This Commission is currently considering several new project areas that have been suggested by members of the public and is awaiting advice from the Government as to possible References so that it can fully plan its workload over the next two years.

The Commission has, in partnership with the Chebucto Community Net (CCN), put all its publications on the electronic information system. At the time this was a pioneer effort in Nova Scotia, since the CCN had not dealt with this volume of material before. In addition, this was the first time that the Mi'kmaq language has appeared on the electronic information system. The Commission has also included, as a public legal research service, linkages through its directory on the CCN to all decisions of the Supreme Court of Canada and the United States and linkages to legal research and reform resources around the world. This information will give greater access to and more opportunity for commentary on the Commission's work. The Commission's site was also nominated for a national award for electronic legal resources. The latest data received by the Commission indicates that it is receiving approximately 2700 "hits" per month on its Home Page. In the Spring of 1996 the Commission's Discussion Paper on Matrimonial Property law was also made available through QuickLaw, a computerized legal research system.

As the foregoing description suggests, the Commission has, in its relatively brief life, developed an identity and credibility with various sectors of the community in Nova Scotia. Although the Commission does not provide legal advice to individuals encountering difficulties with the legal system, the Commission is receiving an increasing number of calls from members of the public seeking suggestions as to where they may obtain assistance. In addition more suggestions for law reform projects are proposed by members of the public, a fact which suggests that the Commission has developed some acceptance or recognition as a public resource. For example, the Commission understands that the translation of summaries of its Papers and Reports into Mi'kmaq and French and the consultation process with community groups has been viewed positively.

In addition, the Commission has achieved recognition for its work at a national level, as its advice and substantive work is now requested by other agencies provincially, federally and internationally. Two Commissioners will be presenting law reform papers at the Commonwealth Law Conference meeting in Vancouver in August, 1996. Early in 1996, the

Executive Director participated in a workshop dealing with reform of the civil justice system in Canada. The Executive Director has also chaired a committee of the Uniform Law Conference of Canada, a national advisory agency, to develop guidelines for jury reform which can be used by all provinces and provide guidance for federal reform. In addition the Commission actively participates in other ULCC projects dealing with electronic information law and is cooperating with the federal initiative to create the Law Commission of Canada. The Commission's work has also been used by various academics as teaching materials for classes, by government and by other agencies and public interest associations to develop awareness of issues and focus discussions. In addition Commission staff and Commissioners have represented the Commission at a number of workshops and seminars designed to provide public information about a range of issues. These include, a province-wide workshop series on domestic violence organized by the Advisory Council on the Status of Women; the Monitoring Committee for the Government's Family Violence Prevention Initiative; Advance Health Care Directives workshops and public meetings; and presentations to legal groups on changes relating to the legal status of the child and matrimonial property; and public presentations on law reform generally.

The Commission devotes a great deal of time, when developing projects, to considering initiatives that are currently underway and seeks ways to ensure that its recommendations do not duplicate existing work but complement or draw together existing initiatives. This, in part, reflects the value the Commission has placed on accountability and a critical reflection on where law or the legal system intersects with a particular social or commercial problem.

The Commission's approach to law reform as articulated through its projects and practices will continue to advance goals such as participation, communication and recognition of equality in the law and its delivery through legal and other systems. In this regard the Administrative Justice Reference is probably the most comprehensive, large scale, structural reform proposal prepared by the Commission. It is an important and challenging area in that many issues, such as the relationship between government and decision-making processes, public rights and the nature of natural justice, the structure of the administrative justice system, including appointment processes and independence, and its relationship to the court system are all aspects of this project.

## D. LAW REFORM PROJECTS 1992-1996

The Law Reform Commission initially chose eight areas for law reform. Except for two cases the projects were initiated in July 1992. After four full years of operation,[3] the

[3]The Commissioners were involved in organizing the Commission in 1991 to 1992.

Commission has now fully completed six of the original eight projects and is close to completion of the remainder of the projects. The six projects that have been completed are: the Enforcement of Maintenance Obligations; Reform of the Jury System in Nova Scotia; Domestic Violence; the Legal Status of the Child Born Outside of Marriage in Nova Scotia; Adult Guardianship and Advance Health Care Directives. The project that is close to being finished is the Administrative Justice Reference in which the Commission has decided to include its views on procedural matters in human rights hearings. In 1995 the Commission chose three new project areas, Matrimonial Property Law; Electronic Information Systems and law reform; and reform of the law dealing with Mortgage Remedies. The Matrimonial Property project has had a Discussion Paper published and is close to completion. The Electronic Information Project will be carried out over two fiscal years and the project will have a Discussion Paper in the 1996-97 fiscal year.

The rest of this section outlines the general issues in each project and lists the specific recommendations (or suggestions where the Project has only had a Discussion Paper) published by the Commission.

**1. The Enforcement of Maintenance Obligations in Nova Scotia**
*(now resulting in legislation)*

This project provided recommendations and a draft *Act* to create a more automatic process of enforcing court orders for family maintenance obligations. The Final Report was submitted in the Fall of 1992. In November 1994 the Government introduced legislation essentially adopting, with some alterations, the Law Reform Commission's draft *Act*. It was enacted as the *Maintenance Enforcement Act*. The new system started operating in 1996. It is expected to result overall in lower cost to taxpayers, the courts and recipients of maintenance obligations, resulting from a more efficient administrative system for enforcing maintenance obligations. This reform may also operate to alleviate some problems arising in the context of family/domestic violence.

**The Commission's recommendations in this project were that:**

1. The courts of Nova Scotia adopt guidelines to help provide consistent and equitable maintenance orders.

2. A Unified Family Court be created for Nova Scotia with all of the powers now available in Supreme Court.

3. An Office of Director of Maintenance Enforcement be established to assume sole responsibility for the enforcement of all maintenance orders in the province which are filed with the Director.

4. All court orders for maintenance contain a direction for the filing of the order with the Director of Maintenance Enforcement for automatic enforcement.

5. Individuals with court orders for maintenance made before the new program is implemented be permitted to file the orders with the Director for enforcement. This may be done by either person without the consent of the other party to the order.

6. All maintenance orders which are now enforced through Family Court be transferred to the Director of Maintenance Enforcement.

7. All maintenance recipients under an automatic system be treated equally.

8. Either party to an Agreement for maintenance may file for enforcement with the Director of Maintenance Enforcement. Once filed, the agreement is treated as an order of the court for the purposes of enforcement.

9. The majority recommends that parties to a court order for the payment of maintenance be permitted to "opt out" of the program if a written consent is signed by both parties.

10. Even if the parties to the maintenance order originally opted out of the enforcement program, either party will have the right to re-file a maintenance order at any time.

11. The court granting the original maintenance order will have discretion to prohibit opting out, if it is in the best interests of those affected by the order.

12. If a person misses a single maintenance payment, garnishment of any available income will automatically be imposed by the Director of Maintenance Enforcement without a default hearing.

13. Where an income source is not available, the Director may seize and sell assets under an execution order without a hearing or opportunity to explain a default.

14. Consequential changes should be made to the *Family Maintenance Act; Family Court Act; Testators' Family Maintenance Act; Workers' Compensation Act; Pension Benefits Act; Maintenance Orders Enforcement Act; and Family Orders Information Release Act* to fully implement the automatic enforcement system.

15. The recommendations contained in this Report be implemented by the adoption of a new law similar to the draft *Maintenance Enforcement Act* set out in the Commission report.

## 2. Reforms to the Jury System in Nova Scotia

*(Final Report with the Government)*

This project involved a review of jury selection processes which are administered by the province. The current system operates at great expense to individuals and society and is believed to have systemic discrimination problems. The changes to court systems including large geographical areas for court jurisdictions also provided additional challenges. The Final Report contained recommendations for a more automatic juror selection system which made use of technological advances and existing computerized systems. It also contained a draft *Juries Act* which reflected the principles of efficiency and inclusion, and eliminated

various areas in which discretion could be used to exclude or excuse people from jury service. It is believed that if implemented, this system would reduce the workload for the jury selection officials and also provide a system where there was more opportunity for inclusion of more people through proper compensation and allowing for deferrals of jury service. The policies and principles underlying the proposed reforms were presented at the meeting of the Uniform Law Conference of Canada in 1993 and it was suggested that many of the principles should be adopted in all provinces. In 1994, the Executive Director of the Commission chaired an interprovincial Committee of the Uniform Law Conference to develop these principles which were considered at the 1994 annual meeting. This consideration was continued and concluded at the 1995 meeting of the Conference. The Commission understands that the Government of Nova Scotia is in the process of considering ways to implement the recommendations in this Report.

**The Commission's recommendations in this project were that:**

1. The Government of Nova Scotia adopt the draft *Juries Act,* the associated Forms and the Recommendations in this Report.

2. Reform of the jury system be based on principles of representativeness, impartiality and administrative efficiency for the participants and the Government in a multicultural society.

3. The principles of representativeness, impartiality and administrative efficiency in the context of the jury system should be achieved through random selection and removal of systemic and other discriminatory exclusions and exemptions rather than through selective representation.

4. Juries should continue to be available in Nova Scotia for criminal and civil matters.

5. The rules governing the availability of juries for civil trials should not be changed, however, all the rules regarding civil juries in Nova Scotia should be consolidated in a new *Juries Act*. The continued availability of peremptory challenges should be considered.

6. The voters' list should no longer be the only source from which Jury Lists are chosen, rather a more comprehensive computerized list such as the medical service insurance list be used.

7. Anyone who is concerned that his or her name might not be on any of the lists to be used should be able to register with the Court Administrator.

8. The twelve month residency requirement in a jury district should be removed.

9. Fewer categories of people should be disqualified or excused from serving as jurors.

10. The majority of the Commission recommends that Canadian citizenship remain a qualification and that medical practitioners be automatically excused from service. Civil Procedure Rule 34.03 automatically excluding a pregnant woman should be repealed.

11. The majority of the Commission recommends that the Governments of Canada and Nova Scotia should examine access to justice issues involved in recognition of the language rights of the Mi'kmaq people in Nova Scotia.

12. The Jury Committee should be eliminated and the Jury Panel list should be prepared by the Court Administrator based on a centralized computer generated selection process.

13. Disqualifications and excuses should occur at the time of Jury Panel selection and should be on the basis of a request by the Panellist recorded on the Juror Information Form.

14. A Jury Panellist should be able to be excused in advance of a trial by a Court Administrator with broader supervisory power to be exercised by the Courts. Jurors should be able to defer service.

15. The juries system and law should be reformed to ensure that its principles are implemented consistently with other Court structure and administration of justice reforms. In particular, the impact of Court reform in the context of the demography of the Province and the representativeness of Jury Panels should be considered.

16. The provisions concerning juror fees should be changed to use the resources more equitably and to ensure that systemic discrimination based on economic barriers is eliminated. In particular:

    (i) the fees paid for service should be higher although no one will be paid for appearing for selection from a Panel. The amount of the fee should be set out in Regulations rather then legislation.

    (ii) employers should not be required to continue to pay when employees serve however jurors who are paid should not get jury fees.

17. There should be increased Public Legal Education regarding juries, particularly in schools.

18. A new *Juries Act* should reorganize and update the provisions in the existing *Juries Act* which are no longer applicable to current practice, including simpler Juror Summons and Juror Information Forms.

## 3. Domestic Violence

*(Final Report with the Government)*

The Final Report on this project, *From Rhetoric to Reality: Ending Domestic Violence in Nova Scotia,* was released in February 1995. The chief issue considered in the project was determining the best and most effective provincial response to the crime of domestic violence. The problems identified by the Commission were social attitudes coupled with fundamental legal and structural problems in the legal system in Nova Scotia which posed a challenge to determining where law reform could best occur. The Report is important in that statistics for Canada and Nova Scotia suggest that Nova Scotia has the third highest rate of domestic violence in Canada and that it is a significant problem imposing large costs on

society as a whole. The Report along with other studies complementing it have resulted in the Government of Nova Scotia committing itself in its 1994-96 budget release to identifying the ending of domestic violence as a quality of life goal and a line item in the budget, although the specific targets and measurements were not determined. In 1995, the Government also announced specific funding to implement training of personnel in appropriate responses to domestic violence and setting up a monitoring committee to evaluate progress on this issue.

The Commission's Report reflected its view that progress in elimination of domestic violence will come through a combination of efforts and strategies to ensure policy compliance by the legal system personnel, and some changes to the laws to make them more useful to women who are assaulted.

**The Commission's recommendations in the project were that:**

1. It is critical that the Government of Nova Scotia make the eradication of domestic violence a priority to which it will target action and resources;

2. The legal response to domestic violence should include improvements both in the criminal and the civil law systems and their delivery;

3. The life-threatening nature of domestic violence, its immense social cost and the barrier to equality for women must be explicitly recognized in the legal and resources response;

4. The law must ensure that, in addition to protection of women, the fact that domestic violence is socially unacceptable must be communicated with clarity and certainty;

5. Develop system-wide inter-departmental Protocols for handling domestic violence cases;

6. Adopt as the central principle of the Protocols the protection and security of the woman and any other endangered people as the priority for all decisions;

7. Commit sufficient human, education and technical resources including modern communication systems to allow the Protocols to be effectively delivered;

8. Ensure that the existing system for monitoring cases of domestic violence is enhanced and that there is personal accountability for individuals involved in implementing the Protocols;

9. Require that an independent agency, such as the Advisory Council on the Status of Women, prepare and publish an annual evaluation of the Government's progress in the eradiation of domestic violence.

10. The Supreme Court judiciary should develop clear sentencing guidelines to ensure that judicial discretion is exercised consistently throughout Nova Scotia in cases of domestic violence.

11. The Minister of Justice for Nova Scotia should seek to create a unified family court in Nova Scotia with appropriate resources. At the same time, there must be resources and full consideration devoted to developing less adversarial methods of resolving family law disputes so that the court is a last resort.

12. The majority of the Commission recommends that a unified family court should not have greater criminal jurisdiction than it already has, that is, ordering and enforcing peace bonds.

13. The majority of the Commission recommends that rather than a specialized separate Family Violence Court, the existing system should be improved to ensure that legal services are delivered equally and fairly to everyone.

14. There should be province-wide specially trained interdisciplinary teams of police and Government and non-Government support workers to respond to domestic violence cases.

15. No court-ordered or sanctioned mediation of family law issues should be permitted where domestic violence is suspected.

16. The definition of husband and wife contained in the *Family Court Act* should be changed to include same sex couples and couples who are in a spousal relationship regardless of the length of time involved to allow more people to apply for peace bonds in family court.

17. There must be safe and affordable housing as transitional and long term alternatives for women escaping domestic violence;

18. The *Matrimonial Property Act* should be changed in two ways: first, domestic violence should be considered when granting an order for exclusive possession of the matrimonial home; and second, orders for exclusive possession of a shared residence should be available to all common law couples, including same-sex couples. The *Act* should also include leasehold interests and provide authority to make orders regarding those interests.

19. *Children and Family Services Act* should place a duty on an abusing parent to stop the abuse. The *Act* should also state that an abused parent will not lose custody of her children solely because she did not report the fact that she was being abused. However, this does not alter the responsibility of the child protection authorities to intervene and protect a child where circumstances require it.

20. The *Family Maintenance Act* should be changed so that domestic violence is a determinative factor in custody and access decisions and settlements.

21. There should be a presumption that it is not in the best interest of the child that an abusive spouse have joint custody or unsupervised access to the child.

22. The provincial Minister of Justice should advocate to the federal Department of Justice for similar amendments to the access and custody provisions of the *Divorce Act.*

23. There should not be mandatory reporting of domestic violence cases until the legal system is sufficiently developed to be able to guarantee the safety of women whose life may be endangered by unexpected police action or responses. Even in that case there should not be a requirement that support workers report domestic violence unless the woman agrees.

24. The Minister of Justice recommend that the *Unemployment Insurance Act* be amended to allow a woman to leave her employment and obtain benefits if she has been subjected to domestic violence and has left her job to escape harassment from her spouse.

25. The Minister of Justice for Nova Scotia advocate changes to the *Criminal Code* to ensure that criminal law is reformed to respond more usefully to the crime of domestic violence. These changes should include the recommendations set out below in paragraphs 26-31.

26. The *Criminal Code* should be gender neutral and peace bonds should be available at the request of a person on behalf of another person;

27. Breach of peace bonds should be a hybrid offence with mandatory conditions prohibiting contact with the woman and possession of firearms in cases of domestic violence.

28. Police officers should be directed to exercise their powers of arrest and detention in cases of domestic violence to remove and detain the abuser until released with conditions or until trial. This can be achieved provincially through system-wide Protocols. In addition, the *Criminal Code* provision governing arrest and detention and judicial interim release should be altered to ensure that where the domestic violence has occurred, the police, prosecution and justices and judges are directed to arrest and detain the abuser in custody unless he obtains an interim judicial release. Justices giving release orders must be required to consider conditions prohibiting contact with the woman and possession of firearms and other conditions appropriate to the particular case including mandatory reporting. Breaches of these conditions must result in detention until trial.

29. The criminal offence of torture should be reviewed to make it available for use in domestic violence cases or alternatively a new crime of domestic violence should be created with similarly severe sanctions.

30. The majority of the Commission recommends that the sentencing provisions of the *Criminal Code* should be altered to require mandatory counselling specifically designed for abusive men in addition to any prison sentence. Alternatives to prison should only be allowed on a post-conviction basis and only where the woman has consented and the prosecutor, judge and the expert evidence conclude that it is appropriate;

31. Evidence giving practices should be reviewed to ensure that wherever possible, the woman should not have to testify if the crime can be established without her evidence. If the woman chooses to do so she should be able to testify behind a screen or through the use of video equipment, subject to the right of the defendant to cross-examine her.

## 4. The Legal Status of the Child Born Outside of Marriage in Nova Scotia

*(Final Report with the Government)*

This project, aimed at implementing the International Convention on the Rights of the Child, has been a matter of interest for a number of groups as it also included discussion of the customary adoption practices in the Mi'kmaq community, new reproductive technology and recognition of broader definitions of the family. It has been used by and is of interest to the federal department responsible for Canada's international obligations. It is of interest also to practitioners in Nova Scotia in that it responds to the recent decisions of the Nova Scotia

Supreme Court which found that legislation in Nova Scotia which distinguishes between children on the basis of the marital status of the child's parents was contrary to the *Canadian Charter of Rights and Freedoms.* Although the Commission reviewed the *Final Report* and draft *Act* at the end of 1994, owing to an editing decision, it was published at the end of March 1995. This project has become increasingly important in light of the Report of the Royal Commission on New Reproductive Technologies published at the end of 1993. While this Report recommended that the technology be regulated federally, it also recommended that provincial Governments which have not done so, pass a law providing certainty for determination of parent-child relationships in connection with sperm donors and ovum donations. The Final Report of the Law Reform Commission is consistent with these recommendations and legislation elsewhere in this matter. There was a dissenting view on the main recommendation and an additional dissent on one specific topic.

**The Commission's recommendations in this project were that:**

1. The law and legal system in Nova Scotia be reformed to abolish discrimination based on the marital status of the child's parents as required by the United Nations *Convention on the Rights of the Child* and the *Canadian Charter of Rights and Freedoms*.

**The majority of the Commission recommended that**:

2. The biological connection remain the foundation of the parent and child's legal relationship with specific exceptions.

3. The draft *Status of the Child Act* contain two exceptions to the principle that the biological parents of the child are the legal parents, namely legal adoption and assisted conception.

4. The Government consider reform of the law on adoption and other matters governing children to take into account customary parenting practices.

5. Further study and research on law and policy be carried out to respond more comprehensively to the regulation of reproductive technology in Nova Scotia.

6. The Government of Nova Scotia adopt the draft *Status of the Child Act* and the consequential amendments and principles recommended in this Report.

7. The presumptions of parentage set out in the draft *Status of the Child Act* be adopted.

8. The draft *Status of the Child Act* contain provisions enabling the use of genetic tests to establish parentage.

9. The *Family Maintenance Act* be amended to allow that genetic tests be admissible to provide confirmatory as well as exclusionary evidence.

10. The draft *Status of the Child Act* provide for declarations of parentage.

11. To provide for greater certainty, declarations of parentage made in Nova Scotia and out of province be filed in a public registry. These declarations would be treated as confidential.

12. A person who believes he or she may be a parent be able to register a unilateral declaration to that effect in the parentage registry. The declaration entitles the person to notification but does not constitute a determination of parentage or provide any other entitlements.

13. Limitation periods that currently exist in legislation for notice be maintained but be interpreted as extending to locating children born outside of marriage.

14. The *Children and Family Services Act* be amended to remove the distinction between children based in the marital status of the parents so that the biological father would be entitled to notice of adoption subject to the courts discretion to waive notice and consent requirements when it determines that it is in the best interest of the child and is consistent with the mother's view of the best interest of the child.

15. The *Children and Family Services Act* be amended to remove the distinction between children based on the marital status of their parents so that in cases involving child protection proceedings, notice be given to biological parents of a child and to people who are recognized in law and by custom as fulfilling a social role of parent to the child.

16. The *Solemnization of Marriage Act* be changed to remove the distinction between children based on the marital status of their parents and the changes recommended in the draft *Status of the Child Act* be adopted.

17. The *Family Maintenance Act* be changed to remove the distinction between children based on the marital status of their parents and the specific amendments set out in the draft *Status of the Child Act* be adopted.

18. The draft *Status of the Child Act* apply to statutes and instruments retrospectively except for cases where rights have vested.

19. The *Intestate Succession Act* be amended to reflect case law which extends succession rights of the child born outside of marriage to include the father as well as the mother.

20. The search, notice, limitation periods and liability provision in the *Trustee Act*, *Probate Act* and *Public Trustee Act* be reviewed in light of the draft *Status of the Child Act*. In particular:

    (a) There be a limitation period of six months for the search for heirs by executors or trustees. The search should include advertisement in a newspaper of wide circulation.

    (b) There be statutory protection from liability for executors and trustees who have conducted a reasonable inquiry for heirs.

21. The *Vital Statistics Act* be amended to remove the distinction between children based on the marital status of their parents.

22. The *Change of Name Act* be amended to remove the distinction between children based on the marital status of their parents; and the changes set out in the draft *Status of the Child Act* be adopted.

23. The *Family Benefits Act,* the *Fatal Injuries Act*, the *Public Service Superannuation Act*, the *Settlement Act*, and the *Victims' Rights and Services Act* be amended to ensure that they are consistent with the principles in this Report, and the specific changes set out in the draft *Status of the Child Act* be adopted.

## 5. Adult Guardianship

*(Final Report with the Government)*

A Discussion Paper was issued in the Fall of 1993 and received extensive media and public commentary and has been well received by the judiciary and public. The project reviewed the *Incompetent Persons Act* of Nova Scotia and the options available for assisting people who may not be able to make decisions for themselves. The issue affects a large number of people from all sectors and its policies are consistent with the overall trend in health law and policy which endorses personal autonomy and respect. The Advisory Group for the project involved people who advocated on behalf of various interests and people who were responsible for implementing legislation. The group had recommended that the Commission extend its research to consider one specific alternative to adult guardianship, advance health care directives (more commonly known as living wills). The Commission considered this view and decided that it would be more useful to provide the Government with a comprehensive Final Report which included both topics. Accordingly, the Commission began work on the Advance Health Care Directives project. A Final Report in both projects including two draft laws was provided to the Government in the 1995-96 fiscal year.

## The Commission's recommendations in this project were that:

1. There be a Nova Scotia law which allows for the appointment of a guardian for an adult who needs one.

2. The law in Nova Scotia, as it relates to the court-ordered appointment of a guardian for an adult in need of one, be reformed.

3. The *Incompetent Persons Act* and the *Inebriates Guardianship Act* be repealed.

4. A law on adult guardianship reflect the following principles:

    * All adults have a right to autonomy and self-determination such that guardianship be used only as a last resort.

    * An adult who is the subject of a guardianship application be presumed to be capable of making decisions about his or her health care, personal care and well-being, and financial affairs until the contrary is clearly demonstrated.

    * The assessment of the capacity of an adult take into account the circumstances of the adult, the kinds of decisions the adult must make, the adult's way of communicating, and the available support and resources.

    * The court not appoint a guardian unless alternatives, such as providing support and help, have been tried or carefully considered.

    * A guardianship order be the least restrictive one possible.

    * The wishes of the adult in need of a guardian be taken into account in an order of guardianship.

5. A new Office of the Public Guardian be established in combination with the Office of the Public Trustee to provide advice and information on adult guardianship to the general public and to professionals, to screen applications, to monitor guardians, and to ensure that adults without a personal guardian receive the appropriate services.

6. The Public Guardian-Trustee in screening applications ensure that the adult is independently informed of the implications of the application and his or her right to representation.

7. The proposed guardian provide the court with a statement of intent as to how he or she will provide support and assistance to the adult in need of a guardian which will be used to measure the guardian's subsequent conduct.

8. Notice of an application to appoint a guardian be sent to a wide variety of individuals to ensure that the adult's interests are protected.

9. The person assessing the adult's needs allow a friend or representative of the adult, if available, to explain the purpose of the assessment and not conduct an assessment unless the adult consents.

10. An adult who is the subject of a guardianship application be presumed capable of instructing counsel.

11. The applicant be required to set out the reasons he or she believes the adult subject to the application lacks capacity and the extent of the alleged incapacity.

12. The assessor evaluate the present and projected needs of the adult and the ability of the adult to understand relevant information and to make and communicate decisions concerning specific tasks.

13. The assessment be multidisciplinary, comprehensive and, where possible, involve interviews with family, friends, and caregivers.

14. The applicant be required to set out in the application alternatives to guardianship that have been considered.

15. An assessment of the adult subject to the application be done before the court application unless the adult refuses consent or it has been established that one is unnecessary.

16. The court limit the authority of the guardian to include only what is necessary to assist the adult in need of a guardian.

17. The order be for a limited duration at which time the order will be reviewed.

18. Review of an order take place at least every three years and at any time on application.

19. The court assess the proposed guardian to ensure that he or she will act in the best interests of the adult.

20. The guardian have a duty to limit his or her interference into the life of the adult as much as possible and to encourage the adult to take part in decision-making as much as possible.

21. Any interested person who considers that a guardian is failing to carry out his or her responsibilities or is doing so improperly or in contravention of the terms of the order be able to file a complaint with the Public Guardian-Trustee.

22. The assessment ascertain whether the adult shows a preference for or a rejection of a particular guardian.

23. The attorney appointed under an enduring power of attorney and a proxy appointed in an advance health care directive be notified of a hearing so that they can reveal what they know of the adult's wishes.

24. The court inquire as to the wishes of the adult subject to the application and respect the adult's wishes to have an attorney or proxy act as guardian unless the court finds them unsuitable according to the criteria set out in the *Act*.

25. The court be satisfied before appointing a guardian that he or she will respect the wishes made by the adult when capable and will respect, as much as possible, the current wishes of the adult.

26. The guardian be required to follow clearly expressed wishes made by the adult while capable; act in the best interests of the adult if no earlier wishes are known; and consider current wishes of the adult that are in the adult's best interests.

## 6. Advance Health Care Directives (Living Wills)

*(Final Report with the Government)*

This project reviewed and considered reforms to allow the use of a broader range of advance health care directives (Living Wills is the common name although technically it is only one form of advance health care directive). A *Discussion Paper* was published in November 1994. It is an area of research which has resulted in legislation in other provinces and, as noted above, was seen by the Advisory Group as an extension of the Adult Guardianship project. It is of interest to a broad range of people including seniors and people representing those with a number of illnesses and other needs, all of whom were involved in the Advisory Group. It is an area of law on which there is some uncertainty in the legal profession in Nova Scotia as to what options are available for clients. The draft law, if adopted, will serve to clarify these important issues. As noted in the Adult Guardianship description, the Final Report on this project was published together with the recommendations on Adult Guardianship in the 1995-96 fiscal year. The Report contained draft legislation. It should be noted that the Report contains a dissent from a Commissioner who disagreed with this project.

**The Majority of the Commission's recommendations in this project were that:**

1. The law in Nova Scotia be reformed to permit a capable person who is sixteen years of age or older to make a wider range of advance health care directives and that the Government adopt the draft *Advance Health Care Directives Act* found at the end of this Report to replace the *Medical Consent Act*.

2. Advance health care directives be included in the law to:

    * allow a person to set out instructions or general principles about future health care decisions to be made on the makers behalf;

    * appoint a proxy to follow instructions and interpret the general principles concerning health care decisions set out in a directive; or

    * appoint a proxy to make health care decisions on the maker's her behalf.

3. A health care decision include consent, refusal or withdrawal of consent to health care including prevention, examination, diagnosis, treatment, and palliation of mental or physical disease, ailment, or disability.

4. A proxy can make personal decisions on behalf of the maker if specifically given authority in the directive.

5. An advance health care directive be effective whenever a person is unable to make health care decisions.

6. The law reflect the principle of autonomy and its purpose be to allow a capable individual a simple means of making health care decisions in the event that he or she is no longer capable of doing so.

7. There be no mandatory form for an advance health care directive but that the *Act* include a sample document to show people the types of issues they should be considering.

8. There be no formal requirement for registration or notification about the existence of an advance health care directive.

9. Although periodic renewal of an advance directive is desirable it not be mandatory.

10. If a person has not made an advance health care directive and does not have a guardian with authority to make health care decisions, there be a statutory list from which a substitute health care decision-maker can be appointed statutory proxy.

11. The maker of a health care directive be allowed to specify who is not to act as his or her statutory proxy.

12. No presumption arises from the fact that a person has not made an advance health care directive or has revoked one.

13. An advance health care directive be revokable if a person has capacity and that it be considered revoked if the person makes a later directive; if another document states that the earlier directive has been revoked; or if the person destroys the directive or tells someone else to destroy it.

14. A person be able to name any number of alternate proxies to replace a proxy if the proxy dies, refuses or is unavailable to act, or loses decision-making capacity. However, joint proxies should not be allowed and, where more than one is named in a directive, they should be presumed to act in succession

15. A capable person who has reached the age of nineteen years be presumed capable of acting as a proxy and there be no other restrictions on who can act as a proxy, such as ones based upon whether they will benefit from inheritance or an insurance policy from the maker.

16. Nothing in the law compel a proxy to act as one if he or she refuses to do so; and a proxy who wishes to resign should notify the maker of the advance health care directive.

17. A proxy who acts in good faith according to the draft *Act* be protected from liability.

18. A person implementing an instructive directive has a duty to follow any relevant and unambiguous instructions in the maker's directive unless there are clear expressions of a contrary wish made subsequently by the maker while capable or unless technological changes make the choice inappropriate in a way that is clearly contrary to the maker's intentions.

19. A proxy have a duty to act according to what he or she believes the incapable person would want based on what he or she knows of the values and beliefs of the person and from oral instructions. If the proxy does not know the person's wishes, he or she make the health care decision that the proxy believes would be in the best interests of the person.

20. The proxy not be allowed to delegate decision-making authority to another person.

21. A proxy be allowed, if authorized in an advance health care directive, to make any lawful decisions that the maker of a directive authorizes.

22. A proxy not be allowed to consent, unless expressly authorized, on behalf of the maker to procedures for the primary purpose of research; sterilization that is not medically necessary to protect the health of the maker; or the removal of tissue from the maker's body while living for transplantation to another person or for the purpose of medical education or medical research.

23. Subject to any limitations set out in an advance health care directive, a proxy has access to all health care information that the person for whom he or she acts would have if capable of making health care decisions.

24. The proxy only use the health care information to carry out his or her duties.

25. Health care providers have a duty to inform the person of a finding of incapacity and the fact that it can be contested if an assessor confirms this.

26. A person who contests a finding of his or her incapacity be presumed capable of instructing counsel and be allowed a hearing.

27. Any interested person who believes there has been misconduct on the part of a proxy be allowed a hearing.

28. Health care providers be protected from liability if they comply with a directive or if they fail to comply because they were not aware of the existence of the directive and the law not contain sanctions against a health care provider who does not follow a directive other than those remedies available at common law.

29. The law provide for recognition of advance health care directives from other provinces.

## 7. Reform of the Administrative Justice System

*(Discussion paper published February 1996 and comments being sought)*

This project is a Reference from the Department of Justice requiring the Commission to draft legislation which essentially restructures the administrative law system in the province. The Reference requires that the Commission examine administrative review/appeals, uniform natural justice/hearing procedures, and uniform powers for tribunals, and consider how to provide for independence of decision makers. The Commission has carried out empirical research regarding all agencies making decisions in the province this year to determine to whom the law would apply and what procedures are now in place. The Commission also developed an Advisory/Resource group including the Chair of the Canadian Bar Association Administrative Law sub-section, practitioners who appear before various administrative boards, Chairs of two Boards/decision makers, academics and several Government staff lawyers. In addition there is active and on-going communication with the two Chief Justices of the Supreme Court to ensure that the perspectives in the judiciary are considered in relation to recommendations on judicial review and appeals. This project is also of interest to the federal Department of Justice and the Executive Council to the extent that it deals with structuring fair and open appointment processes. The Commission has also

researched the numerous appeal/review processes that exist in the legislation and regulations. Aside from its educational function, this research is useful to determine whether a standardized appeal process should exist and whether there should be one or more generic administrative appeal boards to reduce the demands on the court system in Nova Scotia.

The Commission also considered its research in the human rights area. The Commission reviewed its recommendations on other projects and noted that most involved some advancement of human rights concerns in a number of areas, e.g. gender equality, discrimination based on age or sexual orientation or ability. The issue the Commission considered was whether it should have a project specifically dealing with the procedural concerns relating to determination of human rights complaints. In particular, concerns had been expressed about the operation of the existing system for human rights enforcement in Nova Scotia. The Commission concluded that some of the issues were better addressed by the agency specifically mandated with this responsibility. However, concerns related to access to justice, fairness and problems arising from delay were issues which are clearly raised under the administrative justice project and were best addressed in that Report. The Commissioners reached a preliminary view on most matters and a Discussion Paper was published in February 1996.

**The Commission's preliminary proposals for reform in this project are that:**

1. There should be reform of the administrative justice system in Nova Scotia.

2. Reforms to the administrative justice system should seek to ensure independence, accessibility/openness, expertise, representativeness, efficiency and accountability.

3. Any reforms must include education of the public and members of the public acting as decision makers and must take into account the need to provide simple access to information about administrative procedures.

4. The relationship between the administrative structure of an ABC, the operation of an ABC and natural justice, concerns must be fully recognized in any new law and in the system creating administrative agencies.

5. ABCs can come in many different forms, but the role and the operational and structural needs of each should be considered and reflected in the structure, resources, composition and procedures of the ABC.

6. All ABCs should, in both structure and personnel, reflect an analysis of the degree to which independence, expertise, efficiency, accessibility, representativeness and accountability are required to achieve the mandate of the ABC.

7. While evaluation of existing agencies must take place on a case by case basis, it is possible to develop models for various types of ABCs which can be adopted for greater uniformity and efficiency as needs arise.

8. Each Government department responsible for an ABC must have, as part of its legal mandate, a requirement that it carry out an assessment of specific structural and personnel needs and criteria for all agencies it administers. They must specifically outline the needs of each ABC and develop criteria for appointments in accordance with those needs. Although it should not be a basis for an appeal of a decision of the ABC unless bias is established, a new law should say that the appointment process should be transparent and accountable.

9. There should be a new *Administrative Justice Act,* which sets out a number of minimum rights, powers and procedures that could be expected of most ABCs when making decisions that affect others. The *Act* and the administrative justice system must be simple and as accessible as possible for members of the public.

10. The *Act* should require decision makers to develop and to communicate their rules of practice.

11. The Government should prepare and publish "model" rules which, combined with training, will assist decision makers but which are not in the form of a law or regulations but rather are there to provide guidance.

12. There should be a broadly inclusive *Administrative Justice Act*, which will include minimum rules directing agencies to develop their own procedures as appropriate which are consistent with these rules.

13. The *Act* should say it covers all decision makers including those carrying out deliberations and providing recommendations to another agency or person unless their statute specifically excludes operation of the *Administrative Justice Act*. This *Act* would cover all self-governing agencies which are specially created by statutes.

14. ABCs should be required to develop and to communicate standardized rules of procedure for making decisions affecting rights and entitlements. The standardized rules should reflect minimum procedural rights including traditional natural justice rights and emerging fairness rights, such as the rights to access to justice, information, expedition, efficiency and resolution as well as substantive rights to written reasons within a reasonable time and to a decision based on principles of evidence.

15. All decisions should be filed in one central office so they are easily accessible to the public.

16. The enactment of a new law should be combined with the implementation of a training program and the adoption of comprehensive model rules or guidelines (which are not law) to assist decision makers in each agency to develop and interpret the requirements of natural justice, fairness, human rights law and modern case-flow management practices.

17. The Commission invites comment as to how to protect privacy interests while also providing for a right to know of all material being considered by a decision maker.

18. The Commission specifically invites comment on the form of remedy or sanction that could be provided if a decision maker does not comply with the requirement for expedition.

19. An administrative tribunal should be able to control its own process, subject to the rights of people who are affected by its decisions and subject to the supervisory power of the courts through judicial review.

20. There should be minimum standard powers provided in an *Administrative Justice Act* for all administrative tribunals which can be adjusted by the Government in creating the agency.

21. There should only be a very limited power on the part of the decision maker to re-hear a case to correct an error. However, the Commission invites specific comment on this matter.

22. The Commission is unresolved as to whether administrative decision makers should always have standard power to award costs and invites specific comment on this issue.

23. The law relating to judicial review remain as it is currently operating with some amendments to the Civil Procedure Rules regarding the six month time limit on *certiorar*i.

24. The Government should create a single consolidated Administrative Appeal Board for all administrative appeals in Nova Scotia, much like the role currently played by the Utility and Review Board, for many issues in Nova Scotia. This Board should have standardized times for appeals and a standardized basis of appeal. The Administrative Appeal Board should have full and part-time people appointed to it who can meet the public need for expedition, independence, informality and experience combined with sufficient training to ensure principles of natural justice and fairness are complied with.

25. The appointment process for members of any agency which is making decisions and particularly to the Administrative Appeal Board should ensure that where independence from the Government and from any particular interest is important to the agency mandate and to fairness then appointments must reflect this requirement.

26. Appointees must be trained to ensure an understanding of the meaning of conflict of interest and procedures must be developed for ensuring that this is respected.

27. In cases where institutional bias may suggest that otherwise independent decision makers are biased, then there should be a clear separation from Government and provisions for tenure or other mechanisms of accountability, including stated terms of appointment and secondment of staff whose primary obligation is to the agency in question.

28. Where an individual's liabilities, rights or entitlements are affected, then freedom from bias on the part of the decision maker should be paramount.

29. The rights to information and fairness, particularly where the same agency might carry out several roles including investigation, must be respected and are central aspects of the independence of decision makers.

## 8. Reform of the law dealing with Matrimonial Property

*(Discussion Paper published April 1996 and comments being sought)*

This project reviews the law dealing with division of matrimonial property on the break-down of marriage. The project responds to the changing social situation whereby many people living in marriage-like relationships or common-law relationships, also require the assistance of the law to fairly settle disputes and obligations on the ending of the relationship. In addition the increasing number of second families or relationships require legal clarification of existing obligations. The Commission carried out consultation in the province and worked with an Advisory Group. The Commission reached its preliminary

conclusions in March 1996. A Discussion Paper was released early in the fiscal year 1996-97.

**The Commission's preliminary proposals for reform in this project are that:**

1. The *Matrimonial Property Act* of Nova Scotia is in need of reform.

2. There is a need for federal law reform to deal with the situation of separating couples resident on Aboriginal reserves.

3. Reform to the *Family Maintenance Act* should be considered by the Minister of Justice.

4. The *Matrimonial Property Act* of Nova Scotia should be replaced.

5. A new law called the *Family Law Act* should be passed.

6. The new *Family Law Act* should reflect the following values:

   - affirm the role of families as fundamental units of society;
   - recognize a diversity of family forms;
   - provide fairly for the equitable sharing by parents of responsibility for their children;
   - recognize contributions to the family unit which should result in an equal division of family property; and
   - provide for the orderly and equitable settlement of the affairs of couples on the ending of a relationship.

7. The new *Family Law Act* should apply to both married and cohabiting couples.

8. The new *Family Law Act* should allow couples to "opt out" in a domestic contract subject to the existing powers of the court to review domestic contracts.

9. The *Act* should apply to:

   (a) persons who are legally married; and to
   (b) any two persons who are recognized in their community as cohabiting in an intimate relationship of some permanence; or
   (c) any two persons who have cohabited in an intimate relationship of some permanence, if they are, or have assumed the role of, parents of a child.

10. Consistent with its expanded coverage the new *Family Law Act* should use the terms "family assets" and "family property" rather than matrimonial property or matrimonial assets.

11. Family property should continue to be divided on a presumptively equal basis, but there are two models available for division of family property, the economic partnership model, and the existing approach under the *Matrimonial Property Act* (the "integrated model"). The Commission is unresolved as to which of the two models is better suited to Nova Scotia and seeks comment on this issue.

12. The current practice of the courts regarding debts should be codified in the new *Family Law Act*, if the integrated approach to family property division is retained. However, all debts other than purely personal

ones should be deducted from the gross value of each spouse's property if the economic partnership model is adopted.

13. The new *Family Law Act* should continue to provide for an unequal division of assets in specified cases. If the "integrated model" is used as the basis for family property law, the provision should be enhanced and it should be more easily available, particularly to deal with short relationships.

14. The existing exclusion from family property of personal effects, property exempted under a domestic contract and property acquired after separation should be maintained in a new law.

15. The Commission calls for comment on the issue of whether gifts and inheritances should remain in principle excluded from division, or should be included as shareable family assets.

16. The Commission invites comment on whether personal injury settlements, and accident and disability insurance benefits should remain exempt property under a new *Family Law Act*.

17. The exempt status of business assets should be ended. Whether an economic partnership model or an integrated model is used, practical concerns suggest that business assets should be divided on the basis of economic value rather than ownership rights; however, the Commission invites comment on this issue.

18. A reasonable amount of furniture and personal effects necessary for the maintenance of a child of the relationship should be excluded from division under the new *Act*.

19. The term "matrimonial home" should be replaced by "family residence" in a new *Family Law Act*.

20. The Commission refers to its Final Report *From Rhetoric to Reality Ending Domestic Violence in Nova Scotia* and repeats its recommendation that leasehold premises be included within the definition of "family residence".

21. The Commission notes the recommendation in its Final Report *From Rhetoric to Reality Ending Domestic Violence in Nova Scotia* that domestic violence be taken into account as a basis for granting orders for exclusive possession of the family residence, and suggests that an *ex parte* civil remedy be available in such circumstances. However, the Commission notes that there is some concern about whether the adoption of this approach might reinstate fault as an element in property division and soften the criminal aspect of domestic violence. The Commission seeks comment on these concerns.

22. The Commission calls for comment on the desirability of adding additional civil legal penalties, beyond zero tolerance and contempt proceedings, for breaches of exclusive possession orders where domestic violence is the basis for making the order.

23. Pensions should continue to be treated as a family asset and subject to division.

24. If the net worth of the non-member spouse is substantially greater than that of the member spouse by reason of ownership of exempt assets, the court should be given a discretion, under the provision for the unequal division of assets, to deny division of the pension.

25. The existing options available for pension division on the ending of a relationship should all be located in a new *Family Law Act* and pensions should be divided only in accordance with that *Act*.

26. Any division of pension benefits should not leave the member spouse with less than 50% of the full pension benefit.

27. The length of cohabitation should be the means of determining pension entitlement.

28. If couples are unable to agree on a method of dividing pension entitlements, then unmatured pensions should be divided presumptively through a deferred benefit split, with an asset transfer/cash buyout available only where a deferred benefit split would be inequitable or impracticable.

29. A spouse should be able to pay out the non-member's entitlement to another locked-in retirement savings vehicle only where the first two options are inequitable or impracticable, and only with court approval.

30. With regard to valuation and asset transfer/cash buyout, an accepted standard for calculating the value of the non-member spouse's entitlement should be adopted by regulation.

31. Where the amount of pension payment to the non-member spouse would be below the threshold for administration contained in the *Pension Benefits Act*, the plan administrator should be authorized to make a cash settlement with the non-member spouse.

32. Division at source should be authorized in all cases where breakdown of a relationship occurs after a pension is in pay.

33. The new *Family Law Act* should specify that when a spouse applies for a division of family property on the death of the other spouse, the applicant spouse must deduct any benefits received under the will or intestacy of the deceased.

34. There should be a consequential amendment to the *Testators' Family Maintenance Act* which clarifies that a spouse may still apply under that *Act* if, after being awarded his or her entitlement under the *Family Law Act*, he or she is still left without adequate provision for proper support.

35. In principle, court-connected publicly funded mediation should be available to deal with all family law disputes in appropriate cases, including family property division. However, the Commission invites comment on this question and also whether a new *Family Law Act* should require that the parties attempt to resolve disputes over property through mediation before going to court.

36. Marriage contracts should be called "domestic contracts" in the new *Family Law Act* and should be available on the same basis as they currently are under the *Matrimonial Property Act*.

37. The current power of the court to overturn a domestic contract where it is unduly harsh, fraudulent, unconscionable or contrary to the best interests of a child should be maintained.

38. There should be a new provision dealing with the need for independent legal advice to each of the parties.

## 9. Electronic Information System and Law Reform

*(Research and consultation occurring)*

This project deals with two main issues. First, the protection of private sector holdings of personal information, particularly where it is stored electronically. The second aspect deals

with commercial transactions and recognition of signatures where the transaction is electronic. A related aspect of this involves changes to the provincial *Evidence Act* to admit evidence relating to electronic transactions. Work is also being done through the ULCC regarding this issue as the Federal Government is interested in ensuring that Canada's trade position is not negatively affected by failures to address these issues in law. The project does however raise a number of regulatory issues in addition to problems arising from the fact that industry practice is not yet settled. The Nova Scotia Government's Information Policy Initiative also recommended that there be law reform in this area. The Commission had originally planned to publish a Discussion Paper in the Spring of 1996 but has now resolved that it is more appropriate to wait until more work has been done at the ULCC (August 1996) to see if uniformity and consistency in practice between the provinces can be achieved. It is expected that a Paper will be published early in the 1997-98 fiscal year.

### 10. Mortgage Remedies

*(Research occurring)*

This project deals with the law relating to the remedies which a mortgagee (usually a financial institution) may use when a mortgagor defaults on a mortgage. In Nova Scotia, a Sheriff's sale of the mortgaged property, authorized by the court, is the normal remedy when a mortgagor cannot maintain payments. Mortgagees in this province are allowed under the law to buy the property at the Sheriff's sale, a practice which is forbidden in most provinces. In many cases the mortgagee buys the property for a nominal amount and resells within a relatively brief period. The mortgagee may then sue the mortgagor for any deficiency between the amount still owing on the mortgage and the resale price. The standard of care expected of the mortgagee in the conduct of this second sale is unclear under existing case law, and can result in hardship in some cases. Recent changes to the Civil Procedure Rules have imposed more safeguards around the practice of seeking deficiency judgments in the interests of consumer protection, but some problems still remain for consumers. At the same time in order to ensure that mortgages remain available for a wide range of consumers there is a need to consider other remedies that should be available to mortgagees in cases of default. A Discussion Paper is expected towards the end of 1996.

# APPENDIX I

***THE LAW REFORM COMMISSION ACT***

# APPENDIX II

***AUDITED FINANCIAL REPORT***
***FOR 1995-96 FISCAL YEAR***

# APPENDIX III

***SUMMARIES OF DISCUSSION PAPERS and REPORTS***
***in 1995-96***
***ENGLISH, FRENCH AND MI'KMAQ***

- **Adult Guardianship and Personal Health Care Decisions, Final Report (November 1995)**
- **Agencies Boards and Commissions: the Administrative Justice System in Nova Scotia, Discussion Paper (February 1996)**
- **Matrimonial Property in Nova Scotia: Suggestions for a New Family Law Act, Discussion Paper (April 1996)**