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SEVENTH ANNUAL REPORT

THE LAW REFORM COMMISSION OF NOVA SCOTIA
FISCAL YEAR APRIL 1, 1997 - MARCH 31, 1998

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 1997–1998 were:

David A. Cameron (from December 1997)
William Charles, Q.C., Co-President (until December 1997)
Theresa Forgeron
Jennifer Foster (until December 1997)
Justice David MacAdam
Gregory North, Q.C., Co-President
Dawn Russell, Co-President
Dale Sylliboy

The Commission staff in 1997-98 were:

Anne Jackman, Executive Director
Elizabeth R. Butt, Legal Research Counsel (May 1997 - present)
Leona Fitzgerald, Administrative Assistant

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The Commission's work is available on the Internet through the Chebucto Community Net at <http://www.chebucto.ns.ca/Law/LRC> and also from links on the Government of Nova Scotia Web Site (<http://www.gov.ns.ca/>) under Government Agencies.

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
ANNUAL REPORT APRIL 1, 1997 - MARCH 31, 1998

A. OVERVIEW OF THE LAW REFORM COMMISSION

The Law Reform Commission of Nova Scotia was created by the Government of Nova Scotia by the *Law Reform Commission Act*.¹ According to the *Act*, the Commission is 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. It is not, however, a government department but an independent advisor to government. The six part-time Commissioners come from differing sectors of Nova Scotia and their appointment process is set out in the *Act*. One Commissioner is selected by the Judges of Nova Scotia; two are community representatives appointed by the Governor in Council; two are selected by the Nova Scotia Barristers' Society and one person represents Dalhousie University Law School. One of the Commissioners must not be a lawyer. The Co-Presidents of the Commission are chosen by the Commissioners by consensus.

The Law Reform Commission is an important part of Nova Scotia's justice system. The Commission serves a wide range of people and interests in the province. The Commission's structure and independence from government enable it to thoroughly study issues and conduct broad consultation that would not otherwise occur. The Commission draws skills from the community for each project it conducts. Members of the public, lawyers, government officials, judges, community advocates and others freely give their time and expertise to the Commission. That knowledge, in combination with the Commission's independence, uniquely enables the Commission to provide a much needed service to Nova Scotians, namely the performance of full and thorough consultation resulting in the improvement, modernization and reform of laws.

The Commissioners, along with the Commission staff, are responsible for carrying out the work of law reform in the province. The Commission is an independent advisory agency of government. The independence of the Commission is achieved through its Commissioner selection process, its arms-length relationship to government and the fact that it does not rely solely on government funding. 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.

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

¹ S.N.S. 1990, c.17, reproduced in Appendix A. The LRAC existed from 1972 to 1979. The current Law Reform Commission of Nova Scotia was created in 1990 and is an independent Commission, unlike the LRAC. The two Commissions are not connected.

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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.

One of the priorities of the Commission is to discuss, with the general public, any possible changes to the law and the effect of such changes. This is how the Commission determines whether laws that exist are truly serving Nova Scotians, or whether new or changed laws are needed. The Commission actively consults persons or groups with an interest and/or expertise in specific projects of the Commission. It is through discussion and study that the Commission's proposals for reform are made. The Reports of the Commission include summaries in English, French and Mi'kmaw and are available to the public either in published form or on the internet through the Chebucto Community Net. This gives the public an opportunity to respond to suggestions for reform.

It is important to note that 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. The Commission's Reports and recommendations are, however, formally presented to the Minister of Justice for Nova Scotia and may result in changes to the law. Law is also made through the decisions of judges and other appointed administrative decision makers in cases that come before them.

While the Commission attempts to provide the public with accurate legal information and often assists members of the public in locating legal information or advice, the Commission itself does not provide legal advice and does not intervene in individual cases.

The projects of the Commission cover many areas of law. Three of the projects were References (formal requests) from the Government of Nova Scotia. The other projects resulted from suggestions made by members of the public, community or interest groups, judges and lawyers.

The projects taken on by the Commission deal with:

- Enforcement of maintenance obligations
- The jury system
- Adult guardianship
- Domestic violence
- The administrative justice system
- Advance health care directives (“living wills”)
- The legal status of children born outside of marriage
- Matrimonial property division
- Mortgage remedies
- The law of probate

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- Enduring powers of attorney
- *The Tortfeasors' Act*
- Interim payment of damages
- Mental health provisions of the *Hospitals Act*.

The Commission usually prepares two publications during the course of a project. The first publication, the Discussion Paper, is intended to provide information about the project to people who do not have legal training. It sets out the Commission's preliminary suggestions for reform. 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 spend a significant amount of time discussing the proposed reforms with individuals, groups and the media.

The second publication is a Final Report which is submitted to the Minister of Justice as representative of the Government of Nova Scotia. It contains the final recommendations of the Commission and, in some cases, a draft law. The Commission's final recommendations take into account the responses it receives to the Discussion Paper. A Final Report is intended to provide a basis for the Government to consider and adopt the reform recommendations. The Commission does not engage in active advocacy regarding implementation of its recommendations beyond providing the recommendations to the Government and members of the public. Instead, the Commission is of the view that in a democratic system, members of the public, governmental and non-governmental organizations and elected representatives are best placed to encourage implementation of the recommendations that serve their needs. The Commission has, however, been involved with internal government committees that seek to implement the Commission's recommendations and monitor changes to laws which result from the Commission's recommendations.

As of March 31, 1998 the Commission has published the following reports (a list of publications by project is contained in Appendix C at the end of this Report):

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)

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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)

Mortgage Foreclosure and Sale (Discussion Paper, July 1997)

Probate Reform in Nova Scotia (Discussion Paper, March 1998)

Six Annual Reports (1991-1997)

B. THE LAW REFORM COMMISSION

1. Operation of the Law Reform Commission

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● **Law Reform Commissioners, 1997-98**

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 broad representation. Since 1991, all Commissioners have been part-time. The Commissioners are not, however, 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 their services plus reimbursement for expenses incurred on Commission business. The Commission is now operating with six part-time Commissioners. The Commissioners usually meet every two to three months to make decisions 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 *Act*, the Commissioners are to choose one of the Commissioners to act as the President of the Commission. Since 1995, the Commission has operated with two Co-Presidents each year. Dawn Russell and Greg North are currently the Co-Presidents. They share the responsibilities for chairing meetings and working with the Executive Director and staff. The following individuals served as Commissioners during the 1997-98 fiscal year:

David A. Cameron

Commissioner (1997-2000)

Mr. Cameron was appointed by the Government to the Commission in December 1997. He has a B.A. from St. Francis Xavier University and an LL.B. from the University of New Brunswick. He was admitted to the Nova Scotia Bar in 1988 and practices law with the Halifax firm Daley, Black & Moreira. He practices primarily in the administrative, civil litigation and employment and labour law areas.

William H. Charles, Q.C.

Co-President (1991-1997)

Professor Charles served on the Commission since its creation in 1991. He has previously served as President and Co-President until December 1997. Professor Charles is a retired 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. Professor Charles served on the Commission until December 1997.

Theresa Forgeron

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Commissioner (1995-2001)

Ms. Forgeron was nominated by the Bar Council in February 1995. She is a resident of Sydney, Nova Scotia and practices law with the Sydney firm, 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 family law practice.

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 brought to the Commission a long standing involvement with public interest boards dealing with housing, poverty, education and health issues. Ms. Foster served on the Commission until December 1997.

Justice David MacAdam

Commissioner (1995-2001)

Justice MacAdam was admitted to the Bar in 1966 and was appointed to the Supreme Court of Nova Scotia in 1992. Prior to his appointment to the bench he practised law with the firm of Burchell MacAdam and Hayman in Halifax.

Gregory North, Q.C.

Co-President (1996-1999)

Mr. North was nominated by the Bar Council in June 1996. He has an M.A. in Economics and an LL.M. from the London School of Economics. He was admitted to the Nova Scotia Bar in 1974 and practices law with the Halifax firm, Cox Downie. 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. He became Co-President of the Commission in January 1998.

Dawn Russell

Co-President (1994-2000)

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Dean Russell was appointed as the Dalhousie Law School representative and began serving on the Commission in August 1994. She is a full-time faculty member and Dean 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. She is also President of the Canadian Council of Law Deans.

Dale Sylliboy

Commissioner (1994-2000)

Appointed by the Government to the Commission in August 1994, Mr. Sylliboy is a resident of Truro. He was 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 appointed as a member of the National Parole Board.

● **Commission Staff**

Under the *Law Reform Commission Act*, the Commission is to have an Executive Director and such persons as are required to do the work of the Commission. The Executive Director has responsibility for the management, direction, control and administration of the day to day operations of the Commission. The Commission also employs a Legal Research Counsel. 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.

Anne Jackman

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. in health law from Dalhousie Law School. Prior to her work with the Commission, she practised litigation and specialized in family law. Ms. Jackman is a member of several public interest associations. She became Executive Director on April 1, 1997 after serving as Acting Executive Director from December 1996.

Elizabeth R. Butt

Legal Research Counsel

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Ms. Butt joined the Commission in May 1997. In addition to a Bachelor of Commerce (Hon.), Ms. Butt has a Master of Industrial Relations (Queen's) and an LL.B. (Dalhousie). Prior to joining the Commission, she practised law in Halifax for four years, primarily in the area of civil litigation.

The Commission also has a full time administrative staff person, **Leona Fitzgerald**.

- **Consultants**

The following people provided services to the Commission in the 1997-98 fiscal year: Nathalie Bernard (translator), Chris Majka (electronic information system consultation), Katherine Sorbey (translator).

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2. Finances

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

The Commission is funded jointly by the Department of Justice and the Law Foundation of Nova Scotia. Funding of the Commission has been tenuous since its inception and remains so as these two funding sources encounter increasing demands for their support. The Law Foundation in particular is experiencing difficulties due to low interest rates from which it derives its income. Original grants from each of these two sources were in the amount of \$150,000, for a total budget of \$300,000. This budget covers all of the Commission's costs including staff salaries, Commissioners' honoraria, rental of office space, printing and distribution of reports and telecommunications (phone, fax, e-mail and computer equipment). Over the past few years, the Law Foundation's portion was reduced to \$100,000 for a total budget of \$250,000.

In 1997-98, the Commission applied for funding of \$100,000 from the Law Foundation but its application was refused due to a lack of funds. Fortunately, the Department of Justice increased its operating grant to the Commission by \$50,000, allowing it to remain in operation. The Commission was also fortunate to carry a surplus of \$50,000 into the 1997-98 fiscal year due to the fact that there was only one legal staff person with the Commission from January 1997 to May 1997. This means, however, that the Commission will have to continue to look for cost-cutting measures to reduce its yearly budget even further.

The Commission is hopeful that the Law Foundation will be in a better position to provide funding for the 1998-99 fiscal year. It is also optimistic that the long term participation of the Law Foundation will be secured. This non-government funding is crucial to the independence of the Commission since it allows Commission staff to actively communicate and consult with individuals who would otherwise not have a voice in the law reform process.

C. IMPLEMENTING A LAW REFORM MANDATE AND STRATEGY

1. Process and Strategy

Under section 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.

The Commission believes law reform must be based on broad consultation and consideration of the views of people who have not traditionally had an opportunity to contribute to the formulation of law. An important role for any law reform agency is to obtain feedback from as many members of the community as possible. This is challenging, particularly in the context of diverse public communities which are 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 a part of the law reform culture. This has resulted in translation of summaries of Commission papers into French and Mi'kmaw and the use of radio, television, print and electronic media, including the internet. The Commission also recognizes that legal issues must be explained in a manner that enables people to participate in a reasonably informed way. As a result, all of the Commission's papers are written, as much as possible, in a way that can be understood by people who are not lawyers and who are not familiar with the legal system. In addition, having a non-lawyer Commissioner causes the Commission to question many of the assumptions and approaches of people trained in the law.

The educational function of the Commission is also an important aspect of law reform work. This is particularly the case when recommendations for reform, while endorsed in principle by the government, cannot be implemented for a period of time because of fiscal, institutional or other constraints. Pending adoption or consideration of its recommendations,

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the Commission is able to educate individuals, groups, government and elected officials on the areas of law studied.

The Law Reform Commission of Nova Scotia is unique because of its independence and because the Commission has often chosen projects which may be perceived as difficult. These projects often require a great deal of consultation and balancing of diverse interests. As a result, these 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. The Commission has placed a great deal of emphasis on ensuring recommendations create 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. Another measure of the Commission's success is the high regard in which its work is held. This enables the Commission to advise government regardless of the popularity of the advice. 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 is available to other agencies in both the governmental and non-governmental sectors, largely to avoid duplication of effort. Creating public discussion and interest in the work of government and the legal system is a significant contribution of law reform work.

The Commission's work in the first few years tended to be in the areas of equality and family law. This reflects an assessment of the current problems facing society. It also reflects a 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 of the Commission deal more with issues such as consumer protection in the context of mortgage and foreclosure proceedings and the rights of donors in the context of enduring powers of attorney. As well, two substantial references from the government in the area of probate reform and the mental health provisions of the *Hospitals Act* are proving to be of tremendous interest to many Nova Scotians.

The Law Reform Commission of Nova Scotia has now been in operation for seven years. As noted in earlier Annual Reports, the Commission has set up its infrastructure, created and developed its decision-making process and mandate, developed effective working relationships with the public, media, government departments, the practising Bar, academia, numerous interest/representative groups, and begun 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 interest

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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 of the Canadian Bar Association, the Continuing Legal Education Society of Nova Scotia and other interested groups. It is also involved an ongoing 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 and Design:***

The Commission selects a general topic for reform based on suggestions received from the public, legal practitioners, judiciary, media and government. Often staff prepare preliminary research into the size and cost of a project to determine whether it is useful and feasible and how it will relate to other work in the community.

- ***Research/Advisory:***

If a project is taken on, an Issues Memorandum will be prepared for an Advisory Group. The Group is usually made up of a Commission legal staff person 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. The Group meets to consider and identify issues and make recommendations to the Commission. This is presented to the Commissioners in the form of an Issues Memorandum 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. It is reviewed by the Commission 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 often provides a copy of the Discussion Paper to affected government departments shortly 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 communication with the non-legal public. A summary of the Paper is translated in the French and Mi'kmaw languages. A period of several months is allowed for public

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response. During this time, there is communication with the media to ensure the public is aware of the Paper. It is also available on the internet. As well, presentations are made and meetings are held with interest groups to provide information.

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

Comments on the suggestions in the Discussion Paper are reviewed by the Commissioners and a Final Report is prepared. The Final Report will contain the Commission's final recommendations and, if appropriate, draft legislation or instructions that will assist government Legislative Counsel in drafting legislation. The Final Report is provided to the Minister of Justice and affected Ministers. It is also publicly distributed and available on the internet.

One of the considerations that arises during the Commission's discussion on law reform projects is the economic impact of implementing recommendations in an era of scarce resources. Ultimately, the issue for the Commission is identifying whether the problem being considered is one which can be addressed through adoption of a new law or change in the current law or its implementation. One of the more difficult issues 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, to determine the factors that are blocking change and how these barriers can be addressed.

2. Activities, 1997-98

The Commission's current projects indicate that the Commission serves a wide range of people. The project on enduring powers of attorney responds to concerns of citizens, particularly senior citizens, who wish to plan for the possibility that they may become incapacitated in the future. This project also responds to concerns expressed by trust companies and lawyers who see gaps in the current legislation and are unsure whether an enduring power of attorney is valid and effective. A Discussion Paper on enduring powers will be released in June 1998.

The foreclosure project was initially suggested by the judiciary which was concerned that the system was cumbersome, expensive and unfair for both financial institutions and homeowners. This project will not only serve financial institutions but consumers facing foreclosure, a group which cannot usually afford legal representation. A Discussion Paper was released in July 1997. Research and consultation continue on this project and a Final Report is anticipated for the summer/fall 1998.

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The probate project which came about as a Reference from the Attorney General will serve a wide range of people, particularly members of the public, but also lawyers and judges. It will also serve the government which has been unsuccessful in implementing probate reform despite various attempts over the past 20 years. A Discussion Paper was released in March 1998 and there has been a tremendous amount of interest in the project thus far.

Another example of the broad, diverse group of people which might be served by the Commission's work are injured parties waiting for a trial or other resolution of their dispute in Nova Scotia's court system. The Commission's project on interim payment of damages will consider whether, and in what circumstances, injured parties should be entitled to receive interim payment from the wrongdoer, prior to a final determination of the case. Similarly, the Commission's project on reform of the *Tortfeasors' Act* will also serve injured parties and assist lawyers clarifying and filling gaps in the legislation.

Finally, in December 1997 the Commission received a third Reference from the Attorney General to examine the mental health provisions of the *Hospitals Act*. This is a project which will require a comprehensive review of mental health law in the province, particularly in light of the *Charter of Rights*.

In late 1994, the Commission, in partnership with the Chebucto Community Net (CCN), made all its work available on the internet (<http://www.chebucto.ns.ca/Law/LRC>). At the time this was a pioneer effort in Nova Scotia, since the CCN had not previously dealt with this volume of material before. In addition, this was the first time that the Mi'kmaq language has appeared on the internet. The site provides information on the Commission and contains links to numerous electronic resources related to the law. In addition to information on how the Commission functions and how laws are reformed, the site describes the Commission's projects and lists the current members of the Commission. The full text of the Commission's reports are available on the internet and can be freely downloaded. Each report includes a summary that has been translated into French and Mi'kmaq. The Commission's Home Page was recently translated into French. This translation was provided as a complimentary service of the CCN and is located at <http://www.chebucto.ns.ca/Law/LRC/index.html.fr>.

The usage of the Commission's Web Site has steadily increased since 1994. In the past year, there were over 41,000 hits to the site, reflecting an increase of 15% over the previous year. As well, many other web sites contain links to the Commission's Web Site including other Law Reform Agencies and various commercial and government sites, both nationally and internationally.

The Commission also has an e-mail address (lawrefns@fox.nstn.ca). Members of the public can send e-mail to the Commission using this address or through various links on the

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Commission's Web Site. The Commission receives many inquiries and comments via e-mail. In the Spring of 1996, the Commission's Discussion Paper, Matrimonial Property in Nova Scotia, was also made available through QuickLaw, a commercial 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, the Commission is receiving an increasing number of calls from members of the public seeking legal information and direction 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.

The Commission's work has also been used by 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 the work of the monitoring committee for the government's Family Violence Prevention Initiative and the Department of Justice's administrative agencies, boards and commissions tribunal training committee. Staff has also provided information to advance health care directives (living wills) workshops, public meetings and seminars; conducted presentations to legal groups and media interviews on reform of the probate system and on mortgage foreclosure and sale; and public presentations on law reform generally.

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D. LAW REFORM PROJECTS, 1991-1998

Since 1991 the Law Reform Commission has chosen fifteen areas for law reform. The Commission has now fully completed 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. It has also published Discussion Papers on probate reform and mortgage foreclosure and sale. A Discussion Paper on enduring powers of attorney will be published in the spring of 1998 and work is ongoing on the *Hospitals Act*.

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 to the government 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 is expected to result in lower costs to the court system and to benefit recipients of maintenance support.

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. The Commission understands that the Government of Nova Scotia is in the process of reviewing comments from the judiciary and is considering ways to implement the recommendations in this Report.

3. Domestic Violence

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(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. This 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. Domestic violence 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 continues to be 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 lawyers 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, including a draft *Act*, were published in March 1995. The Commission 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 Commission understands that consultations are taking place between the Department of Justice and the Department of Community Services on issues arising from the Final Report.

5. Adult Guardianship

(Final Report with the Government)

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

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number of people from all sectors and the Commission's recommendations are consistent with the overall trend in health law and policy to endorse 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. The Commission understands that the government is looking at implementing legislative changes dealing with adult guardianship in the near future.

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 description of the Adult Guardianship project, the Final Report was published in the 1995-96 fiscal year, together with the recommendations on Adult Guardianship. The Report contained a dissent from a Commissioner who fundamentally disagreed with the Commission's final recommendations.

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 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,

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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 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.

The Final Report has already resulted in one major initiative, the establishment of a training program for members of tribunals that conduct hearings. A 2-day course, "Foundations of Administrative Justice", will be offered for the first time in the fall of 1998. It is being offered jointly by the Legal Services Division of the Department of Justice, the Workers' Compensation Appeals Tribunal (NS) and the Law Reform Commission of Nova Scotia, in response to requests from tribunal members and in response to the Law Reform Commission's Final Report. The Executive Director of the Law Reform Commission is a course organizer for this programme and former Co-President Bill Charles is a volunteer facilitator.

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 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 received considerable attention from the media. The Commission understands that the

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Final Report is currently under review as part of an overall family law initiative by the Government of Nova Scotia.

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 involves changes to the provincial *Evidence Act* to admit evidence relating to electronic transactions. Work is also being done through the Uniform Law Conference of Canada (ULCC) as the Federal Government is interested in ensuring 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 there be law reform in this area. The Commission had originally planned to publish a Discussion Paper in the Spring of 1996 but decided to wait until more work was done by the ULCC to see if uniformity and consistency in practice between the provinces can be achieved. The Commission is also concerned with avoiding any duplication of work given the Commission's scarce resources.

10. Mortgage Foreclosure and Sale *(Discussion Paper released Summer 1997)*

This project deals with the law relating to the remedies which a mortgagee (a lender, usually a financial institution) may use when a mortgagor (a borrower) 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 was released in July 1997. Empirical research obtained from

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a full review of almost 400 foreclosure files was included in the Discussion Paper and a Final Report is anticipated for the summer/fall of 1998.

11. Reform of the Probate System

(Discussion Paper released March 1998)

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 Minister asked the Commission to consider suggestions made by practitioners for a simplified summary procedure for small or uncomplicated estates. The first *Probate Act* was passed in 1842 and since that time only minor changes have been made to the original *Act*. An Advisory Group met throughout the fall of 1997. A Discussion Paper was released in March 1998 and consultations are ongoing. Submissions responding to the Discussion Paper are requested by September 15, 1998. A Final Report is anticipated for the winter of 1998.

12. Enduring Powers of Attorney

The topic of enduring powers of attorney arose 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, the Commission staff decided to examine reform of the law relating to enduring powers of attorney. During the winter of 1997, an Advisory Group met to discuss many of the issues on this project including the need to specifically validate, by law, “contingent” powers of attorney. A Discussion Paper will be released in June 1998.

13. Hospitals Act

In December 1997, the Commission received a Reference from the Government asking it to examine the mental health provisions of the *Hospitals Act*. It is expected that this will be a significant and lengthy project. A Discussion Paper is anticipated for spring 1999.

14. Tortfeasors' Act

This project deals with a possible amendment to the Nova Scotia *Tortfeasors' Act*. The proposed amendment would allow an injured party who gets judgment against a joint tortfeasor to provide a “release” which would not prevent the injured party from also seeking recovery from other joint tortfeasors. Currently a “covenant not to sue” must be used if the injured party wishes to maintain the right to sue joint tortfeasors. This distinction is not

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widely known. This is a problem left from the common law which requires correction by statute. It has been corrected in other provinces, such as Ontario, but not in Nova Scotia. Preliminary research is underway on this project.

15. Interim Payment of Damages

This project deals with the court's ability to order defendants to make interim payments to plaintiffs before a final determination on liability. The issue arises most often when there is a long delay between an injury and a trial. A plaintiff may have no income for that period of time and feel forced to accept a compromise settlement as a result. Amendments to the Civil Procedure Rules of Nova Scotia were made in February 1997 to address some of the concerns in this area. It is believed, however, that the amendments have not gone far enough and have caused further complications. Preliminary research is also underway on this project.

APPENDIX A

THE LAW REFORM COMMISSION ACT

APPENDIX B

***FINANCIAL REPORT
FOR THE 1997-98 FISCAL YEAR***

APPENDIX C

LIST OF PUBLICATIONS (BY PROJECT)

Law Reform Commission Publications

(As of March 31, 1998)

Administrative Justice System (Agencies, Boards and Commissions - ABC Report)

- *Agencies Boards and Commissions: The Administrative Justice System* (Discussion Paper, January 1996)
- *Reform of the Administrative Justice System in Nova Scotia* (Final Report, January 1997)

Adult Guardianship/Advance Health Care Directives

- *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)

Domestic Violence

- *Violence in a Domestic Context* (Discussion Paper, March 1993)
- *From Rhetoric to Reality, Ending Domestic Violence in Nova Scotia* (Final Report, February 1995)

Enforcement of Maintenance Obligations

- *Enforcement of Maintenance Obligations* (Discussion Paper, July 1992)
- *Enforcement of Maintenance Obligations* (Final Report, November 1992)

Jury System

- *Reform of the Jury System in Nova Scotia* (Discussion Paper, May 1993)
- *Reform of the Jury System in Nova Scotia* (Final Report, June 1994)

Matrimonial Property

- *Matrimonial Property in Nova Scotia: Suggestions for a New Family Law Act* (Discussion Paper, April 1996)
- *Reform of the Law Dealing with Matrimonial Property in Nova Scotia* (Final Report, March 1997)

Mortgage Foreclosure and Sale

- *Mortgage Foreclosure and Sale* (Discussion Paper, July 1997)

Probate

- *Probate Reform in Nova Scotia* (Discussion Paper, March 1998)

Status of the Child Born Outside Marriage

- *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)