

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

SIXTH ANNUAL REPORT

**THE LAW REFORM COMMISSION OF NOVA SCOTIA
FISCAL YEAR APRIL 1, 1996 - MARCH 31, 1997**

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 1996–1997 were:

William Charles, Q.C., Co-President
Ronald Culley, Q.C. (until June 1996)
Theresa Forgeron
Jennifer Foster
Justice David MacAdam
Gregory North, Q.C. (June 1996-present)
Dawn Russell, Co-President
Dale Sylliboy

The Commission staff in 1996-97 were:

Moira McConnell, Executive Director (until December 1996)
Anne Jackman, Legal Research Counsel (until December 1996)
Acting Executive Director (December 1996 - March 31, 1997)
Philip Girard, Legal Research Counsel (until January 1997)
Lora MacEachern, Legal Research Counsel (June 1996 - December 1996)
Leona Fitzgerald, Administrative Assistant

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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/> 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.

TABLE OF CONTENTS

Page

A.	OVERVIEW OF THE LAW REFORM COMMISSION AND ITS ACTIVITIES ..	1
B.	THE LAW REFORM COMMISSION	5
1.	The Operation of the Law Reform Commission	5
●	The Law Reform Commissioners, 1996-97	5
●	Commission Staff	7
●	Consultants	8
2.	Finances	9
C.	IMPLEMENTING A LAW REFORM MANDATE AND STRATEGY	11
1.	The Commission's Process and Strategy	11
2.	The Commission's Activities 1996-97	14
D.	LAW REFORM PROJECTS 1992-1997	18

APPENDICES

- A. The *Law Reform Commission Act*
- B. Financial Report for 1996-97 Fiscal Year

THE LAW REFORM COMMISSION OF NOVA SCOTIA
ANNUAL REPORT APRIL 1, 1996 - MARCH 31, 1997

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*.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 and administrative 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. In the up-coming year the Commission will be meeting quarterly in an effort to reduce costs. 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 Co-Presidents of the Commission are 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 is achieved through its Commissioner selection, its relationship to government and its funding structure. This independence is essential to its effective functioning as an advisor to government and allows it to communicate 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 S.N.S. 1990 c.17 (known as the *Law Reform Commission Act*) reproduced in Appendix A. 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 1996 - 1997

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 finds out if the laws that 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 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, the Commission does not provide legal advice to any individual or organization and does not intervene in individual cases.

As of Spring 1997 the Law Reform Commission has completed all the projects it took on when it started and has become involved with several new projects. The projects that the Commission has undertaken cover a large range of concerns and areas of law. Two of the projects were References (formal requests) 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 Law Dealing With Adult Guardianship
- Reform of the Justice System Relating to Domestic Violence
- Comprehensive Reform of the Administrative Justice System
- Reform of the Law Dealing with Advance Health Care Directives (“Living Wills”)

Law Reform Commission Annual Report 1996 - 1997

- 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
- Reform of the Law of Probate

The Commission usually prepares 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, values and principles that the Commission is identifying as the basis for its proposed reforms. The staff of the Commission spends 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. The Commission has, however, been involved with internal committees seeking to implement its recommendations or to monitor changes to the law which were recommended by the Commission.

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 consultation with people who have not historically had a role in shaping the law and to ensure 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 1996 - 1997

As of Spring 1997 the Commission has published:

Enforcement of Maintenance Obligations (Discussion Paper, July 1992)

Enforcement of Maintenance Obligations (Final Report, November 1992)

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

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

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

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

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

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

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
(Final Report, March 1995)

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

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

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

Reform of the Administrative Justice System in Nova Scotia (Final Report, January 1997)

Reform of the Law Dealing with Matrimonial Property in Nova Scotia
(Final Report, March 1997)

Six (6) Annual Reports (1991-1997)

B. THE LAW REFORM COMMISSION

Law Reform Commission Annual Report 1996 - 1997

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 work, although in 1997-98 this will change to every three months to meet budgetary constraints. 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 all of the Commissioners, except the representative of the Judiciary, receive compensation in the form of an honorarium for services plus expenses. 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, 1996-1997

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 and now Co-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- June, 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

Law Reform Commission Annual Report 1996 - 1997

at both appellate and trial levels, as well as commercial and administrative tribunal advocacy.

Ms. Theresa Forgeron

Commissioner (1995-1998)

Ms. Forgeron was nominated by the Bar Council 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.

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.

Mr. Gregory North, Q.C.

Commissioner (1996-1999)

Mr. North was nominated by the Bar Council in June 1996. He holds an M.A. in Economics and an LL.M. from the London School of Economics. He was admitted to practice in Nova Scotia in 1974 and is a lawyer in the firm of Cox Downie in Halifax. Mr. North has extensive experience as an arbitrator and lawyer in the fields of labour relations and employment law. He is also involved with a number of volunteer community organizations.

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 Dean and a full-time faculty member of Dalhousie Law School. Dean 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

Law Reform Commission Annual Report 1996 - 1997

Commissioner (1994-1997)

Appointed by the Government to serve on 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**

For most of 1996-97 the Commission continued its 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. This arrangement continued until December, 1996 when Ms. Anne Jackman became Acting Executive Director. From January 1997 until March 31, 1997, Ms. Jackman was the only legal staff member, but a new Legal Research Counsel will be commencing in May 1997. As well, Ms. Jackman became Executive Director on April 1, 1997.

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. 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.

Dr. Moira L. McConnell

Executive Director (until December 1996)

Dr. McConnell has an LL.B. from Dalhousie University and a Ph.D. in Law from the University of Sydney (Aust.). She 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 taught in the areas of international trade, business, and environmental law.

Ms. Anne Jackman

Legal Research Counsel and Acting Executive Director

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. from Dalhousie Law School. After being admitted to the bar in 1989, she practised litigation and specialized in family law at the firm of Patterson Kitz (now Patterson Palmer Hunt Murphy). Ms. Jackman is a member of several public interest associations. From June to December 1996 Ms. Jackman was on maternity leave. She

Law Reform Commission Annual Report 1996 - 1997

returned as Acting Executive Director in December 1996 and became Executive Director on April 1, 1997.

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. 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.

Ms. Lora MacEachern

Legal Research Counsel

Ms. MacEachern worked for the Commission from June 1996 to December 1996. She has a B.A. from Saint Francis Xavier University and an LL.B. from Dalhousie University. She was called to the Nova Scotia bar in 1996 and is currently working for the Nova Scotia Department of Natural Resources..

● **Consultants**

The following people provided project-related consultation services to the Commission in the 1996-97 fiscal year: Joseph Marshall (translator), Murdena Marshall, (translator), Katherine Sorbey (translator), Nathalie Bernard (translator), Michel Tremblay (translator), Chris Majka (electronic information system consultation and archival work).

Law Reform Commission Annual Report 1996 - 1997

2. Finances

A copy of the Commission's Financial Statement is found at the end of this Report (in Appendix B).

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 for their support. The Law Foundation in particular is experiencing difficulties due to low interest rates. The Law Reform Commission's initial grant application for \$100,000.00 was refused and a re-application will be considered in May 1997.

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. Also, depending upon the outcome of the Law Foundation's May meeting, the Commission may face an overall budget that is \$100,000.00 less than anticipated. In 1996-97 the Commission has a surplus of approximately \$39,700.00 to carry into 1997-98. This is due to the fact that there has been only one (1) legal staff person with the Commission from January 1997 to the end of the fiscal year (March 31, 1997). The grant from the Law Foundation was expected to be \$100,000 for 1997-98. In January, 1997, however, the Commission was informed that this grant had been refused due to a lack of surplus money on the part of the Law Foundation. An application for reduced funding will be considered by the Foundation in May, 1997. The Commission has made some changes to reduce operating costs and is in the process of reviewing its budget to respond to the funding reduction it will experience in 1997-98.

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. Over the last five years the Commission has met with senior Government officials numerous times 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

Law Reform Commission Annual Report 1996 - 1997

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 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 to make recommendations for improvement, modernization and reform including recommendations for:

- (a) development of new approaches to, and new concepts of, 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 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. An important role for any law reform agency is to give voice to the validity of pluralism and to provide models for law and legal writing which reflect this approach. 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, television, as well as electronic 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 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 law 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

Law Reform Commission Annual Report 1996 - 1997

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 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 project 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, it is the Commission's view that while creating a law may have some educational value, if there is no corresponding allocation of resources or institutional reform to properly deliver the promise of the law, 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 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 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 Law Reform Commission of Nova Scotia has now been in operation for six 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

Law Reform Commission Annual Report 1996 - 1997

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 throughout 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 general process of the Commission is reflected in the following outline. This process alters to some extent with each project, but to date has generally followed this 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 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 Group is usually made up of the Commission legal staff assigned to the project and a number of members of the community including government representatives, judiciary, lawyers, and advocacy groups with an interest and/or expertise in the issue. This group meets to consider and identify issues and make recommendations to the Commission. This is 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 and then circulated as broadly as possible. 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

Law Reform Commission Annual Report 1996 - 1997

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. A period of several months is usually allowed for public response. During this time there is media communication to ensure public discussion. As well, presentations are made and meetings are held with 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 appropriate, draft legislation, is provided to the Minister of Justice and affected Ministers. It is also publicly distributed.

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 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 that one of the more difficult issues to identify in making recommendations 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, attempt to determine which factors are blocking change 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 identification of areas in which there is agreement.

2. The Commission's Activities 1996-97

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 for the most part been accepted by the Government. In the Maintenance Project this has been in the form of a new law and in terms of the domestic violence project in the form of education, training, practices and resource allocation to alleviate problems encountered in both of these areas. In fact, the Executive Director is involved with monitoring the Family Violence Prevention Initiatives. In

Law Reform Commission Annual Report 1996 - 1997

In addition, the Commission understands 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, particularly as it 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. The Commission is aware of two government committees reviewing both portions of the Report.

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, a draft *Administrative Justice Act* was released in February 1997.

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. In March 1997, the Commission released the *Final Report - Reform of the Law Dealing with Matrimonial Property in Nova Scotia*. This project has generated significant attention from provincial as well as Maritime media and the practicing bar.

The Commission has 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 Privacy project, the Commission has decided to wait until later in 1997 to consider a Discussion Paper in this area.

Research on the Mortgage Remedies Project began in April 1996 and a Discussion Paper is being prepared for July 1997. The Commission is 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.

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

Law Reform Commission Annual Report 1996 - 1997

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 4,200 "hits" per month on its Home Page. In the Spring of 1996 the Commission's Discussion Paper, Matrimonial Property in Nova Scotia, 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, have been viewed positively.

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 presented 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 (ULCC), a national advisory agency, to develop guidelines for jury reform which can be used by all provinces and provide guidance for federal reform. 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 to 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

Law Reform Commission Annual Report 1996 - 1997

presentations to legal groups and media interviews on changes relating to the legal status of the child and matrimonial property; and public presentations on law reform generally.

When developing projects, the Commission devotes a great deal of time to considering initiatives that are currently underway and seeks ways to ensure 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.

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. 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. The draft *Administrative Justice Act* contained in the *Final Report* attempts to clarify many of these problematic legal issues.

D. LAW REFORM PROJECTS 1991-1997

The Law Reform Commission initially chose eight areas for law reform. All but two projects were initiated in July 1992. The Commission has now fully completed the original eight projects: 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; Advance Health Care Directives; Administrative Justice Reference; and Reform of the Matrimonial Property System in Nova Scotia. Other new project areas include probate, mortgage remedies, electronic information, custody and access, as well as powers of attorney.

The rest of this section briefly outlines each project.

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 and it is expected to result in lower costs to the court system and to benefit recipients of maintenance support. This reform may also operate to alleviate some problems arising in the context of family/domestic violence.

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 be systemically discriminatory. Recent changes to the court structure in Nova Scotia, including large geographical areas for court jurisdictions, provided additional challenges. The Final Report contained recommendations for a more automatic juror selection system which made use of technology and existing computerized systems. It also contained a draft *Juries Act* which reflects the principles of efficiency and inclusion while eliminating various areas in which discretion could be used to exclude or excuse people from jury service. If implemented, it is believed this system would reduce the workload for jury selection officials and would provide more opportunity for inclusion of more people. This would be achieved through proper compensation and the use of deferrals of jury service. The Commission understands the Government of Nova Scotia is in the process of considering ways to implement the recommendations in this Report.

Law Reform Commission Annual Report 1996 - 1997

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 primary goal of the project was to determine 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 suggest 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 complementary studies, has resulted in the Government of Nova Scotia committing itself to identifying the ending of domestic violence as a quality of life goal. The Government has trained almost 2000 personnel in appropriate responses to domestic violence and has set up a monitoring committee to evaluate progress. The Executive Director is a member of this monitoring committee.

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 also of interest to practitioners in Nova Scotia in that it responds to recent decisions of the Nova Scotia Supreme Court which found that legislation in Nova Scotia which distinguishes between children on the basis of their parents' marital status is contrary to the *Canadian Charter of Rights and Freedoms*. The *Final Report* and draft *Act* was published at the end of March 1995 which recommended that provincial Governments which have not already 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 the recommendations of the *Report of the Royal Commission on New Reproductive Technologies*. There was a dissenting view on the main recommendation and an additional dissent on one specific topic.

5. Adult Guardianship

(Final Report with the Government)

Law Reform Commission Annual Report 1996 - 1997

A Discussion Paper was issued in the Fall of 1993. It received extensive media and public commentary and was well received by the judiciary and the public. The project reviewed the *Incompetent Persons Act* of Nova Scotia and considered 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 the Commission's recommendations are consistent with the overall trend in health law and policy which endorses personal autonomy and respect. The Advisory Group included people who advocated on behalf of various interests and people responsible for implementing legislation. The Group recommended 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 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.

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 used for advance health care directives although technically it is only one type of 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 terminal illnesses and other needs. It is an area of law on which there is some uncertainty in the legal profession in Nova Scotia as to the options available to clients. If adopted, the draft law will clarify these important issues. As noted in the Adult Guardianship description, the Final Report was published in the 1995-96 fiscal year together with the recommendations on Adult Guardianship. It should be noted the Report contains a dissent from a Commissioner who fundamentally disagreed with this project.

7. Reform of the Administrative Justice System *(Final Report with the Government)*

This project was a Reference from the Department of Justice requiring the Commission to draft legislation to essentially restructure the administrative law system in the province. The Reference required that the Commission examine administrative review/appeals, uniform natural justice/hearing procedures, and uniform powers for tribunals, as well as consider how to provide for independence of decision makers. The Commission carried out empirical research regarding all provincial decision-making agencies to determine to whom the law

Law Reform Commission Annual Report 1996 - 1997

would apply and the procedures then in place. The Commission also developed an Advisory 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 was active and on-going communication with the two Chief Justices of the Supreme Court of Nova Scotia to ensure the judicial perspective was 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 also researched the numerous appeal/review processes that exist in the legislation and regulations. Aside from its educational function, this research is useful in determining 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 released its preliminary views in a Discussion Paper published in February 1996. The Final Report, containing draft legislation, was published in January 1997.

8. Reform of the law dealing with Matrimonial Property

(Final Report with the Government)

This project reviews the law in Nova Scotia 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 which suggested replacing the *Matrimonial Property Act* with a new law. A Discussion Paper was released in April 1997. The Final Report on this project was published in March 1997. The *Final Report - Reform of the Law Dealing with Matrimonial Property in Nova Scotia* contained a draft *Domestic Property Division Act* which has been receiving considerable attention from the media.

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 when 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 as the Federal Government is interested in ensuring Canada's trade position is not negatively

Law Reform Commission Annual Report 1996 - 1997

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 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 1997) to see if uniformity and consistency in practice between the provinces can be achieved. The Commission will also be deciding in June 1997 whether or not to proceed to the *Discussion Paper* stage on the privacy and personal data protection aspect of the project.

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 usual remedy when a mortgagor cannot maintain payments. Mortgagees in this province are allowed to buy the property at the Sheriff's sale, a practice forbidden in many other 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 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. An Advisory Group met throughout the fall of 1996 on this project and a Discussion Paper is expected in July, 1997. Empirical research obtained from a full review of almost 400 foreclosure files will be included in the Discussion Paper.

11. Reform of the Probate System

During the summer of 1996, the Commission received an official reference from the Minister of Justice asking it to examine the *Probate Act* and make recommendations for its improvement, modernization, and reform. In particular, the reference states: "I request that you consider suggestions made by practitioners for a simplified summary procedure for small or uncomplicated estates." The Commission has been involved with research on this project since the Fall of 1996 and, in particular, has been working closely with the Director of Probate in the Courts and Registries Division of the Department of Justice. The first *Probate Act* was passed in 1842 and since that time only minor changes have been made to

Law Reform Commission Annual Report 1996 - 1997

the original *Act*. It is expected that a Discussion Paper will be released on this project in the Fall of 1997.

12. Feasibility Reports

(i) Custody and Access Law

In July, 1996 the Commission undertook a project pertaining to Children and the Law. At a recent meeting in April, 1997 the topic was discussed in order to narrow the parameters of the project. The Commissioners decided that it was most appropriate for staff to conduct a "feasibility report" on the issue of custody and access law. Custody and access involves both federal and provincial law, and in Nova Scotia the relevant legislation is the *Family Maintenance Act*. The Commission will be deciding whether or not to proceed with further research on this project at its meeting in June, 1997.

(ii) Powers of Attorney

The topic of enduring powers of attorney arises from an earlier Commission project pertaining to adult guardianship. In an attempt to provide an alternative to personal guardianship the Commission provided recommendation relating to living wills. In order to provide alternatives to financial guardianship, as well to address concerns from the bar practicing in the area of geriatric law, Commission staff are preparing a feasibility report on reform of the law relating to powers of attorney. At its upcoming meeting in June 1997, the Commission will decide whether or not to pursue a project in this area.

APPENDIX A

THE LAW REFORM COMMISSION ACT

APPENDIX B

***FINANCIAL REPORT
FOR 1996-97 FISCAL YEAR***