FINAL REPORT

REFORM OF THE LAW DEALING WITH MATRIMONIAL PROPERTY IN NOVA SCOTIA

Law Reform Commission of Nova Scotia

March 1997

The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act to Establish an Independent Law Reform Commission*.

The Commissioners are:

William Charles, Q.C., Co-President
Dawn Russell, Co-President
Theresa Forgeron
Jennifer Foster
Justice David MacAdam
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Law Reform Commission of Nova Scotia

TO: The Honourable J. Abbass
Minister of Justice

In accordance with section 12(3) of the *Law Reform Commission Act*, we are pleased to present the Commission's Final Report *Reform of the Law Dealing with Matrimonial Property in Nova Scotia*.

Theresa Forgeron, Commissioner

Jennifer Foster, Commissioner

David MacAdam, Commissioner

William Charles, Q.C.
Co-President

Justice

Gregory North, Q.C. Commissioner

Dawn Russell
Co-President

Dale Sylliboy, Commissioner

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REFORM OF THE LAW DEALING WITH MATRIMONIAL PROPERTY

IN NOVA SCOTIA

SUMMARY

In the summer of 1995 the Law Reform Commission started a project to consider reforms to the law dealing with the economic consequences of the ending of marriages or marriage-like relationships. One of the main laws in Nova Scotia dealing with this issue is the *Matrimonial Property Act*. It was passed in 1980 in order to remedy the perceived unfairness which existed under the earlier law relating to property division on the ending of a marriage. The *Matrimonial Property Act* has not been altered since 1980, although the *Pension Benefits Act* was changed to clarify matters relating to division of pensions on marriage breakdown. A number of social and legal changes since 1980 suggest that reform is needed to ensure that the law in Nova Scotia better meets current needs. Sixteen years of judicial interpretation of the *Matrimonial Property Act*, reforms adopted in other provinces and territories, the adoption of the *Canadian Charter of Rights and Freedoms*, and changing social attitudes and practices regarding family life, all suggest that a reconsideration of the *Matrimonial Property Act* is necessary.

The Commission carried out legal research and consulted with an advisory group before formulating the suggestions in its *Discussion Paper*. Commission staff also met with interested parties in six centres outside Halifax in an effort to ensure that there was broad agreement across the province with regard to the issues to be addressed in any reform of the *Matrimonial Property Act*. In April 1996 the Commission published a *Discussion Paper* entitled *Matrimonial Property in Nova Scotia: Suggestions for a New Family Law Act*. Since that time, the Commission has carried out additional research and reviewed the written and oral comments received in response to the *Discussion Paper*.

Some of the more important changes considered by the Commission relate to the increasing incidence of unmarried cohabitation. With one in three marriages in Nova Scotia ending in divorce, second and third families and relationships based on unmarried cohabitation are becoming more prevalent. The current case law regarding ideas of fairness in the division of property also needs to be better reflected in the law. Finally, the Commission's interest in reform is consistent with recent proposals to restructure the delivery of family law services to the public.

Although there are other laws in Nova Scotia that deal with the financial consequences of the ending of family relationships, such as the *Family Maintenance Act*, the Commission has decided to focus specifically on the *Matrimonial Property Act.* In the view of the Commission, the primary goal of legislation such as the *Matrimonial Property Act* is to provide for the orderly and equitable settlement of the economic affairs of persons who have been parties to a domestic relationship which involves economic interdependence. The *Act* provides a set of "default rules" regarding the division of property where the parties have not made a private agreement. In this *Final Report* the Commission recommends that the *Matrimonial Property Act* should be replaced with a draft *Domestic Property Division Act.* This does not mean that the existing *Act* is totally

out of date, and in fact the Commission has retained a great deal of it in the new *Act*. However, the Commission believes that a sufficient number of changes are required to warrant a new *Act*. The recommendations on property division in this *Report* relate principally to codifying existing judicial practice in the treatment of debts, ending the exempt status of business assets and clarifying certain aspects of the division of pensions, the treatment of gifts and inheritances, and the interaction of succession benefits with applications for division of property by surviving members of domestic relationships. The Commission also recommends that the new *Act* be extended to couples involved in a domestic relationship of economic interdependence who have cohabited for at least a year. Finally, there are recommendations for changes in the law regarding domestic contracts, mediation, and the treatment of domestic violence in applications for possession of the shared home.

The Commission's recommendations in this *Report* include the following:

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

- There is a need for federal law reform to deal with the situation of separating couples resident on Aboriginal reserves. The appropriate Aboriginal associations should be consulted in the reform process.

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

- A new law should seek to achieve the following goals:

  (a) recognize that contributions to domestic relationships should be treated equally regardless of their form, entitling each party to an equal part of the shareable assets; and

  (b) provide for the orderly and equitable settlement of the affairs of couples on the ending of a domestic relationship.

- The *Matrimonial Property Act* of Nova Scotia should be replaced by a new law called the draft *Domestic Property Division Act*, which should apply to all persons in domestic relationships who fall within one of the following categories:

  (a) persons who are legally married; or
  (b) two adults in a personal relationship where one provides personal or financial commitment and support of a domestic nature for the benefit of the other, where the parties have cohabited for a period of at least one year.

- The draft *Domestic Property Division Act* should allow couples to "opt out" in a domestic contract subject to the existing powers of the court to review domestic contracts.

- Consistent with its expanded coverage, the draft *Domestic Property Division Act* should use the terms "shareable assets" and "shareable property" rather than matrimonial property or matrimonial assets. The basis for dividing shareable property should be stated to be the economic interdependence which characterizes the relationship of couples covered by the *Act*. Shareable property should continue to be divided on a presumptively equal basis and in general, property division should follow the approach currently set out in the *Matrimonial Property Act*.

- The principles regarding apportionment of debts should be codified in the draft *Domestic Property Division Act,* and the valuation date for the purposes of debts and assets should be stated as the date of separation, but this should be framed as a presumption rather than a rule.

- The draft *Domestic Property Division Act* should continue to provide for an unequal division of shareable assets in specified cases.

- The existing exclusion from shareable property of personal effects, property exempted under a domestic contract, and property acquired after separation should be maintained in the new law and the exemption for gifts and inheritances should be strengthened.

- Personal injury settlements, and accident and disability insurance benefits should remain exempt property under a new *Act*. Disability pensions should also be considered exempt property.

- All business assets whenever acquired should be considered shareable assets, but it is the increase in value over the course of the relationship which should be shared, rather than ownership rights. There is a dissenting opinion by one Commissioner who is of the view that while it is appropriate to share value rather than ownership rights in business assets, the calculation of that value should follow the principles used for other shareable assets by taking the entire value into account, rather than just the increase in value over the course of the relationship.

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

- The term "matrimonial home" should be replaced with "shared home" in a draft *Domestic Property Division Act*, and leased premises should be included in the definition.

- Domestic violence should be considered as a factor to be taken into account as a basis for granting orders for exclusive possession of the shared home, and a new *ex parte* civil remedy should be available in such circumstances.

- The options available for pension division on the ending of a relationship should all be located in a draft *Domestic Property Division Act* and pensions should be divided only in accordance with that *Act*.

- A party to a domestic relationship should be able to provide in a will that the survivor of the relationship must elect between benefits under the will and under the *Act.* Where a spouse dies intestate, the new *Act* should provide that the surviving spouse must elect between his or her preferential share under the *Intestate Succession Act* and rights under the draft *Domestic Property Division Act*. The surviving spouse should still be entitled to his or her distributive share under the *Intestate Succession Act*, and the Minister of Justice should review the definition of "spouse" contained in that *Act.*

- Marriage contracts should be called "domestic contracts" in the draft *Domestic Property Division Act* and should be available on the same basis as at present under the *Matrimonial Property Act.* The power of the court to overturn a domestic contract where it is unduly harsh, fraudulent, unconscionable or contrary to the best interests of a child should be maintained, and should be extended to cases where a party has failed to make full disclosure of assets and liabilities prior to entering the contract.

- There should be a new provision dealing with the need for independent legal advice to each of the parties. This provision should state that where such advice was not obtained, the court could disregard the contract or any term if it was found to be inequitable in the circumstances.

RÉFORME DU DROIT CONCERNANT LES BIENS MATRIMONIAUX

EN NOUVELLE-ÉCOSSE

RÉSUMÉ*

À l'été de 1995, la Commission de la réforme du droit amorçait un projet visant la réforme du droit relatif aux conséquences économiques de la rupture d'un mariage ou d'une relation analogue. La *Loi sur le patrimoine familial* (*Matrimonial Property Act*) est l'une des principales lois de la Nouvelle-Écosse traitant de cette question. Elle a été promulguée en 1980 de manière à corriger les inégalités de la loi antérieure régissant le partage du patrimoine familial lors de la rupture d'un mariage. La *Loi sur le patrimoine familial* n'a pas été modifiée depuis 1980. En revanche, la *Loi sur les prestations de retraite* (*Pension Benefits Acts*) a été modifiée pour clarifier le partage des prestations de pension lors de la rupture d'un mariage. Un certain nombre de changements sociaux et juridiques survenus depuis 1980 militent en faveur d'une réforme afin que la loi en Nouvelle-Écosse réponde mieux aux besoins actuels. L'interprétation des dispositions de la loi par les tribunaux au cours de ces 16 dernières années, les réformes adoptées dans d'autres provinces et territoires, la promulgation de la *Charte canadienne des droits et libertés*, et l'évolution des pratiques et des comportements sociaux à l'égard de la famille sont autant de facteurs qui soulignent la nécessité de réviser la *Loi sur le patrimoine familial*.

La Commission a effectué une recherche juridique et travaillé de concert avec un groupe consultatif avant de formuler les suggestions énoncées dans son document de travail. Le personnel de la Commission a également rencontré les intéressés dans six centres à l'extérieur d'Halifax dans le but de s'assurer que, dans l'ensemble de la province, l'on s'entende d'une manière générale sur les problèmes auxquels il faut apporter réponse dans le cadre d'une réforme de la *Loi sur le patrimoine familial*. En avril 1996, la Commission a publié son document de travail ayant pour titre *Matrimonial Property in Nova Scotia: Suggestions for a New Family Law Act* (Le patrimoine familial en Nouvelle-Écosse : suggestions à l'égard d'une nouvelle loi de la famille). Depuis, la Commission a effectué des recherches approfondies et passé en revue les soumissions écrites et les commentaires oraux reçus en réaction au document de travail.

Certains des changements les plus importants envisagés par la Commission sont liés au nombre croissant d'unions libres. Dans la mesure où, en Nouvelle-Écosse, un mariage sur trois aboutit au divorce, les unions libres et les noyaux familiaux secondaires et tertiaires sont de plus en plus fréquents. En outre, la loi doit mieux refléter la jurisprudence relative aux notions

* Note du traducteur, Michel Tremblay : Aucune des lois de la Nouvelle-Écosse n'a fait l'objet d'une traduction officielle. Les titres français indiqués dans le résumé sont donnés strictement à titre informatif.

d'équité dans le partage du patrimoine familial. Enfin, l'intérêt que porte la Commission à la réforme du droit familial s'inscrit dans la foulée des propositions récentes ayant pour but de réorganiser la prestation des services destinés au public qui sont prévus par le droit de la famille.

Bien qu'il existe d'autres lois en Nouvelle-Écosse qui portent sur les conséquences financières de la rupture familiale telle que la *Loi sur les obligations alimentaires* (*Family Maintenance Act*), la Commission a décidé de concentrer ses efforts sur la *Loi sur le patrimoine familial* en particulier. Aux yeux de la Commission, le but premier d'une loi comme la *Loi sur le patrimoine familial* est de prévoir le règlement équitable et ordonné des biens de personnes liées par une relation familiale impliquant une interdépendance économique. La loi prévoit un ensemble de «règles par défaut» concernant le partage des biens lorsque les parties n'ont pas signé d'entente. Dans son rapport final, la Commission recommande que la *Loi sur le patrimoine familial* soit remplacée par une nouvelle loi, la *Loi sur le partage du patrimoine familial* (*Domestic Property Division Act*). Cela ne signifie pas que la loi existante soit à rejeter entièrement. Au contraire, la Commission a retenu une grande partie de l'ancienne loi dans les dispositions de la nouvelle loi. Cependant, la Commission croit que le nombre de changements nécessaires est suffisant pour justifier la promulgation d'une nouvelle loi. Dans le rapport de la Commission, les recommandations concernant le partage des biens portent principalement sur la codification de la pratique juridique existante relativement au traitement des dettes et à la fin de l'exemption fiscale des biens d'entreprise et sur la clarification de certains aspects du partage des prestations de pension, du traitement des dons et des héritages et de l'interaction entre la prestation des biens de succession et la demande de partage des biens par les survivants d'une relation de couple. La Commission recommande également que la nouvelle loi s'applique aux couples qui ont vécu en union libre pour au moins un an dans une situation d'interdépendance économique. Enfin, la Commission a également recommandé des changements aux dispositions de la loi relatives aux contrats entre les membres du couple, à la médiation et à la demande de possession d'une maison en propriété commune lorsqu'il y a eu violence intraconjugale ou intrafamiliale.

Parmi les recommandations de la Commission énoncées dans son rapport final, citons les suivantes :

- La *Loi sur le patrimoine familial* de la Nouvelle-Écosse devrait faire l'objet d'une réforme.

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* Translator's note: It should be noted that the word "domestic" was chosen to reflect the more inclusive character of the law (i.e. cohabitation, same sex couples, etc.). In French, however, the word domestic is usually translated as "familial" or "de la famille". Therefore, some thought should be given as to how the intentions of the Reform Commission and the legislator are to be conveyed in French documents pertaining to the new law and eventually in the translation of the law itself. Perhaps the expression "de couple" (e.g. biens du couple, relation de couple, etc.) could represent an adequate French equivalent.

- La réforme devrait également porter sur les dispositions des lois fédérales s'appliquant à la rupture des liens unissant les couples résidant sur des réserves autochtones. Les

associations autochtones appropriées devraient être consultées dans le cadre du processus de réforme.

- Le Ministre de la Justice devrait envisager la réforme de la *Loi sur les obligations alimentaires* et consolider tous les pouvoirs relatifs au droit de la famille au sein d'un même tribunal.

- La nouvelle loi devrait atteindre les buts suivants :

  (a) reconnaître que les contributions à toute relation familiale ou de couple devraient être traitées avec équité quelque soit leur forme, chaque partie ayant droit à une part égale de l'actif qui peut être partagé; et

  (b) prévoir le règlement ordonné et équitable des affaires d'un couple en phase de rupture.

- La *Loi sur le patrimoine familial* de la Nouvelle-Écosse devrait être remplacée par une nouvelle loi qui aurait pour titre la *Loi sur le partage du patrimoine familial* (*Domestic Property Division Act*), laquelle s'appliquerait à toutes les personnes ayant une relation de couple ou de famille correspondant à l'une des catégories suivantes :

  (a) personnes mariées; ou

  (b) deux adultes qui vivent en union libre pour une période d'au moins un an dans le cadre d'une relation de type familial où l'une des parties prend un engagement et fournit un soutien personnel ou financier pour le bienfait de l'autre partie.

- La nouvelle *Loi sur le partage du patrimoine familial* devrait permettre aux couples de renoncer à l'application de la loi en signant un contrat familial sous réserve des pouvoirs de révision des tribunaux.

- Conformément à sa portée plus étendue, la nouvelle *Loi sur le partage du patrimoine familial* devrait employer les termes «biens partageables» (shareable assets) et «patrimoine partageable» (shareable property) plutôt que «biens conjugaux» (matrimonial assets or property). La répartition des biens partageables devrait être déterminée selon la nature de l'interdépendance économique caractérisant la relation des couples visés par la loi. Comme par le passé, les biens partageables devraient être répartis sur une base présumément égale. D'une manière générale, le partage des biens devrait suivre l'approche préconisée actuellement dans la *Loi sur le patrimoine familial*.

- Les principes relatifs à la répartition des dettes devraient être codifiés dans la nouvelle *Loi sur le partage du patrimoine familial,* et le jour de l'évaluation des dettes et de l'avoir devrait être la date de séparation, quoique cette disposition devrait être présentée comme une présomption plutôt qu'une règle.

- La nouvelle *Loi sur le partage du patrimoine familial* devrait permettre, comme par le passé, un partage inégal du patrimoine partageable dans certains cas.

- Au titre des biens partageables, l'exclusion existante des effets personnels, des biens exonérés aux termes d'un contrat familial et des biens acquis après la séparation devrait être maintenue dans la nouvelle loi, et l'exemption relative aux dons et aux héritages devrait être renforcée.

- Les indemnités pour blessure personnelle de même que les prestations d'assurance en cas d'accident ou d'invalidité devraient demeurer exemptes aux termes de la nouvelle loi. La loi devrait également considérer les rentes d'invalidité comme bien exempt.

- Peu importe la date de son acquisition, tout bien d'entreprise devrait être considéré un bien partageable, mais seul l'accroissement de valeur du bien d'entreprise pendant la durée de la relation devrait être partagé plutôt que le titre de propriété proprement dit. Selon l'avis minoritaire de l'un des membres de la Commission, s'il est approprié de partager la valeur plutôt que le titre de propriété des biens d'entreprise, le calcul de cette valeur devrait se fonder sur les principes utilisés dans le cas des autres éléments de l'actif partageable en prenant en considération la valeur globale plutôt que simplement l'augmentation de valeur des biens en question pendant la durée de la relation.

- Une quantité raisonnable de meubles et d'effets personnels nécessaires au soin d'un enfant issu de la relation de couple devrait être exclue du partage des biens prévue aux termes de la nouvelle loi.

- Le terme «foyer conjugal» (matrimonial home) devrait être remplacé par «foyer commun» (shared home) dans le libellé de la nouvelle *Loi sur le partage du patrimoine familial,* et la définition devrait inclure les locaux loués.

- La violence entre conjoints devrait être considérée comme un facteur pouvant justifier une ordonnance octroyant la possession exclusive du foyer partagé. En outre, il devrait y avoir un nouveau recours civil permettant de faire une demande *ex parte* dans des circonstances semblables.

- Les options régissant la répartition d'une pension en cas de rupture devraient toutes figurer dans la nouvelle *Loi sur le partage du patrimoine familial* et les pensions devraient être partagées uniquement selon les dispositions de la loi.

- Une partie dans une relation familiale devrait pouvoir stipuler dans son testament que le survivant peut choisir entre les prestations indiquées dans le testament ou celles prévues par la loi. Lorsqu'un conjoint meure intestat, la nouvelle loi devrait prévoir que le conjoint survivant doit choisir entre sa part préciputaire aux termes de la *Loi sur les successions intestates* (*Intestate Succession Act*) et ses droits aux termes de la *Loi sur le partage du patrimoine familial* . Le conjoint survivant devrait pouvoir conserver ses

droits à l'égard de sa quote-part successorale ordinaire aux termes de *Loi sur les successions intestates*. En outre, le Ministre de la Justice devrait passer en revue la définition de «conjoint» énoncée dans la loi.

- Dans la nouvelle *Loi sur le partage du patrimoine familial* , les contrats de mariage devraient maintenant s'appeler des «contrats familiaux» et devraient être disponibles selon les mêmes critères que ceux prescrits dans la *Loi sur le patrimoine familial*. Les tribunaux devraient conserver le pouvoir d'annuler un contrat familial si celui-ci est jugé cruel, frauduleux, abusif ou contraire aux intérêts de l'enfant, et ils devraient pouvoir exercer ce pouvoir dans les cas où l'une des deux parties n'a pas dévoilé tous les éléments de son actif et de son passif avant l'établissement du contrat familial.

- Il faudrait prévoir une nouvelle disposition exigeant que les deux parties consultent chacune leur propre avocat. Cette disposition devrait également prévoir qu'advenant le cas où le contrat est établi sans l'aide d'une opinion juridique indépendante pour chacune des parties, les tribunaux pourraient ne pas tenir compte du contrat s'ils jugeaient celui-ci ou l'une de ses dispositions inéquitables.

KOQWAJA`TMK TPLUTAQN MALIAPTIK

MATRIMONIAL PROPERTY ULA NOPA SKO`SIA*

SUMMARY

Nipkek 1995-ek, Law Reform Kmisn poqji ilite'tkis ila'tn ktplutaqn ujit tan tli naskwaten taq koquey toqi alsutmitij tepqatkik kisna tqonasijik, tan tujiw sioqie'tij. Newte tplutaqn Nopa Sko'sia tan maliaptik ula koquey, na Matrimonial Property Act. Sapa'tasikis 1980-ek, klaman ila'tew tan mu koqajitetansnukip amskwes tplutaqnituk tan maliaptik tel naskwa'tatimk koquey tan tujiw sioqiemk. Matrimonial Property Act muna'q ila'tasinuk weja'tekemkek 1980-ek, tlia pa Pension Benefits Act sasewatasikis klaman me wuli nsiten tel naskwa'timk pensionl puna'ltimk. Pukwelk koquey kiwaskasik tplutaqnituk wejatekemk 1980-ek, aq elu'kwek me nutaq sasewasitn tplutaqn Nopa Sko'sia ujit etepnemin tan tel sikaw pmiaql nakwekl. Newtisqaq jel asukuom tesipunqakl kis pmiaql, tan kisi mil utimi'tij Matrimonial Property Act jaja'qq, ilataqnn wewasikl ktikl provincesl aqq territori'l, ewewasik Kenetieney (Canadian) Charter of Rights and Freedoms, aq tan teli asuitasultimk aq piltueyatultimk, elkwaq iliwi'kasin Matrimonial Property Act.

Kmisn tplutaqn panuwijqatkis aqq pipanimasni Advisory Group kesk mu mesqnwi'kmitikwek tan tel te'tmitij discussion paperiktuk. Kmisnukewaq lukowinu'k nespiw welte'skuatisni pilue'y mimajuinu se'kk jiputktuk (Halifax), wejo'tmitis ikalsultinin tan tlsutasitew koquey ujit Matrimonial Property Act. Penatmuiku'sek (In April) 1996-ek kmisn wikatiknatoqsip, Discussion Paper teluisik Matrimonial Property Nopa Sko'sia: Suggestions for a New Family Law Act. Wejatekemkek na tujiw, kmisn me ankui panuijkes aq ilkitkis kisiwikasik aq jiksitkis tan teli asitetasik Discussion Paper.

Me ta'n piamitetasikl sasewasin kmisn etli tetkl, na tan tel pukwalk tqunasu. Tes nesijik malie'wultitij Nopa Sko'sia Newtejijik Divorce'ewijik, eskwiejik tan mawi memajultijik pemi aji muskasik. Nikeyewey tplutaqn ujit tetpa'teken tan tujiw tepi'kek nutaq me wul nmitasin tplutaqaniktuk. Utejkewey, las kmisns ila'taqn wijetinew piley ilsutaqn tan ewewasik Family Law ujit mimajuinu'k apoqnmuj.

Tlia pa ei'kl ktikl tplutaqnn Nopa Sko'sia tan maliaptikl sulieweye'l utmotaqnn tan tujiw puna'ltimk. Nkutey Family Maintenance Act, kmisn kisi te't me nikana'tun Matrimonial Property Act. Tan telaptik kmisn, ksas legislation kutey Matrimonial Property Act kisi koqaji e'tasotimn.

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*Mi'kmaw translation by Katherine Sorbey

Utmotoqnmuow mimajuinu'k tanik elita'sualtultijik suliewei'ktuk. Act ikatoql soqotpetesnmikewe'l' ("default rules") tan tli naskwa'ten kutmotaqnmuow mu ki's kisitmuoq kilow. Ula Final Report kmisn ksa'ss Matrimonial Property Act puni ewasitn toqo awnaqa ewasitn Domestic Property Division Act. Mu telue'k Act mu nuku klutn, muta kmisn minu ewkip pukwelk piley Actiktuk. Pas katu kmisn teli ktlamsit tepian nuta'q kiwaskasitn ujit ili msaqnwikasitn piley Act. Ilsutaqnn ujit tel naskwatmk kutmotaqn ula Report elkwa'q mawi ewmin tan kis etekl tplutaqniktuk tan teli maliaptik tetuoqnn, jigla'tn exempt status ujit businessl, Aqq na wuli nsitasin tan tel naskwa'tmk pensionl, tela'tmk tan iknmul aqq tan wejkuaqamimk. Naqtmask, aqq wiaqiaql wejkuaqmkewe'l tan tijiw siawawsultijik etaw'titij naskwatasin utmotaqnn. Kmisn nespiw el'klusit ula piley Act. Nespalan mimajuinu tan toqi mimajiliji newtipunqik. Klapis, teltek sasewasitn tplutaqn tan maliapik l'uitimasuti, jena'suti, aqq ta'n telo'tm'k wenjintultitij wenjikuom tan etl maw qatmitij.

Wula kmisn ksas wiaqten Reportituk:

. Matrimonial Property Act wjit Nopa Sko'sia nuta'q ilukwasin.

. Nuta'q kaplno'lewey tplutaqn sasewa'sitn, klaman kisi maliamaten puna'ltultiliji l'nue'kati'l e'miliji, nuta'q kinuatuksinew tanik nikan pukuatmititl l'nue'e'l Assosciationl.

. Tepawtik ankite'tmn Minister of Justice ilukwatasin Family Maintenance Act.

. Piley tplutaqn tepawtis we'jitun kisi koqaji maliaptmn ula elmi wikasikl:

    a) Nmitn tan mimajuinu'k teli apoqnmatultitij, ketwitlo'ltitij, wijey tleywan aq mekwayik tma'tn tan alsutmitij; aqq

    b) Qoqaji ilutmn tan telitpielij tan tiwjiw sioqielij mima'juinu.

. Matrimoniliey Property Act ujit Nopa Sko'sia tepawtlk. Jikla'tasitn aqq piluey tplutaqn telui'tasik Domestic Property Act wewasitn, ujit msit mimajuinu'k tan teli wiaqitpiatitij elmuikasik.

    a) Wenik toqapukwa'tasijik tplutaqniktuk; kisna

b) tapusijik wenik nenujik wtank toqa'majik, aqq ki's toqa'majik newtipunqik.

. Domestic Property Division Act tepawtis asite'lman wenik "Asisaptminow" jijuoqa tan tel aqnutmnpnik, pas katu me mekwite'tminow tplutaqn etliknaq courtiktuk.

. Domestic Property Act e'wis klusuaqnn "Mawi Milesuti'l" ("Shareable Assets") aqq "Mawialsutaqnn" ("Shareable Property") Toqo pun e'wmin Matrimonial Property kisna Matrimonial Assets. Ta'q koquey weji naskwatmk mawi alsutaqn na mu ewla'lat wen tan tel sutasik actiktuk. Mawi alsutaqnn siawi naskwatasis tetpa'taqniktuk, Property division siawi majukwes tan tel sutasik Matrimonial Property Actiktuk.

. Mlkiklusikl ujit tan teli mili naskwatmk tetuoqnn tepawtis tepkis ten Domestic Property Actiktuk, aqq uji pqu't kitasis weja'tekmk tesuknitek puna'ltimk, pas katu tlta'sik, keskmna'q tli usua'tn tplutaqani.

. Domestic Property Act nespiw tepawtiss pantenmin pilui naskwateken tan tiwjiw welteskik koquey piluitpiaq.

. Nike' etek asisamuksin wen mu msnmin wikmajl utomotaqn, tan exemptewatasik domestic contractiktuk, aqq ta'n wen kisi kpkwatoq koquey ki's kisi puna'teketek siawi klo'tmin tluen ula piley tplutaqniktuk aqq wula tan exemptewa'tasikl iknmu'lkl aqq naqtmulkl me' mlkiknewa'tunes.

. Mimajuinujile'k tewa'telut, aqq petesinmikewey aponkitwo'ti siawi exemptewis piley Act. Jile'imkewe'l pensionl tepawtis nespiw tli usua'tasin Exemptewin Property.

. Msit businessiktuk ki'l peqwatu'n tli ankaptasin ktqui e'wminow, pas katu taq koqwey pekwatasik wula businessiktuk awnaqa nekmowey kisi mawi ewtoqsip, mu tli usua'tasin kil elt wiaqi alsutmin business. Newtejit kmisner mu piam wul te'tmuk pasik naskwatasin tan pekwatasik wula businessiktuk. Wulte's nekm majukwasik tan koqwajataqn, aqq msit koquey mawkijasin, mu pasik tan business pekwatoqip pe'tepawtik teli kpij'i tqwamaioqop.

. Taqowey mijua'jij nuta'tew teli ankweaj mu wiaqi iknmue'tasin piley actiktuk.

. Klusuaqnn "Matrimonial Home" mu e'wasin tujiw awnaqa e'wasin "Shared Home" Domestic Property Division actiktuk, aqq tan maw lease'ewatasik wiaqi wikasin definitioniktuk.

. Ksu'k matnaqewaqn pemia wjit tan wen tli a'lsusitew wenjikuomk, piley newte'elkwa'q "Ex Parte" ("One Sided") ilkwenawek tepawtis i'ktn tan tiwjiw matnaqewaqn pemiaq.

. Tan tiwjiw kaqiaq nikma'jewe'l'a tepawtis na ten msit optiona'l ujit naskwatmk pensionl Domestic Property Division Actiktuk, aqq pensionl tl naskwastasin pasik tan tel wikasik actiktuk.

. Ki'kmaj tan tla'tekes kesk' mu nepmuk, willituk wikasis tan naqtmask aqq wiaqiwikasis, ki'l kisi eymin tan will tel wikasik kisna tan tel wikasik actiktuk. Tan tiwjiw ne'pk ktoqotiam toqo mu will eyknuk, piley Act ika'tus sikuap kisona siku'sk miamuj wesua'toq taqkoqowey pewat Intestate Secession Actiktuk aqq kwilutk koqaja'luksin Domestic Property Division Actiktuk, siku'sk kisna siku'ap me jukuaqamis natuqouey. Intestate Sucession Actiktuk, aqq Ministl of Justice minuaptis tan "Spouse" teli usua'tasik na actiktuk.

. Toqopukua'luemkewel l'luitmasuti'l tl wi'tasis "Domestic Contracts" ula Domestic Property Division Actiktuk aqq nkutey tlakwis stike' nike' teltek Matrimonial Property Actiktuk. Siaw ten courtiktuk kisi wisuite'tmik tan mu koqatenuk aqq ew'laluekl wjit mijua'jijk, aqq maw court wisuite'lman wenl mu Ke'knaua'lsilikisnn tan tel pukui'j ke'sk mu elui'tmasilikwek.

. Tewpawtis piley tplutaqn tan apoqnmuajij mimajuinn' klaman wuli nsitaq tplutaqn tan asukweteskmi'tij. Ula tplutaqn tl wikasis ta'n wen mu weli nsitmukip elmiaq na courtiktuk ika'j, jajj courtiktuk kis pilua'tew tan mu welaptmuk.

I INTRODUCTION

1. The matrimonial property project

In the summer of 1995 the Law Reform Commission started a project to consider reforms to the law dealing with the economic consequences of the ending of marriages or marriage-like relationships. One of the main laws in Nova Scotia dealing with this issue is the *Matrimonial Property Act.*[1] It was passed in 1980 in order to remedy the perceived unfairness which existed under the earlier law relating to property division on the ending of a marriage. The *Matrimonial Property Act* has not been altered since 1980, although the *Pension Benefits Act*[2] was changed to clarify matters relating to division of pensions on marriage breakdown. A number of social and legal changes since 1980 suggest that reform is needed to ensure that the law in Nova Scotia better meets current needs. Sixteen years of judicial interpretation of the *Matrimonial Property Act*, reforms adopted in other provinces and territories, the adoption of the *Canadian Charter of Rights and Freedoms*, and changing social attitudes and practices regarding family life, all suggest that a reconsideration of the *Matrimonial Property Act* is necessary.

Some of the more important changes considered by the Commission relate to the increasing diversity of family forms.[3] With one in three marriages in Nova Scotia ending in divorce, second and third families and relationships based on unmarried cohabitation are becoming more prevalent. The Commission's interest in reform is also consistent with recent proposals to restructure the delivery of family law services to the public. Although there are other laws in Nova Scotia that deal with the financial consequences of the ending of family relationships, such as the *Family Maintenance Act*,[4] the Commission has decided to focus specifically on the *Matrimonial Property Act.*

The Commission recommends that the *Matrimonial Property Act* should be replaced with a draft *Domestic Property Division Act.* This does not mean that the existing *Act* is totally out of date, and in fact the Commission has retained a great deal of it in the new *Act*. However, the Commission believes that sufficient changes are required to warrant a new *Act*. The recommendations on property division in this *Report* relate principally to codifying existing judicial practice in the treatment of debts, clarifying certain aspects of the division of pensions and the treatment of gifts and inheritances, and ending the exemption of business assets. The Commission also recommends that the new *Act* be extended to couples involved in a domestic relationship of economic interdependence who have cohabited for at least a year. Finally, there

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[1] S.N.S. 1980, c.9; now R.S.N.S. 1989, c.275.

[2] S.N.S. 1987, c.11, s.61; now R.S.N.S. 1989, c.340.

[3] See comments in *Final Reports*: *The Legal Status of the Child Born Outside of Marriage in Nova Scotia* (1995); *From Rhetoric to Reality Ending Domestic Violence in Nova Scotia* (1995) and *Reform of the Laws Dealing with Adult Guardianship and Personal Health Care Decisions* (1995).

[4] R.S.N.S. 1989, c. 160.

are recommendations for changes in the law regarding domestic contracts, the application of the *Act* on death, and the treatment of domestic violence in applications for possession of the shared home.

The Commission carried out legal research and consulted with an advisory group before formulating the suggestions in its *Discussion Paper*. A Commissioner and Commission staff also met with interested parties in six centres outside Halifax in an effort to ensure that there was broad agreement across the province with regard to the issues to be addressed in any reform of the *Matrimonial Property Act*. The members of the advisory group are listed at the end of this *Report* in Appendix A, and their time and contributions to this project are gratefully acknowledged. In April 1996 the Commission published a *Discussion Paper* entitled *Matrimonial Property in Nova Scotia: Suggestions for a New Family Law Act*. The suggestions made in that *Paper* are reproduced in Appendix B. Since that time, the Commission has carried out additional research and reviewed the written and oral comments received in response to the *Discussion Paper*. A list of people who responded in writing to the *Discussion Paper* can be found in Appendix A.

2. Language

In its *Discussion Papers* and *Final Reports* the Commission attempts to write in a way which enables people without legal training to understand and provide comments on the Commission's recommendations for reform. There are still some situations where the language relates to specific legal, or in the case of pensions, technical concepts, and the words used will not be familiar to everyone. The following words in this *Final Report* mean:

ancillary relief — the kinds of relief, aside from the divorce itself, which a spouse seeks in a divorce action, such as child custody and child and spousal support;

cohabitation (cohabitees) — living together in a marriage-like or intimate relationship (cohabitees can refer to opposite sex or same sex couples);

common law — judge-made law, found in reports of decided cases;

common law relationship — describes a spousal-type relationship between two people, historically limited to persons of the opposite sex;

commuted value — means the value of a pension or pension benefit as calculated on a fixed date according to regulations passed under the *Pension Benefits Act*;

constructive trust — in family law, a remedy used to give one cohabitee a share of property held in the name of the other cohabitee, where there has been a contribution in money or labour;

deferred benefit split describes what happens when spouses apply to divide an interest in a pension - the spouse who is not a member of the plan will receive a pension in the future, commencing on the normal retirement date of the member spouse, or the date that the member spouse begins receiving benefits from the plan, whichever is earlier;

dower a right which a widow formerly had to claim an interest for her lifetime in one-third of the real property which her husband had owned during marriage (abolished in 1980);

exclusive possession order under the *Matrimonial Property Act*, an order by which one spouse can have the other spouse excluded from the matrimonial home for a defined period;

exempt assets under the *Matrimonial Property Act*, assets which are excluded from division at the end of marriage and may continue to be held as separate property (presently includes business assets, gifts and inheritances, and some other property);

gender-neutral a law or language which does not specify whether it refers to a man or woman;

in pay when a member of a pension plan begins to receive payments, the pension is said to be "in pay";

intestate dying without a will, in which case the property of a deceased person is distributed according to the *Intestate Succession Act*;

leasehold interest where parties are tenants rather than owners;

legislation law made by elected members of the legislature or parliament; also described as a statute and includes regulations;

maintenance lump sum or periodic payments which a spouse or parent must pay to a former spouse or a child who is in need (also known as support, and formerly as alimony);

matrimonial assets under the *Matrimonial Property Act*, those assets which are to be divided equally between the couple upon the termination of a marital relationship by divorce, marriage breakdown or death;

matrimonial home under the *Matrimonial Property Act*, the home or homes which a married couple occupies as its family home(s);

matured pension a pension which has begun to be paid out;

personal property property other than land;

real property land;

same sex couple a form of intimate relationship where the parties are both male or both female; at present this form of relationship has relatively little recognition in family law;

separate property the principle which governed matrimonial property matters before the passing of the *Matrimonial Property Act*, which stated that each spouse could only claim property which was actually held in their name;

shareable assets all property currently described as matrimonial assets;

statute law made by elected members of the legislature;

succession law the laws that govern what happens to the property of a person who has died;

unequal division under the *Matrimonial Property Act*, where a court decides that an equal division of matrimonial assets would be unfair or unconscionable, it may divide them on other than a 50-50 basis, or may divide non-matrimonial assets, or both; and

unmatured pension a pension where no benefits have yet begun to be paid out.

3. Legal and social context of the *Matrimonial Property Act*

(a) the legal context

The *Matrimonial Property Act* was adopted in Nova Scotia in 1980 as part of a general law reform movement in all the common law provinces[5] which attempted to address dissatisfaction with the existing law regarding division of property on the ending of marriage. Prior to these reforms the law had been based on a concept known as "separate property". This was a concept developed in the late nineteenth century which provided that upon marriage termination, whether by death or divorce, each spouse could retain only that property to which they could show legal title. In other words, there was no such thing as "family property" or "matrimonial assets". This meant that in Nova Scotia until 1980, all property owned by a married couple was considered to belong either to the wife exclusively or to the husband exclusively, unless they had *expressly* obtained legal title together as co-owners of the property. While the concept of separate property may seem unfair or archaic from a contemporary perspective, it was originally adopted in 1884 in response to discontent with the common law's approach to matrimonial property.[6] Prior to 1884 a husband was given full control over any property which his wife brought to the marriage or acquired during the marriage by any means. Separate property responded to the need of married women to be recognized as full legal persons distinct from their husbands. Changes in the law of matrimonial *property* did not, however, affect the right of a wife to seek *maintenance* (also called support, or alimony) from her husband after divorce or separation. Both before and after the adoption of the *Married Women's Property Act* in Nova Scotia in 1884, a husband remained under an obligation to support his wife, an obligation which was in principle lifelong.

For several decades after its adoption, separate property worked reasonably well in a large majority of cases. Questions of title to property between husband and wife are usually irrelevant while the parties are living in harmony. It is only when death, separation or divorce intervenes that questions of title become important. Even death of a spouse will not usually give rise to questions about title to property, as long as adequate provision has been made for the surviving spouse by will or by the law of intestate succession. In cases of separation or divorce, however, wives in particular were disadvantaged by the system of separate property. They had a claim to *maintenance* from their husbands (or ex-husbands), but no claim to any *property* to which he had sole title, even if that property had been acquired over the course of a long marriage and by their joint efforts. However, the low divorce rates which existed in Canada before the adoption of the federal *Divorce Act*[7] in 1968, meant that the potential unfairness of the separate property system for divorced

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[5] In Quebec, family law is governed by the Book II of the *Civil Code of Quebec*, S.Q. 1991, c.64.

[6] *Married Women's Property Act*, R.S.N.S. 1884, c.94; now R.S.N.S. 1989, c.272.

[7] S.C. 1967-68, c.24.

women did not come to public attention until the 1970s. Even then, judges were sometimes able to alleviate the harshness of separate property by ordering the ex-husband to pay a larger amount for lump-sum maintenance, as provided for under the *Divorce Act*.[8]

Rising divorce rates, increasing economic prosperity, and growing dissatisfaction with the traditional roles assigned to married women all led to intense scrutiny in the 1960s and 1970s of family law in general and of the law of matrimonial property in particular. This scrutiny was given particular momentum by the decision of the Supreme Court of Canada in *Murdoch* v. *Murdoch*.[9] In that case, an Alberta rancher sought during the course of a divorce proceeding to have her interest in land legally recognized. Although the land had been effectively acquired through the joint efforts of both her and her husband during a 25-year marriage, title to the land was held solely in her husband's name. The Supreme Court of Canada concluded that she had no legal right to any share of it on marriage breakdown. The injustice of this state of affairs led provincial and territorial governments to consider legislative reform of matrimonial property law.

Murdoch was important in that it pointed to the need to rethink not just the law of matrimonial property, but also the law regarding support obligations within the family (family maintenance), and the law dealing with the rights of surviving spouses against the estates of their deceased spouses (the law of succession). There was also a need to ensure that the family law of the various provinces and territories was in harmony with the federal *Divorce Act* of 1968. This *Act*, in addition to making divorce somewhat easier to obtain, also made it available on the same basis across Canada for the first time. The dramatic increase in the divorce rate[10] after 1968 was undoubtedly the principal factor motivating the need to find "orderly and equitable" ways to settle ex-spouses' financial affairs. The concept of separate property, which assumed each spouse to be equally positioned to earn an income and acquire property, had been revealed as inadequate at both a practical and a psychological level. Practically speaking, the prevalence of the male-provider/female-dependent model in the postwar period meant that the assumption of an equal opportunity to earn income was meaningless. The separate property model also seemed to be based on a model of emotionless and rational calculation which was psychologically at odds with the acceptance of romantic love as the basis of marriage. Some provinces responded to the need for change by enacting omnibus family law reform legislation which covered both matrimonial property and family maintenance. Nova Scotia passed two acts, the *Family Maintenance Act* and the *Matrimonial Property Act* on the same day, June 5, 1980, and they came into effect on the same day, October 1, 1980.

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[8] A practice commented upon by Chief Justice MacKeigan in *Johnson v. Johnson* (1974), 20 R.F.L. 12 at 13 (N.S.C.A.). Under the *Divorce Act*, judges have a choice as to whether support should be awarded as periodic payments or as a lump sum.

[9] [1975] 1 S.C.R. 423.

[10] The divorce rate increased tenfold between 1961 and 1981.

The Nova Scotia *Matrimonial Property Act* changed the existing law in two main ways:

(1) by creating a "pool" of assets owned by either spouse, known as "matrimonial assets", which could be divided, regardless of legal title, in equal shares between the spouses upon marriage breakdown, divorce or the death of a spouse; and

(2) by giving each spouse an equal right of possession in the matrimonial home, without regard to which spouse has the title in law; and providing that no sale or mortgage of the matrimonial home can occur without the consent of both spouses.

The right to equal division is a *presumption* only, in that the *Act* also allows judges to make an unequal division in some cases, for example where the length of the marriage might indicate that an equal division would result in unfairness.[11] The right to equal division arises only at the *end* of a marriage. Before then, each spouse retains title to whatever property is in their name, and they may freely dispose of it without the consent of the other spouse. The only exceptions to this are the right to equal possession of the matrimonial home, and to veto any sale or mortgage of it. These rights arise at the moment of marriage and continue *during* the marriage.

Another important legal change relevant to matrimonial property, but not contained in the *Matrimonial Property Act,* occurred in 1987 when the *Pension Benefits Act* was amended to provide for the division of pension benefits upon marital breakdown. The fact that pensions had not been specifically mentioned as matrimonial assets in the *Matrimonial Property Act* had led to some uncertainty as to whether they could even be considered as a matrimonial asset.[12] However, in 1990, the Supreme Court of Canada ruled that pensions were to be included as matrimonial assets under the law in Nova Scotia.[13] The amendments to the *Pension Benefits Act* allow the Supreme Court of Nova Scotia to award a maximum of half the pension benefit earned during marriage to the non-member spouse. This entitles the non-member spouse to a pension commencing on the date that the member spouse begins receiving a pension, or the member spouse's normal retirement date, whichever is earlier. While this amendment was helpful at the time, it has now created a situation where there are two different systems operating in Nova Scotia dealing with division of pensions on marriage breakdown, one under the *Matrimonial Property Act* and one under the *Pension Benefits Act*.

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[11] S.13.

[12] See *Lawrence* v. *Lawrence* (1981), 25 R.F.L. (2d) 130 (N.S.C.A.) and *Clarke* v. *Clarke* (1986), 1 R.F.L. (3d) 29 (N.S.C.A.).

[13] The Supreme Court of Canada in *Clarke* confirmed that pensions are matrimonial assets under the *Act*: (1990) 101 N.S.R. (2d) 1 and in so doing, reversed the decision of the Supreme Court of Nova Scotia.

As suggested by its name, the *Matrimonial Property Act* does not apply to common law or cohabitation relationships, but only to people who are legally married. The support obligation in the *Family Maintenance Act*, however, does apply to common law couples as well as to legally married couples.[14] In addition, the *Pension Benefits Act* also applies to common law couples after three years of co-habitation. Judge-made law (notably *Pettkus v. Becker*[15] and *Peter v. Beblow*[16]) has established that members of common law couples, including same sex couples[17], may have a right to a share in each other's property provided they can prove a contribution in money or labour to that property, but they have no statutory rights to property division under the present *Matrimonial Property Act*. Nor does the equal right to possession of the matrimonial home apply to common law couples.

The law governing family relationships in the area of marriage and divorce is complicated by the fact that both the federal and provincial government have constitutional authority to regulate it. The *Constitution Act, 1867* gives jurisdiction over divorce to the federal government, which means that where issues of spousal and child support, or child custody (also called "ancillary relief"), are dealt with in a divorce context, only the provisions of the *Divorce Act*, *1985* can be applied, and provincial legislation on these topics is inoperative. Since "property and civil rights within the province" are topics under provincial authority, however, the division of matrimonial property after divorce remains a provincial responsibility, currently provided for in the *Matrimonial Property Act*. If issues of spousal or child support, or child custody, come up in a setting *other than* divorce, they are considered to involve "civil rights" in the province, and are dealt with in the Nova Scotia *Family Maintenance Act*.

There is one exception to this general scheme which applies to the real property of some Aboriginal persons in Nova Scotia. Under the *Constitution Act, 1867* authority over "Indians and Lands reserved for the Indians" rests exclusively with the federal government and provincial matrimonial property legislation has been held not to apply to interests in land situated within Aboriginal reserves. In two 1986 cases, the Supreme Court of Canada held that the British Columbia courts had no constitutional authority under the provincial *Family Relations Act* to award a half-interest in a matrimonial home situated on reserve land to an otherwise eligible spouse,[18] nor to issue an interim order for exclusive possession of the

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[14] Under the *Family Maintenance Act* a court may order a common law spouse to pay maintenance to a current or former partner of the opposite sex, provided the couple has cohabited for one year. The *Pension Benefits Act* also has an extended definition of spouse. Section 2(aj) provides that spouses include couples of the opposite sex who have cohabited for three years or more, provided that neither is married to another person.

[15] [1980] 2 S.C.R. 834.

[16] [1993] 1 S.C.R. 980.

[17] *Brunet* v. *Davis* (Ontario General Division, *Lawyers Weekly*, 12 June 1992, at 6); *Anderson* v. *Luoma* (1986), 50 R.F.L. (2d) 127 (B.C.S.C.).

[18] *Derrickson* v. *Derrickson*, [1986] 1 S.C.R. 285.

matrimonial home accompanied by a restraining order against an abusive husband.[19] The *Matrimonial Property Act* does apply, however, to spouses living on reserves with respect to any assets and debts they may have off the reserve.

A new and increasingly important constitutional factor in the family law field is the effect of the *Canadian Charter of Rights and Freedoms*. Since the adoption of the *Charter* in 1982, it is possible for family law legislation to be struck down by the courts if it infringes a protected right (for example, the right to "equal protection and benefit of the law" under s. 15). Recently, family law provisions or provisions dealing with definitions of "spouse"[20] or "child"[21] in other legislation have been questioned on *Charter* grounds.

In Nova Scotia, the Supreme Court of Nova Scotia has exclusive authority over the matters dealt with in the *Matrimonial Property Act*. It also hears applications for divorce and for ancillary relief, while matters of family maintenance outside the divorce context are dealt with by the Family Court. Generally speaking, the Family Court cannot constitutionally be granted authority over real property, but in issuing peace bonds it may, in effect, temporarily deprive a spouse or common law spouse of possession of real property in his or her name by ordering that person to stay away from a particular location.[22] In recent years there has been an effort in some provinces to create Unified Family Courts which would have jurisdiction over all family law matters. Such a court was recommended for Nova Scotia in the *Report of the Nova Scotia Task Force on Court Structure* (1991). In its Final Report *From Rhetoric to Reality Ending Domestic Violence in Nova Scotia* (1995) and the *Enforcement of Maintenance Obligations in Nova Scotia* (1992), the Commission endorsed the move toward creating a properly resourced Unified Family Court in the province. The Commission also notes that the Nova Scotia Department of Justice made public in January 1996 a *Proposal to Establish a Family Division of the Supreme Court of Nova Scotia* with province-wide authority over all family law matters.

(b) the social context

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[19] *Paul v. Paul*, [1996] 1 S.C.R. 306. For a critique of these cases, see M. Turpel, "Home/Land" (1991) 10 *Can. J. of Fam. Law* 17.

[20] In *M. v. H.* (1996), 27 O.R. (3d) 593, the Ontario Court of Justice, General Division decided that the support obligations imposed by the Ontario *Family Law Act* on opposite sex cohabitees had to be read as extending to same sex cohabitees, in accordance with s.15 of the *Charter*. The decision was approved by a majority of the Ontario Court of Appeal on December 18, 1996: [1996] O.J. 4419.

[21] See Law Reform Commission of Nova Scotia *The Legal Status of the Child Born Outside of Marriage in Nova Scotia* (1995) report which dealt with the problem of laws which still describe people as "illegitimate" for some purposes. For example, the Nova Scotia Court of Appeal has decided that a child of unmarried parents is able to inherit from both parents, even though the *Intestate Succession Act* states that such a child can inherit only from the mother: *Tighe v. McGillivray Estate* (1994), 127 N.S.R. (2d) 313.

[22] *Reference re B.C. Family Relations Act*, [1982] 1 S.C.R. 62.

Any reforms to family law should take into account available information about Nova Scotian families.[23] The trends in this province are similar to those occurring across Canada. In general, families are getting smaller, the mix of different family types is shifting, and more mothers are working. In 1991, 49% of all families in Nova Scotia were married couples with children living at home, while another 29% were married couples without children. Some 9% were common law couples, 6% with no children and 3% with children. Female single parents comprised 11% of all families, while male single parents constituted 2% of all families. The fastest growing of all these family types is the female single parent family, which increased by 30% between 1981 and 1991.

Family size has diminished considerably over the last thirty years (1961-1991). The number of families with three or four persons has remained almost constant, but the number of families with five or more persons has declined from 32% to 11%. By contrast, the number of families with two persons has increased from 28% in 1961 to 42% in 1991. In part this phenomenon has been caused by a much higher divorce rate, which results in more but smaller households. The divorce rate increased 10 times between 1961 and 1981, when it peaked at about 270 divorces per 100,000 population. Since 1981 the divorce rate has declined to about 249 per 100,000 population in 1992.

Another significant change relates to the connection between children and marriage.[24] Until two decades ago, the majority of the population accepted that only married persons should have children. In early twentieth century Nova Scotia, and as recently as the 1950s, less than 5% of all births were outside marriage. The rate of such births began to rise in the 1960s, and reached 29% of all births as of 1991. In the last decade only one-quarter of these births have been to teenagers. Approximately 6% of all couples with children are now cohabiting couples. Many single-parent households (which now comprise 20% of all households with children) are households where there were formerly two parents who formed a common law couple. Although the trend toward dissociation of marriage and childbirth is not as pronounced in Nova Scotia as in some parts of the country (for example, in Quebec out-of-marriage births topped births to married parents for the first time in 1993), the change has still been relatively dramatic.

Labour force participation by women has increased significantly in the last few decades, with the percentage of married women in the work force doubling from 30% in 1971 to 60% in 1994. Their earnings relative to men have remained low: Nova Scotia women working

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[23] The information in this part is derived from *Women in Nova Scotia: A Statistical Handbook,* 2nd ed. (Nova Scotia Department of Human Resources, Women's Directorate, 1995).

[24] The viability of reproductive technology is likely to create even more changes in the nature of family relationships since, as noted in the Law Reform Commission's Report on *The Legal Status of the Child Born Outside of Marriage in Nova Scotia* (1995), it is possible now with sperm and ovum donation to have a situation where the "social parents" of a child are not genetically related to the child. The Commission has recommended that the Government of Nova Scotia adopt a law clarifying this important social and legal issue consistent with laws elsewhere in Canada.

full time earn on average 64 cents for every dollar earned by men. This average conceals considerable disparity at the level of the individual household. Statistics Canada reported recently that nearly one in four working wives earns more than her husband.[25] Labour force participation by women has ceased to be related to an absence of children at home. About 66% of married women with children work outside the home, and the figure does not vary according to whether the children are preschoolers or not. With single and divorced mothers the age of the children does play a role in labour force participation, with mothers of younger children being less active in the labour force. Of mothers of children under six, about 44% of single mothers and 55% of divorced mothers work outside the home. When their children are over six, the participation rate rises to 60% (single women) and 72% (divorced women).

Another basic fact of family life in Nova Scotia is the association of family breakdown with poverty. Children who are born into a two-parent household where the marriage remains intact have approximately a 20% chance of living in poverty.[26] Children born into a household where the parents divorce, have a 73% chance of living in poverty.

[25] Dorothy Lipovenko, "More Women Primary Breadwinners," *The* [Toronto] *Globe and Mail*, 15 August 1996, A6.

[26] "Poverty" is defined here as the Statistics Canada poverty line.

II RECOMMENDATIONS FOR REFORM

1. The *Matrimonial Property Act* should be reformed.

In Part I, the background to the enactment of the *Matrimonial Property Act* was discussed, and reference was made to the changing nature of family relationships over the last few decades. It is now time to assess how the law has responded to these changes. Has the interpretation of the *Matrimonial Property Act* by the courts, and the passage of related legislation, such as the *Pension Benefits Act*, provided adequately "for the orderly and equitable settlement of the affairs of spouses upon the termination of a marriage relationship"? With regard to the economic aspects of property division, the Commission notes two trends in the courts' interpretation of the *Act* to date: a strong commitment to equal sharing, with a correspondingly decreased role for unequal division; and a tendency to narrow the scope of exempt property (principally business assets, gifts and inheritances). Both of these trends appear to illustrate a strong commitment to spousal equality on the part of the courts. The judges have shown little inclination to enter into the rights and wrongs of a past relationship, and have taken seriously the *Act*'s declaration that "there is a joint contribution by the spouses, financial and otherwise, that entitles each spouse equally to the matrimonial assets." The Commission believes that, in general, the courts have interpreted the *Act* as was intended in 1980, and that there is still a strong social consensus around the value of matrimonial property legislation. With regard to the presumption of equal sharing and the definition of shareable assets, the Commission believes that with one exception (the treatment of business assets) only fine-tuning is necessary, and that judicial interpretation of certain aspects of the law needs to be codified.

With regard to the treatment of pensions at the end of a relationship, the situation in Nova Scotia is somewhat confusing at present because pensions may be dealt with under two different statutes which have different requirements and offer different modes of sharing. The Commission believes that all such provisions should be located in the draft *Domestic Property Division Act*, and that reform is required to clarify the treatment of pensions in certain instances and the options available to the parties.

When the possible application of the *Act* to couples who are not formally married is discussed, there is less of a social consensus. That is not surprising, given the fact that social and legal treatment of relationships based on cohabitation is in a state of transition, similar perhaps to the legal and social treatment of divorce and divorced persons thirty years ago. During a state of transition, inconsistencies abound. Why is it that common law spouses of the opposite sex have a statutory right to the division of each other's pensions, but to no other asset? Why is it that same sex couples are treated similarly to common law couples of the opposite sex for the purposes of some kinds of employment benefits and insurance plans, but not with regard to various kinds of statutory benefits? During a period of transition, the law (whether statute or common law) often responds on a case-by-case basis because the application of the general principle in question is still controversial. The

Commissioners have reached the view that the existing law which applies on the termination of cohabitation relationships is neither clear nor fair, and their reasoning is discussed in more detail below. The Commission is convinced that reform of the *Matrimonial Property Act* is required in order to enable couples in such relationships to benefit from it.

Accordingly, the Commission has taken the view that the law dealing with matrimonial property is in need of significant reform. The Commission is strengthened in its views by the fact that most of the changes recommended in this *Final Report* have occurred, or have been recommended, in other provinces in Canada.[27] In addition, although not the specific focus of this project, the Commission suggests that the Minister of Justice for Nova Scotia should raise the need for federal reform to respond to the situation of separating couples resident on Aboriginal reserves. Although the *Matrimonial Property Act* applies to property owned by Aboriginal couples off-reserve, it does not apply to interests in land situated on a reserve. The law relevant to the resolution of such disputes is unclear at the moment. In any discussion of reform, representatives of the appropriate Aboriginal associations should be consulted and thoroughly involved.

The Commission has also noted that the *Family Maintenance Act* is in need of reform which requires specific consideration. Such reform has not been addressed as part of this Project since it raises other broader policy questions relating to parental responsibility. The Commission is of the view that replacing the *Matrimonial Property Act* need not await reform to the *Family Maintenance Act*, although ideally reform of the two statutes should not occur too far apart in time. The Commission also notes its earlier recommendations regarding the desirability of a court with unified jurisdiction in the field of family law.

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[27] In 1986, Ontario repealed its *Family Law Reform Act*, 1978 and replaced it with a new *Family Law Act* (see now R.S.O. 1990, c.F-3). The main changes adopted at this time were the extension of the *Act* to apply on the death of a spouse; and the shift from an approach based on sharing matrimonial assets exclusive of business assets, to an approach based on sharing the increased value of assets, including business assets, over the course of a marriage. Newfoundland repealed the *Matrimonial Property Act* of 1979 and the *Maintenance Act*, R.S.N. 1970, c.223 and replaced them with a single *Family Law Act*, S.N. 1988. c.60 (see now R.S.N. 1990, c.F-2). This *Act* authorizes the court to appoint a mediator agreed upon by the parties and provides for non-harassment orders. Manitoba and British Columbia have amended their matrimonial property legislation a number of times and most provinces have altered their pension benefits legislation to deal with the division of pensions on marriage breakdown.

A number of law reform commissions have issued reports dealing with basic principles of property division (B.C. 1990, Ontario 1993); division of pensions (Alberta 1986, additional Consultation Memorandum 1995, British Columbia 1992, Ontario 1995); the matrimonial home (Alberta 1995); and the definition of spouse (Ontario 1993).

The Commission recommends that:

1. **There should be reform of the *Matrimonial Property Act* of Nova Scotia.**

2. **There should be federal law reform to deal with the situation of separating couples resident on Aboriginal reserves. The appropriate Aboriginal associations should be consulted in the reform process.**

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

4. **The Government should consolidate jurisdiction over all family law matters in one court.**

2. The values underlying any reform should provide for an orderly and equitable settlement of the affairs of couples at the end of a relationship

Any discussion of reform must assess whether the objectives of existing legislation are still relevant to meet today's needs, and also whether the existing law in fact has achieved these goals. The preamble to the *Matrimonial Property Act* states that it has four purposes:

- to strengthen the role of the family in society;
- to improve the position of children by clarifying issues of parental responsibility;
- to recognize that the contributions of spouses to a marriage are equal regardless of their form;
- to provide for the orderly and equitable settlement of the affairs of spouses upon marriage termination.

In its *Discussion Paper* the Commission suggested that the goals and values referred to in the preamble were still valid. The Commission also suggested that the statement of purpose in any reformed legislation acknowledge a diversity of family forms in the province, in view of its suggestion that the *Act* be extended to include cohabiting couples. In light of comments received, the Commission has reconsidered whether an *Act* dealing with the division of property on the breakdown of a relationship could be said to "strengthen the role of the family" in society. It has concluded that a law providing "default rules" regarding the division of property where the parties have not privately agreed to a division is not a law which promotes the family or marriage or any particular form of relationship. Rather it is a law designed primarily to provide for an orderly and equitable settlement of the economic affairs of persons who have been parties to a domestic relationship which involves economic interdependence.

Viewed from the perspective of 1980, when much of family law was being reformed with the avowed goal of making it fairer for women, it may have seemed to legislators of the day that the *Matrimonial Property Act* would assist in "strengthening the role of the family in society." Now that the legislation has been in force for 16 years, it seems clear to the Commission that the principal role of the *Act* is remedial; it creates a mechanism which provides for the equal sharing of matrimonial assets on the termination of marriage. With the exception of the provisions relating to the home, the *Act* applies only at the end of a marriage, whether by death, divorce, annulment or final separation. It does not purport to tell people how they should arrange their affairs during their marriage, only what will happen to their property at the end. Strengthening the role of the family in society is a worthy goal of provincial legislation, but the Commission believes it is not the role of a law governing the division of property on the termination of a relationship.

With regard to "clarifying issues of parental responsibility," again this is a worthy objective but one which is carried out primarily by other legislation such as the *Family Maintenance Act* and the *Children and Family Services Act.*[28] While children are not totally absent from the *Matrimonial Property Act,* and judges generally try to be sensitive to their needs in ordering divisions of property, it remains the case that the *Act* deals primarily with their parents' property, not with parental obligations toward them. As a result, the Commission believes that references to issues of parental responsibility should not appear in the statement of purpose in the draft *Act*.

The principal way in which the *Act* seeks to achieve an "equitable settlement" is by deeming contributions to a marriage relationship to be equal, regardless of their form. This effected an important change in the law, which had traditionally ignored or undervalued unpaid work in the home. The economic interdependence involved in a marriage, and the social worth of the efforts of both spouses, are recognized by treating monetary and non-monetary contributions as equal in principle. At the time, this change was considered an important victory in the cause for legal equality of the sexes. It also has a number of other benefits. The deemed equal contribution restricts judicial discretion and provides clarity in the law, which facilitates the negotiation of agreements between the parties. It also reflects the difficulty of deciding who contributed what to a marriage. Not only does the deemed equal contribution accord with current notions of spousal equality, but it is also a practical solution which avoids resort to notions of fault or gender stereotypes in evaluating the parties' contributions. The Commission agrees that this principle should remain in the draft *Act*, with a change in wording to reflect the expansion of the *Act* to cover unmarried couples.

It is worth noting, however, that the kind of equality espoused in the *Matrimonial Property Act* is largely formal equality: property may be divided in equal shares, but the results for each spouse are often different because their situations are different. Men usually leave marriage with their income-earning potential intact or even enhanced, while women, particularly if they retain custody of any children, may suffer a decline in their ability to earn

[28] S.N.S. 1990, c.5.

an income or establish a career or business. Empirical research conducted in Canada in the late 1980s confirmed that the economic position of women and children after divorce or separation tended to deteriorate markedly when compared to the position of their former spouses. The extent of this post-divorce disparity is a matter of some debate, but the fact of it is generally accepted. The 1970s assumptions that gender-neutral legislation and equal sharing of matrimonial assets would lead to equality have thus been revealed as naive and unrealistic.

The law may also produce "substantive" equality (that is, where both people are in a similar situation after the division) in those situations where there are no children and both spouses work outside the home for approximately the same salary. Such cases are still a minority at present. Especially for couples with children, it is still the case that the primary care-giver will suffer some long-term economic disadvantage. People who become parents are prepared to accept that having children involves some economic responsibility. What is sometimes seen as unjust is the fact that such burdens often are not equally shared after divorce or separation.

Should Nova Scotia adopt “substantive equality” as a goal of its property division legislation? Some countries, such as England, at one time adopted as a goal of their legislation that ex-spouses should enjoy approximately the same standard of living after divorce.[29] Unfortunately, the divided jurisdiction over post-divorce property and support matters in Canada makes such a goal impractical without joint federal-provincial efforts. Reform of matrimonial property law alone cannot solve the problem of post-divorce poverty or improve the kinds of economic opportunities available to women. Property division is only one aspect of the post-divorce or post-separation situation: child and spousal support are another. Recent Supreme Court of Canada decisions in the area of spousal support suggest a shift away from the emphasis on the "clean break" theory of divorce and on the rapid achievement of financial self-sufficiency after divorce, both of which are based mainly on ideas of formal equality.[30] In the field of child support, new national child support guidelines, based on a more realistic estimate of the actual costs of child-rearing, have just been added to the *Divorce Act*.[31] As well, Nova Scotia's new maintenance enforcement system aims to ensure that a higher percentage of all maintenance payments are received by the family.[32] These are all important measures which move in the direction of creating real equality. The Commission believes that some of the other changes it is proposing will also

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[29] The English *Matrimonial Proceedings and Property Act* 1970, c. 45 adopted as a goal that divorce should affect the parties’ economic lives as little as possible. This goal was superceded by a commitment to the “clean break” contained in the *Matrimonial and Family Proceedings Act* 1984, c.42. See generally S.M. Cretney and J.M. Masson, *Principles of Family Law*, 5th ed. (London: Sweet & Maxwell, 1990) at 381-415.

[30] *Moge v. Moge*, [1992] 3 S.C.R. 813.

[31] The House of Commons passed Bill C-41, adding these guidelines to the *Divorce Act*, on November 18, 1996.

[32] *Maintenance Enforcement Act*, S.N.S. 1994-95, c.6.

advance substantive equality. These relate principally to the definition of what assets are divisible at the end of a relationship, and are dealt with below.

The Commission recommends that:

1. A new law should contain the following goals:

(a) recognize that contributions to domestic relationships should be treated equally regardless of their form, entitling each party to an equal part of the shareable assets; and

(b) provide for the orderly and equitable settlement of the financial affairs of couples on the ending of a relationship.

3. A new law, called the *Domestic Property Division Act*, should replace the *Matrimonial Property Act*.

One of the difficulties in making suggestions for law reform is to determine whether it is in the public interest to change the existing law or create a new law. The Commission has a concern about creating too many new laws as this becomes confusing and costly for members of the public and for the legal community. At the same time, creating change by amendments to existing laws means that people must then check two statutes and it may create a problem for accessibility. After some consideration, the Commission has taken the view that it is best to recommend the repeal of the existing *Matrimonial Property Act* and replace it with a new *Domestic Property Division Act*. The remainder of this *Final Report* examines a variety of issues in some detail, and for each one either recommends keeping the wording of the existing law or explains why a new provision is needed. All of the Commissioners support the recommendations that a new *Act* is necessary. They were less than unanimous on some of the individual recommendations, and the tenor of the debate is noted in the discussion at certain points in order to provide a full record for the public and policy-makers.

In its *Discussion Paper* the title *Family Law Act* was suggested, but some commentators believed that this title was not suitable if the provisions on family maintenance were not incorporated within it. Since the time frame for reform of the *Family Maintenance Act* is not clear, the Commission felt there was some justice in this observation. In light of the fact that the law proposed by the Commission deals with the division of property on the termination of a domestic relationship, whether based on marriage or cohabitation, the Commission has decided that the *Domestic Property Division Act* would be an appropriate title.

The Commission recommends that:

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

2. A new law called the *Domestic Property Division Act* should be passed.

4. The draft *Domestic Property Division Act* should include cohabitation relationships.

(a) rationale for change

In its *Discussion Paper* the Commission proposed that the draft *Act* should apply automatically to all cohabiting couples who meet a statutory definition, with provision for "opting out" in the form of a domestic contract. The Commission recommends later in this *Final Report* that the *Act* apply to two adults who have cohabited for at least one year in a personal relationship where one provides personal or financial commitment and support of a domestic nature for the benefit of the other. This definition is discussed in more detail below. In this section, the Commission feels the need to explain in some detail its rationale for recommending the inclusion of cohabitees under the draft *Act*, given the importance of this change, and the amount of public interest in it.

At present the *Matrimonial Property Act* applies only to legally married couples. The *Act* draws a clear line between married and unmarried couples. Such distinctions were historically justified on the basis that the state had an interest in fostering marriage and the "legitimate" family as fundamental social institutions. According to recent statistics, marriage is still favoured by most Nova Scotians, as it is by most Canadians. Almost 80% of all Nova Scotian families are composed of married couples, either with or without children. A national survey of high school students in 1992 found that 85% of those surveyed planned to marry. While marriage and the association of childbirth with marriage are still the more usual social pattern in Nova Scotia, social practices are clearly changing. As mentioned earlier, nearly 1/3 of all births in Nova Scotia now take place outside marriage. The marriage rate has been dropping slowly but steadily for at least the last 25 years, and the average age at marriage has been constantly rising. Unmarried cohabitation is becoming more socially acceptable, particularly among young people. In the survey mentioned above, nearly 90% of teenagers approved of unmarried couples living together. As of 1990, it was estimated that nearly one-third of Canadian couples 25 years of age and under were living in a common law relationship. Less than a quarter of these relationships were found to last more than five years.[33] Statistics Canada reports that the number of common law unions

[33] *Mothers & Children, One Decade Later* (Nova Scotia Department of Community Services, 1991), p. 22.

doubled nationally between 1981 (when this information was first collected) and 1991. In Nova Scotia the increase was less dramatic (from 6% to 9%) but still significant.[34]

Marriage itself is changing, as the frequency of divorce puts into question the lifelong commitment formerly associated with marriage. It is clear that many individuals will be involved in more than one marriage-like relationship over the course of a lifetime. Divorced persons often remarry or form new cohabitation relationships, while cohabiting couples end their relationships and begin new ones. In 1985, in 29.5% of marriages one of the parties had been previously married, an increase of nearly 250% from 1967, when the figure was 12.3%. The 29.5% figure does not include previous common law relationships which one of the parties might have had.[35]

It is clear that relationships based on cohabitation are increasing in popularity and are likely to continue to do so. Given their increasing prevalence, it is important to ensure that the law applicable on their termination be reasonably clear and fair. A brief review of the existing law is necessary to support the suggested reform in this area.

At present, the rights of cohabiting couples are defined by a combination of common law, statute, and any contract they have made. With regard to property matters, their rights are decided mainly through court cases. As noted earlier, the law of unjust enrichment applies to the resolution of property disputes between cohabiting couples.[36] Where one party builds up assets during cohabitation and the claimant's contributions to the relationship are such that they can reasonably expect compensation upon its termination, a claim may be made. If the claim is successfully proved, the court may award either a sum of money or a share in property owned by the other party. Initially, the law required that there be a direct connection established between the assets and the contribution, but this position seems to be altering. The courts have not imposed any presumption of equal sharing of assets acquired during quasi-marital relationships. In each case the court must decide what amount is "fair" given the contributions of each party.[37]

As noted earlier, Nova Scotia statute law already provides for support obligations and pension division in cohabitation relationships. The support obligation is found in the *Family Maintenance Act,* which provides that a spouse "includes a man and woman who, not being

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[34] The 1981 figure can be found in *Mothers & Children, One Decade Later*, p. 22, while the 1991 figure is provided in *Women in Nova Scotia: A Statistical Handbook*, 2nd ed. (Nova Scotia Department of Human Resources, Women's Directorate, 1995), p. 5-3.

[35] *Mothers & Children*, One Decade Later, p. 24.

[36] The courts have not made any distinction between opposite sex and same sex couples when applying the doctrine of unjust enrichment. *Brunet v. Davis* (Ontario General Division, Lawyers Weekly, 12 June 1992, p.6); *Anderson v. Luoma* (1986), 50 R.F.L. (2d) 127 (B.C.S.C.).

[37] *Peter v. Beblow*, [1993] 1 S.C.R. 980.

married to each other, live together as husband and wife for one year" (s. 2(m)). Pension division for cohabiting couples who have lived together for three years is provided for under the *Pension Benefits Act* which allows for the division of pension benefits earned during the relationship, to a maximum of 50% of the credits in favour of the non-member partner.[38] These two laws, as well as other provisions in laws which indirectly deal with cohabitation relationships, define the relationship in different ways.[39]

Cohabiting couples may also enter into contracts defining the extent of their obligations to one another. Unlike many provinces, Nova Scotia does not at present specifically authorize such contracts under the *Matrimonial Property Act*, but in practice they are drafted and it is unlikely that a court would hold such a contract invalid. The Commission was not able to determine how often cohabiting parties entered into such contracts, and there has been very little litigation in which such contracts have been interpreted. The Commission's impression is that such contracts are the exception rather than the rule between cohabiting couples.

The Commission heard a variety of opinions about the clarity and fairness of the existing law. Some people felt that the existing law was satisfactory, and that more regulation of the cohabitation relationship would compromise the autonomy which parties to such a relationship seek by choosing not to marry. Often these commentators were concerned that any further blurring of the line between marriage and cohabitation would undermine the status of marriage. Others commented that the existing law is not easy to understand or to apply in individual cases because it depends on proving a lengthy catalogue of facts, which is difficult and expensive. Some people wrote of their personal experiences in this regard. Another view expressed was that the existing law discriminates on the basis of marital status, sexual orientation, or both. In other words, public reaction to the Commission's proposal reflected the range of opinion which undoubtedly exists in the province on this important and somewhat controversial issue of social policy. On the whole, however, the majority of comments supported the Commission's proposal as outlined in the *Discussion Paper*, that the *Matrimonial Property Act* be extended to unmarried couples, whether of the same or opposite sex.

After reviewing all the comments, the Commission remains of the view is that the existing law regarding cohabitees is neither clear nor fair. Although property disputes between cohabitees have been decided with reference to the law of trusts and unjust enrichment since 1980, the application of these doctrines in an individual case is often difficult. In effect, parties in cohabitation relationships are subject to legal doctrines which are as difficult to apply as those which governed married persons prior to the enactment of the *Matrimonial*

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[38] The definition of spouse in s. 2(aj) of the *Pension Benefits Act* includes either of two persons of the opposite sex, "not being married to each other and neither being married to another person [who] have lived together as husband and wife for three years and living together at the relevant time". Common law spouses may also have rights to pension division under pension plans regulated by federal law, where the definition of "spouse" may be different.

[39] A large number of provincial statutes provide an extended definition of "spouse" which includes relationships based on cohabitation, for a variety of purposes.

Property Act. The combination of legal results under judge-made case law and a variety of statutes means that the legal situation of cohabiting couples is uncertain in terms of their obligations and rights towards each other. Since 1980 there have been dozens, possibly hundreds, of reported cases across Canada involving the termination of cohabitation relationships. The extreme flexibility of the law of unjust enrichment, the emphasis on proving a contribution, and the lack of any presumption of equal sharing, make it difficult for lawyers to provide guidelines to clients who are terminating their cohabitation relationships, and to allow them to resolve their differences quickly. The need to prove all the details of the parties' economic lives makes the law costly, inaccessible and distressing for some Nova Scotians.

With regard to the fairness of the existing law, the Commission has reached the view that most cohabitation relationships are functionally similar to marital relationships, and deserve to be treated similarly by the law. Human beings seek out long-term relationships for a variety of reasons, including companionship, love, emotional support, sexual intimacy, procreation, economic need and social expectation. Such relationships, especially but not exclusively where there are children, often generate patterns of economic dependency. These patterns, which may not be apparent during the relationship, are exposed on its termination. The state has determined that it is appropriate to address this situation as a matter of policy for married persons in the form of laws governing the division of property and ongoing support and child custody arrangements. In opposite sex relationships the economically disadvantaged partner has traditionally been the woman. New patterns of life have given rise to situations where the male partner may now be the economically disadvantaged one where he has been a stay-at-home parent,[40] and current case law makes it clear that patterns of economic dependency can arise in same sex relationships as well. The reason for the law to impose property division in marriage and cohabitation relationships is to respond to the economic interdependence which arises in such relationships, and to ensure that the dependent partner is not punished for the role which he or she has played during the relationship.

The principal argument against mandating property division for cohabitants, which was advanced by some commentators, is one based on autonomy. If the parties themselves have chosen a way of life that involves less overt legal regulation than marriage, then the law should respect that choice. The Commission does not agree with this for several reasons. First, it is unclear that autonomy is a principal factor motivating couples to choose cohabitation over marriage, or that it is proper to speak of couples as "choosing" cohabitation.[41] It may be that one party wishes to marry but the other does not, or that the

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[40] The federal Department of Justice study of the effects of the *Divorce Act*, 1985 found that 42% of men with sole custody had incomes below the poverty line compared to 11% of all men after divorce. Statistics Canada reported recently that 25% of married women had incomes higher than those of their husbands.

[41] W.H. Holland, "Marriage and Cohabitation -- Has the Time Come to Bridge the Gap?" in *Special Lectures of the Law Society of Upper Canada 1993. Family Law: Roles, Fairness and Equality* (1994), at pp. 379-80.

parties value autonomy differently. Second, the parties may be mistaken about the current state of the law. There was anecdotal evidence before the Commission to the effect that some unmarried parties believe, incorrectly, that the *Matrimonial Property Act* applies to them after one year. In addition, the Commission was concerned that providing only for a voluntary "opt in" process would allow for the continuance of any existing inequality of bargaining power, which may work against the interests of women and children. The Commission's view as outlined above is that the existing law regarding cohabiting couples is neither clear nor fair, and altering the law to provide for only optional coverage of such couples would simply perpetuate the existing situation.[42] In addition, it may be observed that if both parties in a relationship value autonomy from legal regulation strongly and equally, they will undoubtedly contract out of the *Act*.

On a more practical level, the Commission believes that people are more likely to turn their minds to the financial implications of a relationship where the decision is to opt out of the law by domestic contract. It does not seem realistic in the context of a couple setting up a home and life together to expect them to give detailed consideration to their economic affairs if the relationship does not continue. If the law provides a fair division of property which recognizes the likelihood of more than one relationship in a lifetime, then it will not be detrimental to the interests of the couple if they do not address the issue. If they have concerns, as is the case currently for married couples, then they may develop a domestic contract regarding the division of property. Any contract would still, as the case is now, be subject to the court considering the best interests of any children that may be affected.

The Commission notes that similar concerns have motivated recent recommendations by the Ontario Law Reform Commission with respect to extending the property division provisions of the *Family Law Act* to cohabiting couples.[43] Although no Canadian province has yet adopted such legislation, the Commission notes that a number of Australian states and the Australian Capital Territory have passed laws allowing the courts to adjust the property of cohabiting couples upon termination of their relationship.[44]

The Law Reform Commission of Nova Scotia has recognized the presence and significance of non-marital relationships in a number of its Final Reports. Its *Final Report* on *The Legal*

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[42] Although the issue is under consideration in other provinces, to date only Newfoundland has extended provisions for property division on marital breakdown to cohabitation relationships. The Newfoundland law provides that common law spouses may "opt in" to the *Act* as if they were married. Consultation with Newfoundland lawyers revealed, however, that couples very seldom make use of this provision.

[43] Ontario Law Reform Commission, *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (1993).

[44] New South Wales, *De Facto Relationships Act* 1984; Victoria, *Property Law (Amendment) Act* 1987; Northern Territory, *De Facto Relationships Act* 1991; Australian Capital Territory, *Domestic Relationships Act* 1994. See generally Rebecca Bailey-Harris, "Property Disputes in De Facto Relationships: Can Equity Still Play a Role?" in Malcolm Cope, ed., *Equity: Issues and Trends* (Sydney: Federation Press, 1995). The first three *Acts* apply only to opposite sex cohabitees, while that of the Australian Capital Territory applies to same sex cohabitees as well.

Status of the Child Born Outside of Marriage in Nova Scotia (1995), in recommending the abolition of all remaining legal distinctions between children based on birth status, has proposed the removal of a significant legal disadvantage associated with cohabitation relationships. The Commission in the context of its *Final Report From Rhetoric to Reality Ending Domestic Violence in Nova Scotia* (1995) also recommended extending the matrimonial home provisions to cohabitees. In its *Final Report* on *Reform of the Laws dealing with Adult Guardianship and Personal Health Care Decisions* (1995), the Commission recommended that a person's spouse or "partner" have a right to be appointed a statutory proxy to make health care decisions for a person not possessing the capacity to make them personally. "Partner" is defined in the draft *Advance Health Care Directives Act* as "a person of the same or opposite sex with whom the person has lived for at least 1 year and with whom the person has a close personal relationship that is of primary importance to both of them".

Those who view favourably the inclusion of cohabiting couples under the *Act* may nonetheless have concerns about the appropriateness of applying the principle of "deemed equal contribution" that currently exists for married couples. Where parties have committed themselves in marriage, with the knowledge that this is the rule unless they agree otherwise, the application of this principle can be justified. Is it right to apply it to parties who have not made this commitment? Is a presumption of equal sharing appropriate? Should the application of the *Act* to unmarried parties perhaps be left more discretionary? The argument is superficially attractive, but it quickly encounters a number of problems. First, codifying a right to property division but leaving the actual proportion to be calculated on the basis of each party's "contribution" to the relationship would operate a change only in the form, not the substance, of the current law, which the Commission has found to be unclear and difficult to apply in practice. The Australian statutes, for example, give the court a wide discretion to "adjust" the property of cohabitees. The academic literature has been very critical of the usage of this discretion and has recommended the institution of a presumption of equal sharing. Second, the division of property at the end of a relationship is by definition a retrospective process, and people's views of any original intentions, perhaps relating to a much earlier period, are less relevant. It seems odd to apply a presumption of equal sharing to a divorcing couple who have been married two years but to not to apply it to an unmarried couple who have cohabited for twelve. Any argument that cohabiting couples do not expect to have to share their property equally is really an aspect of the autonomy issue, which was discussed above.

The Commission appreciates that the inclusion of same sex cohabiting couples within the regime of a new draft *Domestic Property Division Act* may seem to some people to undermine traditional family values in this province, but very few comments to this effect were received by the Commission as a result of the *Discussion Paper.* In fact, a number of comments supporting such a change were received. Given the view expressed earlier that the *Matrimonial Property Act* is primarily a set of default rules for the resolution of property disputes at the termination of a marriage, and has little to do with promoting marriage as

such, in the Commission's opinion traditional family values will not be affected one way or the other by the inclusion of same sex couples under the proposed *Act*.

In reaching its recommendation in this section, the Commission notes that it is consistent with an emerging trend to discourage the drafting of legislation which discriminates on the basis of marital status or sexual orientation.[45]

The Commission recommends that:

1. **The draft *Domestic Property Division Act* apply to both married and cohabiting couples, including same-sex couples.**

2. **The draft *Domestic Property Division Act* allow couples to "opt out" in a domestic contract subject to the existing powers of the court to review domestic contracts.**

(b) definition of relationships covered by the *Act*

Having reached this conclusion as to which relationships should be covered under the proposed *Act*, a related question that arises is how to determine when the relationship of cohabitation is established. The application of the law to legally married people is reasonably simple in that marriage is a legal change of status which takes effect on a particular day. A more difficult issue arises with respect to cohabitation arrangements.[46] Initially, the Commission proposed a definition which required cohabitation and community recognition of "an intimate relationship of some permanence," or cohabitation in such a relationship accompanied by parenthood.

Responses to this proposal were almost uniformly negative. Lawyers were concerned about the possibility of conveyancing problems with respect to real property, and members of the public were concerned that such a definition was too subjective and would not be readily understood. Almost all commentators suggested that a minimum period of cohabitation be established, both because it was easier to understand and for consistency with other provincial statutes.

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[45] *Egan and Nesbit* v. *Canada* (1995), 182 N.R. 161; *Miron and Valliere* v. *Trudel* (1995), 181 N.R. 253; *M.* v. *H.* (1996), 27 O.R. (3d) 593 (Gen. Div.), affirmed by Ontario Court of Appeal, [1996] O.J. 4419, December 18, 1996; *Human Rights Act*, R.S.N.S. 1989, c.214.

[46] The courts in Nova Scotia have considered the definition of common law spouse a number of times: see *Soper* v. *Soper* (1985), 67 N.S.R. (2d) 49 (C.A.); *K.B.* v. *H.K.* (1988), 85 N.S.R. (2d) (Fam. Ct.); *Eisnor* v. *Jensen* (1990), 98 N.S.R. (2d) 8 (C.A.).

The Commission believes that the determination of when the draft *Act* applies should be related to the purpose of extending it to include cohabitees. As stated earlier, the primary reason for inclusion is based on functional similarity to married couples, and on the likelihood of economic dependency by one partner on the other. The three-year period of cohabitation required by the *Pension Benefits Act* is presumably motivated by such concerns. However, the one-year cohabitation test used for purposes of family maintenance has been in place for over 25 years, is used in a number of other statutes, and people are generally familiar with it. One year is also the period used in many federal laws such as the *Income Tax Act*.[47]

The Commission was of the view that the recent legislation of the Australian Capital Territory came closest to capturing its idea of an appropriate definition of parties who should be covered by the *Act*. The Australian law refers to "a personal relationship (other than a legal marriage) between two adults in which one provides personal or financial commitment and support of a domestic nature for the benefit of the other." This is no more than a codification of some of the factors which Nova Scotia courts already use to establish whether a couple has been cohabiting for the purposes of various provincial laws. To this the Commission would add the requirement that the parties have cohabited for at least one year.

The Commission recommends that:

1. The draft *Domestic Property Division Act* should apply to:

(a) persons who are legally married; and to
(b) two adults in a personal relationship where one provides personal or financial commitment and support of a domestic nature for the benefit of the other, where the parties have cohabited for a period of at least one year.

5. Division of shareable assets

Consistent with its recommendations regarding the application of the draft *Domestic Property Division Act*, the Commission suggests that a new term, "shareable assets", be used instead of "matrimonial assets."

At present, all assets of a married couple which fall within the definition of "matrimonial assets" are subject to a presumption that they will be divided equally unless there is some basis for an unequal division under s. 13 of the *Matrimonial Property Act*. Assets are divided

[47] R.S.C. 1985, c.1. (5th Supp.).

on the happening of one of the "triggering events" set out in s. 12 of the current *Act*: divorce; death; annulment of the marriage; or separation where there is no reasonable prospect of resuming cohabitation. "Matrimonial assets" are defined in the *Act* to include all assets of a married couple, whether acquired before or after marriage, unless they are specifically excluded by the *Act*. Before commenting on whether specific inclusions or exclusions need to be reconsidered, the Commission believes it is necessary to consider the philosophy which underlies the division of assets.

(a) the theory behind equal property division

In its *Discussion Paper* the Commission outlined two models for dealing with the division of assets, the "economic partnership" model and the "integrated" model, and called for comment on which was more desirable. The first model, the economic partnership approach, is the one used in most provinces in Canada. The second model is the one currently found in the Nova Scotia *Matrimonial Property Act*, which the Commissioners have called the integrated model for the purposes of this *Report*. These two approaches share some features but diverge in other respects, and the philosophies upon which they are based are somewhat different.

Under the first model, marriage is treated as an economic partnership of a particular kind. Different kinds of contributions to the "common enterprise," whether in the form of homemaking services, child-rearing, or employment outside the home, are seen by the law to be equal contributions to the partnership. These contributions entitle both parties to share equally the increase in value of assets built up by the parties over the course of the marriage. The value of assets owned by either spouse on the date of marriage is excluded, although any increase in the value of those assets is shared, as is the increase in value of any exempt assets such as gifts and inheritances. It is value which is shared, rather than assets, and although unequal divisions are possible, the circumstances justifying them are strictly limited.

The second model views marriage as a specific social institution to which the partnership model is appropriate only in certain respects. The *Matrimonial Property Act* shares a number of features which characterize the economic partnership model. For example, the preamble recognizes the contributions of spouses to a marriage to be equal, no matter how they are provided. The *Act* also presumes equal sharing of all non-exempt assets. On paper, the discretion to make an unequal division is broader in Nova Scotia, but in practice it resembles that found in other provinces. However, the Nova Scotia *Act* also contains features which distinguish it from the economic partnership model. It is based on a sharing of assets rather than their increase in value. It includes in a division all non-exempt property owned by either spouse at the date of marriage, including pension entitlements built up at that time. The *Act* treats spousal relationships as special units of economic welfare because of the economic interdependence which arises in marriage. This fact justifies treating as shareable certain assets which would not be subject to division in an ordinary business partnership.

The Commission received comments supporting both the economic partnership model and the integrated model, and some people suggested new approaches, such as using a formula to calculate entitlement based on the number of years a couple has stayed together. In general, comments from lawyers and legal associations preferred to maintain the current approach to the division of assets contained in the *Matrimonial Property Act*, largely because it has worked well in practice. The Family Law Section of the Canadian Bar Association, for example, strongly supported the existing model. Members of the public were somewhat divided, and a number of comments expressed the view that dividing assets owned by people prior to entering a relationship was unfair. The Commission notes, however, that such assets can be excluded by contract or under s. 13 in appropriate cases, which will normally involve short relationships.

The economic partnership approach, while perhaps appearing more "fair" in the abstract, has tended to involve frequent litigation in other provinces over the precise mode of evaluating assets. It also relies heavily on the testimony of expert appraisers, which can be expensive.[48] While this may be justified in the case of business assets, it is inappropriate in the large majority of cases that arise. With regard to the inclusion of pre-marital assets under the *Matrimonial Property Act*, in many cases, particularly if the parties are young, there will be few such assets. In those cases where there are substantial pre-marital assets, parties should consider using domestic contracts if they do not wish those assets to be shared. The Commission has heard that such contracts are becoming more frequent in the case of second marriages.

The Commission was somewhat divided in its view on which model was preferable. Some Commissioners preferred to adopt the economic partnership model, on the basis that it is more consistent with the underlying theory of asset division and the expectations of most people. Given the recommendations made below on sharing the increase in value of business assets, it was felt by some that retaining the integrated model for other assets was confusing and inconsistent. There was also a concern that some of the other changes recommended would result in more frequent recourse to unequal divisions by the court, with unfortunate consequences for the overall certainty, predictability and fairness of the system. Over-reliance on unequal division to achieve justice might discourage people from reaching agreement and encourage more litigation.

In the end, the Commission believes that the benefits of an approach which has proved its worth in practice should not be overlooked. The majority of Commissioners were sympathetic to the concerns about inclusion of pre-marital assets but felt, on balance, that the benefits of the economic partnership model were outweighed by the other concerns noted above.

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[48] The Ontario Law Reform Commission, for example, has recently published a 366-page report dealing just with the evaluation of pensions for family property purposes: *Report on Pensions as Family property: Valuation and Division* (1995).

The Commission recommends that:

1. **Consistent with its expanded coverage, the draft *Domestic Property Division Act* should use the terms "shareable assets" and "shareable property" rather than matrimonial property or matrimonial assets.**

2. **The basis for dividing shareable property is the economic interdependence which characterizes the relationship of couples covered by the *Act*. Shareable property should continue to be divided on a presumptively equal basis, and in general, property division should follow the approach currently set out in the *Matrimonial Property Act*.**

(b) treatment of debts

In its *Discussion Paper* the Commission noted that debts are not dealt with in any detail in the *Matrimonial Property Act*. At present the only reference in the *Act* to debts is contained in s. 13, the section which allows the court to make an unequal division of the spouses' property in certain cases. Section 13(b) states that one of the factors which the court can take into account is the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred. The *Act* does not define matrimonial debts, but the courts have generally asked whether the debts were incurred for the benefit of the family unit, whether they were ordinary household debts and, if they were incurred after separation, whether they were necessary to meet basic living expenses or to preserve matrimonial assets with the overall consideration being whether the debts were reasonably incurred.[49] The court has occasionally decided that a debt was personal to one spouse and was not therefore a "matrimonial" debt, as in the case of the legal bill for advice in a custody dispute over the child of a husband's previous marriage.[50] The courts have been able to define genuinely "matrimonial" debts with little difficulty, and the Commission sees no need to add a statutory definition of such debts.

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[49] This paragraph paraphrases the language of Roscoe J. in *Bailey* v. *Bailey* (1990), 98 N.S.R. (2d) 9, (T.D.).

[50] *Davey* v. *Davey* (1994), 133 N.S.R. (2d) 202 (S.C.).

Although the *Matrimonial Property Act* contains no explicit direction to divide matrimonial debts equally, the courts have generally done so. Where the parties have little or no net worth, however, the courts have been willing to look at the respective ability to pay of each party, and to divide the debts unequally. For example, in *Davey* v. *Davey*, the spouses had debts of some $36,000, minimal equity in the matrimonial home, and no other assets.[51] The husband's post-divorce annual income was $50,000, while the wife's was $20,000. The court directed that the husband pay 75% of the debts and the wife 25%, because the wife had been financially disadvantaged by the marriage and did not have the income to manage paying off an equal share of the debts.

Public comment on the treatment of debts agreed with the current practice of the courts, with one qualification. It was observed that the attribution of debts based on post-separation ability to pay should be restricted to those situations where the parties' net worth is at or near zero (as in the *Davey* case, just discussed). In other cases, all debts should be deducted from the total asset value in order to calculate the net worth of the couple. If the court wishes to make an unequal division of the debts, that inevitably means that an unequal division of the assets will be made. Therefore, any unequal division of debts in cases where the couple has a positive net worth should be done only in light of the factors enumerated in s. 13 and not pursuant to some more open-ended discretion on the part of the court. Public response on this issue also indicated a desire to codify the existing practice of the courts, with the modification referred to above. The Commission has attempted to do so in the draft *Act* found at the end of this *Report*.

The Commission recommends that:

1. **The principles regarding apportionment of debts should be codified in the draft *Domestic Property Division Act*. Debts should be subtracted from assets and any net equity shared. The court may make an unequal division of debts only in light of the factors relevant to the making of an unequal division of assets. Where the parties' net worth is at or near zero, however, the court may take ability to pay into account in attributing responsibility for debts.**

(c) valuation date

At present the *Matrimonial Property Act* does not refer to the date on which assets are to be valued for the purposes of division. In general the courts have valued the assets as of the date of separation, but occasionally have departed from this date where the circumstances justified it. The Commission believes that an absolute date for valuation has proven

[51] *Ibid*.

inconvenient in other provinces and that the approach adopted by the Nova Scotia courts should be codified. The Commission recommends that the date of separation should be presumed to be the valuation date under the draft *Act,* but the court may use an earlier or later date where justified by the circumstances.

The Commission recommends that:

1. The valuation date should be stated as the date of separation, but this should be framed as a presumption rather than a rule. The court should be able to use an earlier or later date where circumstances warrant.

(d) unequal division

In its *Discussion Paper* the Commission suggested that the current provision on unequal division be maintained. Under the *Matrimonial Property Act* it is possible to apply for an unequal division of matrimonial assets and a division (equal or otherwise) of non-matrimonial assets. The situations where it is possible for the court to make an unequal division are set out in s.13, which lists thirteen (13) factors which the court may consider in deciding whether an equal division would be "unfair or unconscionable":

> *13. Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors*:
>
> *(a) the unreasonable impoverishment by either spouse of the matrimonial assets;*
> *(b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;*
> *(c) a marriage contract or separation agreement between the spouses;*
> *(d) the length of time that the spouses have cohabited with each other during their marriage;*
> *(e) the date and manner of acquisition of the assets;*
> *(f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;*

(g) the contribution by one spouse to the education or career potential of the other spouse;
(h) the needs of a child who has not attained the age of majority;
(i) the contribution made by each party to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
(j) whether the value of the assets substantially appreciated during the marriage;
(k) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse;
(l) the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring;
(m) all taxation consequences of the division of matrimonial assets.

Although in theory, s. 13 permits a fairly wide judicial discretion in fact, an unequal division is generally difficult to obtain.[52] The Commission sought comment on whether the draft *Domestic Property Division Act* should include (1) the same discretion regarding unequal division; (2) more discretion on the part of judges; or (3) less discretion. In principle, the Commission felt that it was important to provide for some discretion to account for the circumstances currently covered, with the exception of the factors referred to in sub-sections (f), (i) and (k). Given the Commission's recommendation to include business assets as shareable property, s. 13(f) will no longer be required. The role of s. 13(i) has never been clear, since it directs the court to consider as a factor justifying an *unequal* division, considerations which the preamble states to be the basis for an *equal* division. This provision should be removed. The Commission received comment to the effect that the definition of "child" in s. 13(h) should not be restricted to a child under the age of majority, since many children now reside with and remain economically dependent on their parents past the age of majority. The Commission recommends that the new definition accord with that contained in the *Divorce Act.*[53] In accordance with the Commission's recommendation to extend the *Act* to unmarried parties, s. 13(d) should be redrafted to read "the length of time that the parties have cohabited with each other." This will also make clear that any period of pre-marital cohabitation should be considered when dealing with married parties.

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[52] *Tibbetts* v. *Tibbetts* (1993), 119 N.S.R. (2d) 26 (C.A.). The two terms are used disjunctively ("or") but the courts have routinely insisted that the circumstances giving rise to an unequal division must be "unconscionable," rather than merely "unfair." See W.R.E. Goodfellow, "Nova Scotia," in J.G. McLeod and A.A. Mamo, eds., *Matrimonial Property Law in Canada*, vol. 1 (1993). Justice Goodfellow's contribution is updated to April 1996.

[53] Bill C-41, passed by the House of Commons on November 18, 1996, amends the definition of "child of the marriage" in s.2 of the *Divorce Act* to mean a child who is under the age of majority as determined by the law of the province where the child ordinarily resides and who has not withdrawn from parental charge, or who is over the age of majority and under parental charge but unable, by reason of illness, disability, pursuit or reasonable education or other cause, to withdraw from their charge or to obtain the necessaries of life.

There is one situation where the courts routinely make what is technically an unequal division even though the requirement of unconscionability may not be met. Where sale of the matrimonial home is postponed to allow any children of the marriage to complete their education, the Court of Appeal has said that this constitutes an unequal division in that it suspends the right of the non-custodial spouse to benefit immediately from the half-share in the equity which would be realized on a sale.[54] The Commission agrees that the goal of providing some stability for the children is an important one which should be considered where postponement of the sale of the home is economically feasible. The Commission believes that the power to postpone sale for such purposes should be part of the court's ordinary powers in dealing with the home, and should not be dealt with under the provision for unequal division. The Commission realizes that there may be difficulties where custody of the children changes after the date of the order, and with regard to the maximum length of time that a sale could be postponed. Rather than imposing arbitrary rules, the Commission believes it is appropriate to leave the exact limits of the postponement power to judicial interpretation.[55]

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[54] *Nolet* v. *Nolet* (1985), 68 N.S.R. (2d) 370 (C.A.); *Blackie* v. *Blackie* (1993), 126 N.S.R. (2d) 224 (C.A.).

[55] Commissioner Forgeron dissented with regard to the proposed elimination of ss. 13(f) and 13(i) [see below, footnote 60] and wished to see a further provision added to the unequal division section of the proposed *Act*. The text of her dissent follows:

I concur with the comments of the majority of the Commission respecting the exclusion of gifts and inheritance from the concept of shareable property subject to one exception which I would like to see addressed in the unequal division section of the *Act*.

I agree that in theory inheritance and gifts should be exempt from the definition of shareable assets. Clearly such assets have little to do with the marriage, the roles assumed or the sacrifices made. One usually inherits because of a connection to the testator, often a family member.

I do acknowledge, however, that in certain circumstances the nonowning spouse should be able to receive a portion of the inheritance. Social commentators have noted a trend in families to have parents and in-laws reside with them as the parents age and require care. In these circumstances, spouses may provide food, shelter, care and assistance of a significant nature to in-laws and other family members. Such care and assistance may be done without reimbursement of any form. Such care is often done out of love or a sense of family responsibility. Such care occasionally results in economic sacrifice, a sacrifice which has little significance unless separation occurs.

In these circumstances, and upon strong evidence to support such a claim, the nonowning spouse should have the right to a portion of the inheritance as would be just according to the evidence presented. The presumption would continue to exist that such assets are nonshareable. A claim would only result in unusual cases where it would be unconscionable or inequitable not to divide all, or a portion, of the inheritance pursuant to the unequal division section of the *Act*.

The Commission recommends that:

1. **The draft *Domestic Property Division Act* should continue to provide for an unequal division of assets in specified cases. The list of factors to be considered should be amended in certain respects.**

2. **The court should be empowered to postpone the sale of the shared home to permit the completion of the reasonable education of any child of the relationship, without it being shown that the conditions for an unequal division are present.**

(e) exempt assets

There are presently seven types of exempt property under s.4 of the *Matrimonial Property Act:*

1. gifts, inheritances, trusts or other settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;
2. an award or settlement of damages in court in favour of one spouse;
3. money paid or payable to one spouse under an insurance policy;
4. reasonable personal effects of one spouse;
5. business assets;
6. property exempted under a marriage contract or separation agreement; and
7. property acquired after separation (unless the spouses resume cohabitation).

The Commission noted in its *Discussion Paper* that the exclusions listed under 4 (personal effects), 6 (property excluded under a marriage contract) and 7 (property acquired after separation) were not in need of reform and should be maintained in a new law. The remaining exemptions raise broad policy questions, and are treated differently in various provinces. The Commission proposed a number of changes to the list of exemptions, and received a great deal of commentary on the subject. In general, public response largely supported the proposals made in the *Discussion Paper*. The following distills the Commission's discussion, public comments, and the Commission's conclusions on each point.

The Commission recommends that:

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

(i) gifts and inheritances

The *Matrimonial Property Act* exempts from sharing "gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children." In other words, gifts and inheritances are normally excluded from division, but if the recipient spouse makes these assets available for use by the family, then they become shareable assets to that extent. If, for example, a spouse inherits a cottage property and it is used at least once for a family vacation, it will become a family asset. If the cottage is rented out to third parties and the income kept in a separate bank account in the name of the inheriting spouse, it will likely remain exempt from sharing, although it can be taken into account under s.13[56]; alternatively, the spouse may have a claim under s. 18 if he or she has contributed money or labour to the maintenance or improvement of the asset in question.

In its *Discussion Paper* the Commission proposed two alternatives for the treatment of gifts and inheritances. The first was to maintain the current exemption in some form and the second was to end it. Comments received from the public were almost unanimously in favour of retaining the exemption, and most were in favour of strengthening it in some form. It was pointed out that most donors and testators do not wish to see gifts to a child shared with an ex-spouse. Even if the *Act* were to include gifts and inheritances as shareable property, donors would be able to avoid the legislation by using devices such as discretionary trusts. The Commission was advised that this is already done to some extent because the exemption in the current *Act* is relatively "leaky," but that such practices would increase significantly if the *Act* sought to include gifts and inheritances in principle.

The current provision tries to strike a balance between the assumption, recognized in most provinces, that gifts and inheritances are usually meant to be personal to the recipient or to be passed on to the recipient's children; and the reality that certain tangible gifts may be regularly used by family members (or in the case of money, used to acquire what would

[56] It should be noted that where a gift or inheritance has been used in the purchase of a matrimonial home, the recent practice of the Nova Scotia courts has been to give the money back to the inheriting spouse pursuant to an unequal division where separation has occurred relatively soon after the receipt of the funds: see *MacIsaac* v. *MacIsaac* (1996), 150 N.S.R. (2d) 321 (C.A.) (three years); *Zervobeakos* v. *Klinakis* (1996), 150 N.S.R. (2d) 65 (S.C.) (four years).

otherwise be shareable assets), therefore giving rise to reasonable expectations that such assets will be shared. The Commission is of the view that the two interests must be balanced, but that the existing principle of exemption has perhaps been too diluted.

One particular problem which was brought to the attention of the Commission was the difficulty of knowing, under the existing legislation, exactly when the exemption for inherited property is lost. For example, if a spouse inherits $50,000, but only uses the interest on that sum for family purposes, does the capital sum remain exempt, or is it too shareable? The Commission agrees that this type of situation is not dealt with clearly enough under the existing law. In keeping with the general tenor of the responses on this question, the Commission recommends that the exemption be construed broadly and the exception to the exemption should be construed narrowly. A new provision dealing with gifts and inheritances should state clearly that such property is exempt and will be considered shareable only to the extent that it is actually used for domestic purposes. A share in an otherwise exempt gift or inheritance could still be awarded pursuant to the court's power to divide property which is not a shareable asset, now contained in s. 13.

The Commission recommends that:

1. Gifts and inheritances should remain in principle excluded from division, and the exemption should be strengthened. In particular, it should be stated that gifts and inheritances used by the parties or their children for domestic purposes will lose the exemption only to the extent that they are actually used for such purposes.

(ii) an award or settlement of damages in court in favour of one spouse, except where the money is paid or payable in respect of a matrimonial asset

In its *Discussion Paper,* the Commission was unresolved as to the status of this exemption, which is aimed principally at personal injury damage awards. On the basis of comments received, and its own further consideration, the Commission believes that these awards should remain exempt property, with the exception of any amount which refers to lost wages earned during a period of cohabitation. Such awards are meant to compensate for non-pecuniary loss which is purely personal to the party in question, and for lost income-earning capacity, which in the context of property division will usually refer to a period after the termination of the relationship.

(iii) money paid or payable to one spouse under an insurance policy, except where the money is paid or payable in respect of a matrimonial asset

In its *Discussion Paper*, the Commission noted that the original intent of this section was unclear, and that it has received little judicial interpretation. Where an insurance policy is taken out to guard against risks to property, the proceeds will follow the status of the property. If the asset was exempt, the proceeds will be exempt, while if the asset was shareable, the proceeds will be shareable. Insurance policies may be taken out, however, for a variety of reasons unconnected with risks to property: accident insurance and disability insurance, for example. Accident and disability insurance benefits are presently excluded from sharing under s.4(1)(c), presumably according to the same rationale which allows personal injury awards to be exempted under s.4(1)(b). The Commission in its *Discussion Paper* called for comment on whether this exemption should be maintained. Public comment was to the effect that the exemption should be maintained, and the Commission agrees.

The argument in favour of non-division is similar to that regarding awards of damages. In addition, these kinds of payments are normally personal to the individual: they are not a transferable form of property. The Commission considered the argument in favour of division as based on treating the household as a unit of economic welfare, but has concluded that the current exemption should be maintained. It should also be extended to disability pensions, which the Commission understands are treated as divisible assets at present. There is no rationale for sharing disability benefits when they are paid as a pension, but excluding them from sharing when paid under an insurance policy. The Commission notes that accident and disability benefits are normally paid periodically rather than as a lump sum, and may be more easily categorized as relating to maintenance rather than property division. Amounts received under a disability pension would also be considered in any application for maintenance. When the recipient of a disability pension reaches normal retirement age, however, the pension should lose its exempt status.

The Commission recommends that:

1. Personal injury settlements, accident and disability insurance benefits should remain exempt property under a new *Act.* Disability pensions should also be considered exempt property until the recipient reaches normal retirement age.

(iv) business assets

In its *Discussion Paper*, the Commission suggested that the current exemption for business assets should not be maintained. Public responses were received both for and against this suggestion, but most, including the Canadian Bar Association, Family Law Section, supported the Commission's view. Four provinces presently include business assets as matrimonial property: Alberta, Manitoba, Ontario, and Saskatchewan. The Maritime provinces, British

Columbia, Newfoundland and Quebec do not. Ontario initially excluded business assets from its definition of matrimonial assets, but included them in 1986. There is no doubt that the line between business assets and matrimonial assets has been a difficult one for Nova Scotia courts to draw. Without going into a lengthy discussion of the various case authorities, it is clear that there are many decisions which are difficult to reconcile.[57] In particular, the courts have tried to draw a line between assets held for long-term investment or appreciation, which tend to be characterized as providing security during retirement and are therefore matrimonial assets, versus assets held for short-term investment or speculation, which are treated as business assets and excluded from division. Any such classification, relying on intentions of the parties which may not be well-formulated at the outset and which may change over time or which may not be shared by both spouses, will give rise to problems of application.

It should be noted that the exemption of business assets applies only to those situations where the business is owned by one spouse. Where the spouses run a business together under a formal or informal contract of partnership, they are co-owners as of right and the current exempt status of business assets is no bar to the recognition of interests in both spouses. Nor would the recommendations in this Report about valuation of business assets change this state of affairs.

The current exclusion of business assets is difficult to justify according to the basic theory of property division. Under the current *Act*, each spouse is entitled to one-half the assets built up over the marriage, except exempt assets. The general principle behind exemptions is that the property in question is considered to have been acquired in a manner extraneous to the marriage relationship, or to be purely personal to one spouse. Business assets do not satisfy either of these tests, since in most cases the business of one or both spouses will very much determine the way in which a couple lives. As well, any increase in the value of a business during a marriage may be viewed as the product of joint effort. Traditionally it has been the domestic services provided by one spouse which have allowed the other spouse to maintain a business. With regard to any other asset, the *Act* states that such contributions by the spouses are deemed to be equal and to justify an equal division of the matrimonial assets. Yet the *Act* goes on to exclude business assets from division, which is illogical.

Ending the exempt status of business assets would also end an anomaly which exists under the current system. At present, the pension entitlements earned by an employed spouse during marriage are shareable, but the other spouse's business assets are not. This does not seem to represent either formal or substantive equality. Logically, either both should be shareable or neither should be shareable. For these reasons, the Commission recommends that the exempt status of business assets should be ended. All business assets, whether owned before or after the commencement of a relationship, should be treated as shareable assets, subject to the remarks on valuation made below.

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[57] *Lockyer* v. *Curry* (1994), 129 N.S.R. (2d) 50 (S.C.); *Hebb* v. *Hebb* (1991), 31 R.F.L. (3d) 401 (N.S.C.A.).

Ending the exemption poses a practical issue of how such assets are to be shared. At present, the jurisdictions which provide for business assets to be shared have adopted a "sharing of value" rather than "sharing of assets" approach. This means that no property rights are created in one spouse with regard to business assets held by the other spouse. This is important because it avoids what may be potential disruption for a business if a new "partner" is suddenly part owner of an enterprise. Such an involvement may result in ending the business, thereby defeating the purpose of the division. In most provinces, the claims of the non-business owning spouse are resolved by sharing the increase in value of the business over the marriage, rather than sharing the business itself. A cash payment is the usual way of resolving such claims. Such an approach means that small businesses, which are often used as income vehicles and possess relatively little capital value, are not unduly burdened.

Some Commissioners were uneasy about sharing only the increase in value of the business over the course of the relationship. Although accepting the need for a valuation approach to business assets, it should be noted that there was some concern within the Commission that this approach may be unduly restrictive with regard to the party who did not own the business.[58]

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[58] Commissioner Forgeron dissented on this point. The text of her dissent follows:

I am regretfully unable to accept the view of the majority of the Commission respecting the treatment of business assets. Although I am cognizant of their position, I nonetheless believe that there is no reason to treat business assets any differently than other shared assets.

I am highly supportive of the integrated model of property division. In my practice, I have found that this model more accurately describes the relationship which evolves in a marriage or other long term union. Marriage is not an economic partnership.

Marriage creates a union wherein both parties assume roles and obligations which are not mirrored in any other area of life. One party, most often the woman, willingly sacrifices career and education, for the benefit of the family. Such sacrifice may occur when a spouse takes maternity leave, remains at home to be a full time home maker, works outside the home on a part time basis, or foregoes career advancement or educational opportunities to ensure that the needs of the family are met. The family benefits immensely from these sacrifices. Many would argue that society likewise reaps a benefit given the perceived stability flowing to the children of such unions.

In light of these sacrifices, it is difficult to justify, from my perspective, why the value of business assets should be afforded a different treatment than other shareable assets. The philosophy behind the division remains the same. The sacrifices, obligations and unique economic interdependence remains the same.

It is easy to envisage the inequities which can develop with the suggested treatment of business assets. The following example illustrates my point. The husband and wife marry. At the time of marriage, the husband owns a small business which has an equity of approximately $50,000.00. The wife is a teacher. Both work in their respective roles after the marriage. The wife assumes more household duties as the husband puts in late hours at his business. Children are born. The parties determine that the family would benefit if the wife remained at home on a full time basis. The husband's business is making enough to support the family. The wife quits her employment and cashes in her pension, including pre-marriage funds. These are applied to family expenses. The children grow. The husband continues to work late hours as he owns a small business. The wife assumes a disproportionate share of the household and child care duties. The family unit prospers. The children attend university and become independent. The wife is able to find casual, part time employment at this juncture in her life. There are no permanent, full time jobs available to women of her age who have been out of the work force for so long.

Then after 25 years of marriage, the live of the parties take an unexpected twist. A divorce is commenced. Due to the downturn in the economy, the business is now only worth $50,000.00. The wife therefore gets nothing from

The decision to adopt a different mode of sharing business assets means that such property must be defined in the draft *Act* and differentiated from other forms of shareable property. The Commission believes that the dominant approach in the case law has been to restrict the category of business assets to property which is used to generate income or profit in an entrepreneurial manner. As Justice Hallett of the Court of Appeal observed recently, "generally speaking, an investment portfolio of stocks, bonds, GICs, mutual funds or the like does not involve the employment of capital for the purpose of generating income in an 'entrepreneurial sense'", and therefore should not be treated as a business asset.[59] The Commission has aimed to codify this approach to business assets in the draft *Domestic Property Division Act.*

The Commission recommends that:

1. The exempt status of business assets should be ended. All business assets, whenever acquired, should be considered shareable assets. A majority of the Commission recommends that the increases in the value of the assets over the course of the relationship should be divided, rather than ownership rights in the business itself.

(v) a reasonable amount of furniture and personal effects necessary for the maintenance of a child of the relationship

This new exemption was suggested by the Commission in its *Discussion Paper*. It is intended to respond to the situation where furniture necessary to the care and maintenance of a child or children is treated as an asset of the custodial parent, which means that it is treated as the property of that parent and subject to equal division. The result is that the value of the

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the business despite the sacrifices she has made.
This situation is not unique. There are many divorces being commenced after years of marriage in situations similar to the one described above. Divorce is not restricted to short term marriages. It would be unjust to suggest that wives (or husbands for that matter) in these situations are being appropriately compensated by being excluded from the value of the pre-marriage business asset. After 25 years, the distinction between pre-marriage and post-marriage values becomes unproductive.
If we truly recognize that work within the home is as valuable as other forms of work, then clearly there should be no distinction in the treatment of the shareable assets, including business assets.
It is therefore my suggestion that the value of the business assets be divided upon the same terms and conditions as all other shareable property. In the alternative, some form of protection is essential for spouses who find themselves in this position. The unequal division section of the *Act* should be crafted to deal equitably with the above scenario, which is not unique or atypical in today's divorce climate. Specifically sections 13 (f) and (i) should be retained and expanded. They should not be eliminated.

[59] *Tibbetts* v. *Tibbetts* (1993), 119 N.S.R. (2d) 26, at p. 33.

custodial parent's property can be unrealistically inflated. A number of judges deal with this problem at present by ordering an unequal division of household furniture in favour of the custodial spouse.[60] This suggestion will have the same result. Public response was generally favourable.

The Commission recommends that:

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

6. Rights in relation to the shared home

(a) language

Consistent with its recommendations regarding application of the draft *Domestic Property Division Act* to cohabiting couples, the Commission recommends that the term “shared home” be used, instead of "matrimonial home."

(b) exclusion of leaseholds

In its Report *From Rhetoric to Reality: Ending Domestic Violence in Nova Scotia (1995),* the Commission recommended that the *Matrimonial Property Act* be amended to include leasehold premises within the definition of matrimonial home, and the Commission repeats that recommendation here in connection with the draft *Domestic Property Division Act*. Under section 3(1) of the *Matrimonial Property Act* a matrimonial home is defined as "the dwelling and real property occupied by a person and that person's spouse as their family residence and in which either or both of them have a property interest other than a leasehold interest." Nova Scotia and Newfoundland are the only provinces in Canada which do not permit a leasehold interest to qualify as a matrimonial home. For purposes of property division, the exclusion of leasehold premises is probably not significant. Long residential leases are not common in Canada, so that it is unlikely that a spouse would want to claim half the capital value of the unexpired portion of such a lease.

However, the exclusion of leases from the *Act* also means that the provisions of ss. 6-11, which provide significant protection for a spouse who may not have formal title to the matrimonial home, are not available where the home is leased. In cases where the names of

[60] *Clancey* v. *Clancey* (1991), 99 N.S.R. (2d) 147 (T.D.); *MacDonald* v. *MacDonald* (1994), 126 N.S.R. (2d) 17 (S.C.).

both spouses are on the lease, there will be no problem: each will have an equal right to possession under the lease, and will not be able to evict the other or terminate the lease without the consent of the other. In the case where one of the spouses was a sole tenant before marriage, however, and the spouses continued to occupy the same premises after marriage without changing the lease, the other spouse currently has none of the protections contained in ss. 6-11. The spouse who has the legal right to the lease may also give notice to quit, and may assign or sublet the premises without notifying the other spouse. In cases where couples separate and are not able to negotiate with each other on these issues, this can create problems for either of the spouses since the spouse whose name is on the lease is still responsible for the rent payments and is in a position to affect the other spouse's "home."

The acceptance of this recommendation will require some consequential changes to residential tenancies law. In some provinces courts have awarded possession of leased premises to a spouse whose name is not on the lease. Both Alberta and Saskatchewan give the court power to deem that spouse a tenant for the purposes of the lease in question.[77] The Commission recommends that the court be enabled to deem a party to a relationship covered by the *Act* a tenant, and to make that party principally liable to the lessor for the rent. The lessor should be able to proceed secondarily against the original tenant, who should have a right of contribution against the new tenant. It should be stated that the new tenant should not have any greater rights than the original tenant with respect to the lessor.

(c) orders for exclusive possession in cases of domestic violence

The Commission recommended in its *Final Report From Rhetoric to Reality: Ending Domestic Violence in Nova Scotia* (1995) that the *Matrimonial Property Act* be changed in two ways: "first, domestic violence should be considered when granting an order for exclusive possession of the matrimonial home; and second, orders for exclusive possession of a shared residence should be available to all common law couples, including same sex couples."[78] The first recommendation is already the law in several provinces, notably Alberta, British Columbia, Ontario and Saskatchewan, and the Commission's position is consistent with the current trend in Canadian legislation. The second recommendation is addressed by the fact that the draft *Domestic Property Division Act* covers cohabiting couples.

In its *Discussion Paper*, the Commission raised two possible means of dealing with allegations of domestic violence in the context of applications for exclusive possession of the shared home. One was the creation of a new civil remedy which would allow an *ex parte* application to be made in such cases, and the other was through an adaptation of the existing Civil Procedure Rules.

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[77] *Matrimonial Property Act*, R.S.A. 1980, c.M-9, s.24; *Matrimonial Property Act*, S.S. 1979, c.M-6.1, s.5(1)(j).

[78] At 102.

The Commission also called for comment on whether the inclusion of domestic violence as a factor in such proceedings might be seen as a step backward – a return to the concept of fault in divorce. No commentator raised this specific concern, but one did express concern about the prospect of a new civil remedy providing a "reward" for a party alleging domestic violence. It was suggested that such a remedy might provide an incentive to litigate immediately rather than negotiate upon separation. The Commission appreciates that the creation of a new civil remedy is accompanied by some risk of abuse or misuse. The same, however, might be said of many new legal remedies. At a time when all actors in the legal system are being encouraged to take all possible steps to prevent and remedy domestic violence, it seems inappropriate not to question whether better protections might be put in place with regard to the primary locale of much domestic violence - the home itself.

After some consideration, the Commission recommends that a new civil remedy be used in cases of domestic violence. In cases where domestic violence is alleged to be an issue, an *ex parte* application for exclusive possession of the shared home could be made, returnable within 72 hours. An *ex parte* application is one which does not have to be served on the other party, and it is used only in situations where urgent relief is required. If the court finds that the application is well founded, a day should be set aside for hearing the other side's case, at which time the court will decide whether an interim order for possession should be made. This order would govern the situation until the filing of an application for division of assets under the *Act* or until such other time as the court should specify.

Under section 11(4) a court may make an order for possession of the matrimonial home where other provision for shelter is not adequate in the circumstances, or it is in the best interest of a child to make such an order. The new draft law adds domestic violence to this list of factors which the court must take into consideration in deciding whether to make an order. Most respondents supported this change as they believed that it was consistent with what the court was already doing.

A related issue raised in the *Discussion Paper* was whether the new *Act* should contain penal sanctions for the violation of an exclusive possession order. There was no support for the addition of such penalties, and the Commission notes that the addition of the civil remedy referred to above in no way affects the continued availability of the criminal law in cases of domestic violence. As with any other court order, the Commission notes that a breach of the order would be subject, in principle, to contempt of court provisions. The Commission suggests that breaches of these orders in the context of domestic violence should be responded to in the same way that the justice system has currently been directed by the Government of Nova Scotia to respond to other incidents of domestic violence: zero tolerance in enforcement.

The Commission recommends that:

1. **The term "matrimonial home" be replaced by "shared home" in a draft *Domestic Property Division Act.***

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

3. **The Commission notes the recommendation in its Final Report *From Rhetoric to Reality: Ending Domestic Violence in Nova Scotia* that domestic violence be considered as a factor to be taken into account as a basis for granting orders for exclusive possession of the shared home, and recommends that an *ex parte* civil remedy be available in such circumstances.**

7. Division of pensions

(a) general principles

As noted in the *Discussion Paper*, pensions are dealt with under two different laws in Nova Scotia, and several modes of division are possible. The Commission suggested that all provisions dealing with the division of pensions on the breakdown of a relationship be located in the draft *Domestic Property Division Act*, and that certain aspects of the division process be clarified. The Commission received several very helpful and thorough comments regarding possible reforms in this area, most of which are reflected in its recommendations.

After initial hesitation in the Nova Scotia courts, the Supreme Court of Canada decided that pensions could be considered matrimonial assets under the *Matrimonial Property Act*.[79] There was considerable confusion, however, about how pension entitlements should be valued, and about the mechanics of the division. Pensions are in some sense an ongoing asset, where there is a need to assign a right to an amount reflective of the length of the relationship. This could be done by valuing the pension during the time of the relationship and then simply paying the spouse in cash the amount to which they are entitled. However, the true value of a pension is only realized when it matures and is then paid out on retirement. To provide someone with a lump sum amount may not truly reflect the value of the pension if received later in life. Until 1988, in Nova Scotia it was not possible for a court to direct division at source of an unmatured pension on marriage breakdown. Therefore, the pension benefit

[79] See: *Lawrence* v. *Lawrence* (1981), 25 R.F.L. 2d 130 (C.A.); *Clarke* v. *Clarke* (1986), 1 R.F.L. (3d) 29 (C.A.). The Supreme Court of Canada in *Clarke* finally settled the question: [1990] 2 S.C.R. 795.

itself was not divided, but it was valued and the member spouse was required to transfer cash or other property to the non-member spouse to acquit the obligation. If marriage breakdown occurred after a pension was being paid out (in pay), the spouse in receipt of the pension could execute a trust agreement whereby he or she agreed to hold a set portion of each payment in trust for the non-member spouse.

As of January 1, 1988, the *Pension Benefits Act* provided a mechanism for the division of pension benefit in an unmatured pension, whereby the non-member spouse would be entitled to a separate pension upon the commencement of the member spouse's pension, or the normal retirement date of the member, whichever was the earlier. A court order including such a division is binding on pension plan administrators, and in effect makes the non-member spouse a member of the plan in some respects.[80] Upon the earlier of the two dates mentioned, the plan administrator will set up a separate account for the non-member spouse, and he or she will begin receiving payments directly from the plan. From that point on, the pension will not be affected by the death of the member spouse, since the separate pension of the non-member spouse will have been calculated using actuarial assumptions appropriate for that spouse (s. 61(4)(e)). For the same reason, the pension of the member spouse will not increase if the non-member spouse dies after beginning to receive a separate pension (s. 61(4)(f)). If the member spouse should die before retirement, the practice is that the non-member spouse's entitlement is preserved, although that is not presently stated in the *Act*.[81] If the non-member spouse dies before receiving the separate pension, his or her estate is entitled "to a refund of the contributions plus interest made in respect of that spouse's proportion of the pension benefit earned during the marriage" (s. 61(4)(c)).

The *Pension Benefits Act* does not allow an immediate "roll-over" of a share of pension benefit from the member spouse's pension plan to an RRSP or other retirement savings vehicle upon marital breakdown. Such a transfer is allowed only in the case where, after the court order but before retirement, the member changes employment. In such cases, the non-member spouse may require that the plan administrator pay the commuted value of that spouse's pension to another pension plan, to a prescribed retirement savings fund, or for the purchase of a deferred life annuity (ss. 61(4)(b) and 50(1)).

There are two general limitations on the power of the court under s. 61 of the *Pension Benefits Act*: it may not award more than 50% of the pension benefit earned during the marriage to the non-member spouse; and it may only consider contributions made during the marriage. This leads to some inconsistency since the *Matrimonial Property Act* does not impose any restriction on the power of a court to order an unequal division. Presumably, then, it may make an order which leaves the member with less than 50% of the value of their pension. The *Matrimonial Property Act* also provides that *all* property of both spouses which

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[80] The *Act* does not actually use the term “limited member”, but it does provide that the non-member spouse is entitled to be provided with such information about the plan as is prescribed by regulation: s.61(4)(h).

[81] Information supplied by the Provincial Superintendent of Pensions.

they own *at marriage* or acquire thereafter, unless specifically exempted, falls within the category of matrimonial assets. In *Dort* v. *Dort*, for example, the Court of Appeal decided that it was wrong for the trial judge to exclude a pension from the division of assets under the *Matrimonial Property Act* solely on the basis that all contributions to it were made before the marriage.[82] The conditions for applying the *Pension Benefits Act* were not met in that case, but the court could still deal with the value of the pension under the *Matrimonial Property Act*.

It is important to realize that the *Pension Benefits Act* mechanism did not replace the kinds of orders which the court could make under the *Matrimonial Property Act*. Those continue to be possible, and in some cases will be the only possible remedy if the conditions for the application of the *Pension Benefits Act* are not met. At present, the parties are free to agree on whichever method suits them. If they are not in agreement, however, and it is possible to deal with the pension under either law, then the courts are not provided with any guidance about which statute to prefer.

It should be noted that many people in Nova Scotia work directly for the federal government or in federally regulated industries such as shipping and communications. The division of their pensions on divorce or separation will be governed primarily by federal law, and the recommendations in this *Final Report* should be understood to relate only to those pensions which are within provincial jurisdiction.

In considering suggestions for reform it is important to understand that pensions are a very special form of property. They are established for the purpose of providing financial security for employees during their retirement years, and there is a strong public interest in ensuring that pension funds remain financially solvent and thus able to satisfy liabilities which will arise over a very extended period of time. It is this public interest which justifies the very extensive regulatory apparatus contained in the *Pension Benefits Act* of this province, and similar legislation in every other province and at the federal level. The public interest in ensuring financial security upon retirement is so strong that members of pension plans are forbidden from dealing with their entitlements as they would with other forms of property. No interest in a pension can be assigned, charged, or given as security, and money payable under a pension plan is exempt from execution, seizure or attachment (ss. 70, 71).[83] The general principle is that money can be withdrawn from a pension plan only in the situations contemplated by the *Act*, and any other form of dealing with such funds is strictly forbidden.

Given the stringent treatment of pension contributions and entitlements under existing legislation, one might question whether pension benefits should be divided at all. When

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[82] (1994), 126 N.S.R. (2d) 313. When remitted to the trial judge, however, an unequal division was awarded which left all the pension benefit with the husband, on the basis that the benefit did not flow from the marriage.

[83] A recent exception is found in the *Maintenance Enforcement Act*, S.N.S. 1994-95, c.6, s.2(d)(iv), which treats pension income as an "income source" which can be garnisheed to satisfy the payment of a maintenance order.

people retire at present, their pensions usually provide them with substantially less income than they had while employed. If such pension rights are divided, clearly the financial security of employed persons during their retirement years will be affected to some extent. The response to this objection is that there is also a public interest in ensuring an equitable sharing of assets upon marriage breakdown. Achieving this goal may require that a spouse who has had the opportunity to acquire the prospect of financial security upon retirement may be required to forego some of that security in order to provide some security to an ex-spouse who might otherwise have had none, or very little. The basic philosophy of the *Matrimonial Property Act* is that each spouse is entitled to an equal share of non-exempt assets regardless of the role which he or she played during the marriage. For many couples, the pension entitlement of one or both spouses will be the primary "investment" (aside from their home) which remains at the end of their relationship.

As the labour force participation of women - and their own entitlement to pension benefits - continues to increase, it is likely that the division of pensions will be a subject of less practical significance in the long term. If, at the termination of a relationship both spouses possessed pension entitlements of roughly equal value, there would be little reason to divide them. However, it is well known that women tend to earn significantly less than men, and that women's employment tends to be found disproportionately in those occupations with few benefits, or in part-time employment where pension benefits often do not exist. For the foreseeable future, the division of pensions will remain of crucial importance.

All provinces now treat the division of pensions upon marriage breakdown as a matter of right rather than need. Given the values involved in the division of pensions, that of ensuring equitable recognition of contribution to a domestic relationship, a change in approach does not seem appropriate, nor was there any public response to the *Discussion Paper* advocating such a change. The Commission's view is that, in principle, pensions should be treated as much as possible like other shareable assets. This means that all contributions prior to the commencement of cohabitation should be considered in an application for division. In order to ensure that pensions are treated like other shareable assets, the Commission has changed its views on two suggestions made in the *Discussion Paper*. One was to the effect that the court be given a discretion to deny division of a pension where the non-member spouse enjoyed a significantly higher net worth than the member spouse because of the ownership of exempt assets. The other was to the effect that any order dealing with a pension leave the member with a minimum of 50% of the pension benefit. Although cases where the member would be left with less than half their pension might be rare, on reflection the Commission was persuaded that the argument in favour of treating pensions differently was not sufficiently strong to justify an exception to the general principle.

At the time when the *Pension Benefits Act* was adopted, it was not clear that pensions were going to be divisible assets under the *Matrimonial Property Act* and it was not contemplated that there were going to be two approaches to dealing with pensions on marital breakdown. There is nothing wrong with spouses having a number of options about how to order their financial affairs after marital breakdown, but at present there are some inconsistencies

between the two *Acts*, as noted above. The Commission believes that the best way to achieve consistency is to locate all the provisions relating to pension division in the draft *Domestic Property Division Act*, as has recently been done in British Columbia.[84] This change was supported by virtually all respondents, including the Acting Superintendent of Pensions for the province of Nova Scotia. It would have the effect of treating pensions like other forms of family property with regard to the period of contribution included, the presumption of equal sharing and the principles applicable to an unequal division.

(b) methods of dividing pensions

Questions arise as to the best way to divide pensions fairly. Currently there are several methods:

(i) valuation and asset trade/cash buyout

This is what presently occurs under the *Matrimonial Property Act.* The pension benefit is evaluated and cash or property to an equivalent value is transferred to the non-member spouse to satisfy his or her right to a half-share. At present there are no guidelines in the *Act* to indicate how the pension benefit is to be evaluated, and court cases have used a variety of approaches to valuation.

(ii) provision of separate pension via benefit split or trust

At present, there are two ways of dividing "in kind" an entitlement in an unmatured pension. A separate pension, payable in the future to the non-member spouse, can be ordered under s. 61 of the *Pension Benefits Act* (see above for a fuller description). As well, under the *Matrimonial Property Act,* it can be ordered that the member spouse hold their interest in the pension partly in trust for the other spouse, with the obligation to pay out the appropriate portion of each payout when the pension commences.

(iii) immediate payout to pension vehicle of non-member spouse

An immediate payout upon marriage breakdown of the calculated value of the non-member spouse's entitlement, into another locked-in pension vehicle, is not permitted at present.[85] Nonetheless, the Commission has heard that such transfers are currently being made by some trust and insurance companies at the request of both spouses. Clearly there is a demand for such an option, which is permitted at the federal level and in several provinces, and is

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[84] *Family Relations Amendment Act*, S.B.C. 1994, c.6.

[85] Such payouts are not permitted with regard to pensions under provincial jurisdiction, but are permitted with regard to certain pensions regulated under federal law. See, e.g. the *Pension Benefits Division Act*, S.C. 1992, c.46 (proclaimed in force 30 September 1994), which permits lump sum transfers on marriage breakdown with regard to contributors under the pension plans of the Public Service, the RCMP and the Armed Forces, among others.

being contemplated in others. Non-member spouses might want to exercise this option if they feel that their own plan is likely to have a better rate of return than that of the member spouse, or simply to have a "clean break." However, at present it is not clear on what basis the commuted value of the non-member spouse's entitlement is being determined. It is possible that in requesting an immediate payout, the non-member spouse is accepting less than he or she would ultimately receive under a benefit split.

(iv) where pension already in pay - division at source

Although the *Pension Benefits Act* contemplates the eventual payment of a separate pension in cases where the member's pension is unmatured, it does not expressly permit division at source in cases where the pension has matured (i.e., where the member has retired and the pension is in pay) by the time marriage breakdown has occurred. The only way to "divide" a pension in pay is to set up a trust agreement, where the member receives the entire periodic payment but holds a specified portion of each payment in trust for the non-member spouse. Anecdotal evidence suggests that some pension plans already do this, in spite of there being no authorization for it under existing law.

It is suggested that the two principal modes of dealing with pensions on the termination of a relationship continue to be valuation and asset transfer/cash buyout, as currently carried out under the *Matrimonial Property Act*, and a deferred benefit split, as currently carried out under the *Pension Benefits Act*. The choice of method should initially be left to the parties, but if they cannot agree, it should be presumed that a deferred benefit split will be ordered, unless it is clearly inequitable or impracticable to do so. This weighting aims to satisfy the policy goal that pension funds be preserved to provide security in retirement, unless there is strong reason to act otherwise. The presumption of a deferred benefit split is in accordance with the current practice of the Supreme Court of Nova Scotia. Justice Bateman has recently stated that, especially in the case of a non-member spouse who has not been employed outside the home, "it is particularly important to preserve future pension entitlement."[86]

Although transfer out upon marriage breakdown may seem like a logical step, it has a number of drawbacks. At marriage breakdown, actual retirement may be a long way off. N.S. Reg. 269/87 requires that the value of a pension entitlement for transfer purposes be calculated as if the member terminated employment on the date of marriage breakdown. Such an assumption means that future salary increases and promotions will not be considered in the calculation. With defined benefit plans, omitting such factors can make a big difference to the amount of pension eventually received.

There is a debate over whether it is appropriate in any case to take such future enhancements into account. The Alberta Law Reform Institute has suggested that it is unfair to the member spouse to take post-separation enhancements into account. The British Columbia Law Reform Commission meanwhile, has refused to allow immediate payouts on the basis that

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[86] *Ray* v. *Ray* (1993), 121 N.S.R. (2d) 341 (S.C.); see also *Taylor* v. *Taylor* (1992), 111 N.S.R. (2d) 91 (S.C.).

there is no fair way to evaluate the non-member spouse's share.[87] The Commission appreciates that the valuation of pensions is a complex topic, but does not believe that the difficulties are insurmountable. The transfer of a non-member's entitlement to another locked-in retirement savings vehicle would not be objectionable if a fair means of evaluating the entitlement were found. The Commission recommends that the Government establish a small working group of experts to review N.S. Reg. 269/87, with a view to establishing an acceptable standard for calculating the value of the pension entitlements of non-members upon breakdown of a relationship. Like the Law Reform Commission of British Columbia, the Commission recommends that future enhancements be taken into account in the evaluation process.

There is little debate about the need for an immediate payout in one particular situation. Where the value of the annual benefit which would be payable to the non-member is below the threshold for administration as defined in s.58 of the *Pension Benefits Act*, the plan administrator should be authorized to pay a cash amount to the non-member instead of administering a benefit split.[88]

Trust arrangements which have evolved as means of dividing pensions in pay leave the non-member spouse vulnerable and pose a number of practical problems regarding income tax and the like. A more convenient arrangement would be to allow division at source, whereby the pension plan administrator would send out two cheques directly to each ex-spouse, having first made the appropriate income tax deductions.

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[87] Alberta Law Reform Institute, *Matrimonial Property: Division of Pension Benefits upon Marriage Breakdown* (1986), pp. 32-33; Law Reform Commission of British Columbia, *Report on the Division of Pensions on Marriage Breakdown* (1992), pp. 47-48.

[88] Such a provision has been recommended by the Ontario Law Reform Commission in its *Report on Pensions as Family Property: Valuation and Division* (1995), p. 228.

The Commission recommends that:

1. **Pensions should continue to be treated as a shareable asset and subject to division.**

2. **The existing options available for pension division on the ending of a relationship should all be located in a draft *Domestic Property Division Act* and pensions should be divided only in accordance with that *Act*.**

3. **Pensions should, as far as possible, be treated like other shareable assets, in particular with regard to the period of contribution included, the presumption of equal sharing and the principles applicable to an unequal division.**

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

5. **A member of a pension plan should be able to pay out the non-member's entitlement to another locked-in retirement savings vehicle where the parties agree.**

6. **With regard to valuation of a pension entitlement for purposes of an asset transfer/cash buyout or a payout to another retirement savings vehicle, an accepted standard for calculating the value of the non-member's entitlement should be adopted by regulation. Future enhancements to the pension plan should be taken into account in the valuation process**.

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

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

8. Rights to property division on death

The failure to address the interaction of the various inheritance rights which arise on the death of a spouse was probably the single biggest drafting failure of the *Matrimonial Property Act*. A surviving spouse may have rights under a will, or if there is no will under the *Intestate Succession Act*, and may also have a right to apply for relief under the *Testators' Family Maintenance Act*, in addition to the rights granted under the *Matrimonial Property Act*. Section 12(1)(d) simply provides that rights under the *Act* are "in addition to the rights that the surviving spouse has as a result of the death of the other spouse, whether these rights arise on intestacy or by will." This provision was probably meant to ensure that surviving spouses were not accorded fewer rights than divorced spouses, but its lack of specificity has proved frustrating.

The main problem with this provision is that it does not specify in what order one should calculate the various benefits. The Supreme Court of Canada clarified this matter in a 1985 case decided under Saskatchewan's *Marital Property Act*,[89] which on this point raised the same problem as the Nova Scotia *Act.*[90] The court stated that where a surviving spouse applied under the *Act*, the first step was to carry out the division of property between the surviving spouse and the deceased spouse's estate. Only when that has been done can the size of the deceased's estate be determined. The ordinary rules of testate or intestate succession can then be applied to whatever assets remain in the deceased's estate.

The Commission agrees with the Supreme Court's approach to this question. It is also of the view that the general principle of s. 12(4) is sound: the surviving spouse should be able to cumulate succession benefits and any entitlement under matrimonial property legislation. Exactly how that cumulation should be effected, however, requires more detail than the section currently provides. A distinction must first be made between testate and intestate succession. If a spouse dies testate, leaving all his or her assets to a surviving spouse, there will likely be no need for an application under the *Matrimonial Property Act*. If the spouse leaves something less than all his or her estate to the surviving spouse, the survivor should be able to receive that interest as well as any share under the *Matrimonial Property Act*. The deceased spouse should have been advised at the time of making the will that the survivor would be able to apply under the *Matrimonial Property Act* as well as taking any interest provided by will. A possible cumulation of the benefits is presumed to have been within the Testators' contemplation.

Should the testator be able to put the surviving spouse to an election? That is, to require that the spouse take either under the will or under the *Matrimonial Property Act*? The Commission believes that a testator should have this facility, which is consonant with the general power of freedom of testation. The testator is in effect making a conditional gift, by saying that not making an application under the *Matrimonial Property Act* is a condition

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[89] S.S. 1979, c.M-6.1.

[90] *Donkin* v. *Bugoy*, [1985] 2 S.C.R. 85.

precedent to taking under the will. In general, any condition may be attached to a testamentary gift which does not contravene public policy. Allowing the testator to put a spouse to an election does not contradict the public policy of the *Matrimonial Property Act*, since the surviving spouse is not prevented from making an application under the *Act.* The situation is analogous to that which used to obtain with dower: a testator could not override dower, but he could provide by will that his widow elect between her dower and any interest provided for under the will. If after receiving an entitlement to the shareable assets and any available will benefits, the spouse is still left without adequate provision for his or her proper support, an application under the *Testators' Family Maintenance Act* should still be possible.

In the case of intestate succession, the interaction of the *Matrimonial Property Act* and the *Intestate Succession Act* is not totally straightforward. Under the latter *Act*, a surviving spouse is entitled to both a "preferential share" and a "distributive share" of the estate of the deceased spouse. The preferential share refers to the surviving spouse's right to claim the first $50,000 of the deceased's estate, regardless of the presence of other heirs, or the principal residence of the deceased even if it is worth more than $50,000 exclusive of any charges against it. If the equity in the home is worth less than $50,000, the surviving spouse can treat the house as part of the preferential share and claim the rest in cash. In cases where the estate of the deceased is worth less than $50,000, the surviving spouse can therefore claim it all under the *Intestate Succession Act*, and in such cases there will seldom be any need to apply under the *Matrimonial Property Act*.[91] If the estate is worth more than $50,000, the surviving spouse may claim the preferential share plus a distributive share over the remainder. The size of the distributive share depends on the number of children, if any, left by the deceased. If the deceased leaves no issue, the surviving spouse takes the entire estate, and there is no need to distinguish between a preferential and a distributive share. In such cases, an application under the *Matrimonial Property Act* again seems unlikely. If the deceased is survived by one child, that child and the surviving spouse share the surplus over $50,000 equally. If there are two or more children, one third of the surplus goes to the surviving spouse, and the other two-thirds is shared equally among the children.

The current law does not specify how the preferential share is to interact with any claim under the *Matrimonial Property Act*. If after dividing the spouses' property under the *Matrimonial Property Act* the deceased spouse's estate is left with $50,000, can the surviving spouse claim that amount as a preferential share under the *Intestate Succession Act*, leaving nothing for any children of the deceased? The current drafting of s. 12(4) would suggest a positive answer. The question is whether that result is appropriate. It should be recalled that the *Intestate Succession Act* was passed in 1966, long before the *Matrimonial Property Act*. The preferential share was added to the *Act* at that time. It was meant to address the perceived injustice of requiring widows to share their husbands' estates with the children

[91] A claim under matrimonial property legislation might be preferable where there are large claims by creditors against the deceased's estate. A division of assets comes ahead of the claims of creditors, so that a half interest under matrimonial property legislation might be preferable to a heavily indebted interest under the *Intestate Succession Act*.

even where there were few assets, with the result that a widow might be left in poverty unnecessarily. The policy of the preferential share was to ensure that in the case of small estates the surviving spouse would have a first claim, up to an amount thought to be sufficient to ensure a decent standard of living. As noted above, however, in the case of estates under $50,000, or where the matrimonial home is the only real asset, the *Matrimonial Property Act* is essentially irrelevant on death, for the *Intestate Succession Act* will allow the survivor to claim the entire estate. The question, then, is how should the two *Acts* be harmonized where the deceased has shareable assets worth more than the preferential share?

The Commission has concluded that a surviving spouse should be required to elect between the right to apply under the *Matrimonial Property Act* and the preferential share under the *Intestate Succession Act*, but that in either case the distributive share of any assets remaining in the deceased's estate should still be available. The *Matrimonial Property Act* and the preferential share under the *Intestate Succession Act* have different policy goals. One aims to recognize contribution to the marital relationship, the other to prevent poverty among widows and widowers. In the case of small estates, however, these goals tend to overlap, and for that reason the Commission believes an election is appropriate. In the case of larger estates, the policies underlying both *Acts* can and should be carried out, in the Commission's view. A surviving spouse should be able to apply under the *Matrimonial Property Act* and still receive a distributive share under the *Intestate Succession Act* if the deceased has left children.

It is important to remember that the claim of a surviving spouse under the *Matrimonial Property Act* is not like the claims of ordinary creditors. The result of the application will be to attribute certain assets, or an amount of money, to the surviving spouse. Those assets belong to that spouse and cannot be subject to any claims which creditors may have against the estate of the deceased spouse. The draft *Domestic Property Division Act* should contain a provision clarifying that any award under it takes precedence over the claims of any creditors of the deceased and any orders made under the *Testators' Family Maintenance Act*.

The recommendations of the Commission in this *Final Report* are slightly different from the suggestions contained in the *Discussion Paper*, and largely respond to comments made in response to it. It had been suggested that in any application under the *Matrimonial Property Act*, the surviving spouse should have to deduct all benefits received under the will or intestacy of the deceased spouse, along the lines of recent changes to the law in Manitoba.[92] The above recommendations are more generous to the surviving spouse, and are the result of public comments, and further research and reflection by the Commission. The Commission had also suggested that, as in Manitoba, the court should have no power to make an unequal division where a surviving spouse applies under the *Act*. The rationale for this change in Manitoba was presumably that it was unfair for an adverse decision to be made against the estate of a deceased spouse where that spouse was not available to testify. However, the Commission believes that there may be instances where an unequal division on death is still

[92] R.S.M. 1987, c.M.45.

warranted, for example, in the case of a short relationship. It has therefore withdrawn the suggestion made in the *Discussion Paper* that the court should have power to make an unequal division on death.

The situation of cohabiting couples on the death of one of them raises fewer problems than that of married couples, since cohabiting couples have fewer rights under the law of succession. They are not heirs of one another under the *Intestate Succession Act* nor can they make applications under the *Testators' Family Maintenance Act*. The Commission is not recommending any change to the definitions of "spouse" in those *Acts* at present, but it does suggest that they be reviewed if the other recommendations in this *Report* are accepted. The Commission recommends that the survivor of a cohabiting couple be permitted to apply for a division of assets in the same manner as a married spouse. The recommendations above regarding the cumulation of will benefits and a division of assets would also apply in the same way.[93]

[93] The Commission notes that the Alberta Law Reform Institute has recently suggested that the definition of "spouse" in the Alberta Intestate Succession Act be amended to include opposite sex cohabitants who have lived together for three years or are the parents of a child: *Reform of the Intestate Succession Act, Report for Discussion No. 16* (January 1996).

The Commission recommends that:

1. **A testator should be able to provide that will benefits are conditional on the survivor of the couple not making an application under the draft *Domestic Property Division Act*.**

2. **When an application is made for a division of shareable property where the other members of the couple has died testate, and the testator has not put the applicant to an election, the applicant may claim under the draft *Domestic Property Division Act* and under the will.**

3. **There should be a consequential amendment to the *Testators' Family Maintenance Act* which clarifies that an application may be made by an eligible spouse under that *Act* if, after receiving an entitlement under the draft *Domestic Property Division Act* and any benefits available under the will of the deceased, he or she is left without adequate provision for proper support.**

4. **When an application is made for a division of shareable property where the other spouse has died intestate, the applicant is required to elect between his or her claim under the draft *Domestic Property Division Act* and his or her preferential share under the *Intestate Succession Act*. The applicant may still claim a distributive share under the *Intestate Succession Act* after the election.**

5. **The draft *Domestic Property Division Act* should state that any entitlement under that *Act* takes priority over any claims by creditors or orders under the *Testators' Family Maintenance Act*.**

6. **Surviving members of couples covered by the draft *Domestic Property Division Act* should be entitled to apply under it in the same way that married parties can. The definition of "spouse" in the *Intestate Succession Act* and the *Testators' Family Maintenance Act* should be reviewed if the other recommendations in this *Report* are accepted.**

9. Mediation of property division

Mediation and other conflict resolution processes are increasingly being used in Canada and elsewhere to deal with family law matters.[94] This reflects the view that the adversarial process of the court room creates even more problems for couples and any children involved in these personal conflicts. The court process is also seen as very costly to the individuals concerned and the public. The Commission has recommended previously that there should be a Unified Family Court in Nova Scotia which is fully resourced to provide a range of services including mediation. The Commission notes a recent proposal to create such a court in Nova Scotia, which includes both education on conflict resolution methods for parents and couples as well as provisions for court-connected mediation opportunities for some family law issues such as custody and support.[95] Mediation is believed to be a method which enhances the personal autonomy of the individuals while also equipping them with better communication and conflict resolution skills to deal with other matters that may arise. A number of provinces have expressly provided for the possibility of court-connected mediation in their matrimonial property legislation.[96]

The Commission is aware that concerns have been raised by some people that mediation may not always operate to the benefit of the person with less power (usually the woman) in the relationship. Most mediation processes in Canada provide for screening out cases where domestic violence may be occurring or may be a factor in the relationship. In addition to this concern, which the Commission shares, there are also some concerns that mediation might perpetuate existing inequalities. The Commission notes that mediation is a process that the parties may always choose to assist them in settling disputes regarding the division of property. It should be encouraged, but public responses stated that it should not be made a mandatory pre-requisite to litigation, and the Commission agrees. The Commission suggests that where publicly funded mediation is available to resolve some family conflict then, in principle, it would seem appropriate to seek to resolve all related conflicts at the same time.

In view of the fact that certain initiatives with respect to court-connected mediation are underway in the province, it seems premature to recommend specific statutory provisions at this time. The Commission urges the Government to consider adding appropriate provisions to any future domestic property division legislation once court-connected mediation is in place.

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[94] Judge M. C. Legere, "Integration of Mediation into the Court Process", presented at CBA Family Law Seminar, Halifax, N.S., November 25, 1995.

[95] *Proposal to Establish a Family Division of the Supreme Court of Nova Scotia* (Department of Justice, Province of Nova Scotia, January 1996). The Department of Justice 1996 proposal has recommended that publicly-funded mediation services connected to a new Family Division of the Supreme Court focus principally on child custody and child maintenance.

[96] See, e.g. *Family Law Act*, R.S.N. 1995, c.F-2, s.4, *Family Law Act*, R.S.O., 1990, c.F.3, s.3. See Alberta Law Reform Institute, *Court-Connected Family Mediation Programs in Canada, Research Paper No. 20* (May 1994).

The Commission recommends that:

1. **Court-connected publicly funded mediation should be available to deal with all family law disputes in appropriate cases, including domestic property division.**

2. **Mediation should be encouraged by lawyers and all participants in the justice system, but not made a pre-requisite to litigation.**

10. Domestic contracts and legal advice

The *Matrimonial Property Act* refers at present only to "marriage contracts", in which spouses may agree on their respective rights and obligations while cohabiting, and upon separation, death or divorce, including the power to "opt out" of the *Act*. This power is subject to two constraints: a court may disregard any provision in a marriage contract which is unduly harsh, fraudulent or unconscionable, and any provision contrary to the best interests of a child. The Commission suggests that, consistent with other language changes, these should be called "domestic contracts" rather than "marriage contracts."

The Commission received a comment to the effect that failure to make full disclosure of assets and liabilities should be added to the list of factors which may be invoked by a court to set aside a domestic contract, and it agrees with this suggestion.

The *Matrimonial Property Act* is currently silent on the issue of whether parties to a marriage contract should have independent legal advice. The Commission understands that lawyers are seldom willing to act for both sides in such matters. However, the Commission feels that an explicit provision would impress upon the parties the desirability of obtaining independent legal advice. The New Brunswick *Marital Property Act* states that a court may disregard any provision of a domestic contract "if the spouse who challenges the provision entered into the domestic contract without receiving legal advice from a person independent of any legal advisor of the other spouse, where the Court is of the opinion that to apply the provision would be inequitable in all the circumstances of the case."[97]

In other words, the absence of independent legal advice does not invalidate a domestic contract but it does allow the judge to disallow any clause of the agreement which is "inequitable." This is a lower standard than "harsh and unconscionable," which is the standard which the court would use where both parties had been represented by independent counsel. Such a provision would give some assistance to a lawyer who is prevailed upon by both parties to draft an agreement. The Commission believes that a similar provision should be added to the draft *Domestic Property Division Act.* The Family Law Section of the Canadian Bar Association was opposed to the addition of such a provision, believing that it

[97] S.N.B. 1980, c.M-1.1, s.41.

would unduly hamper negotiations in the case of a party who adamantly refused to obtain independent legal advice. The Commission notes that the failure to obtain independent legal advice does not in itself invalidate the contract, so that a refusal to obtain such advice should not hold up negotiations indefinitely.

The Commission recommends that:

1. **Marriage contracts should be called "domestic contracts" in the draft *Domestic Property Division Act* and should be available on the same basis as they currently are under the *Matrimonial Property Act*.**

2. **The current power of the court to overturn a domestic contract where it is unduly harsh, fraudulent, unconscionable or contrary to the best interests of a child should be maintained, and this power should be extended to cover cases where a party has failed to make full disclosure of assets and liabilities prior to entering the contract.**

3. **There should be a new provision dealing with the need for independent legal advice to each of the parties. This provision should state that where such advice has not been obtained, the court may disregard the contract or any term found to be inequitable in the circumstances.**

III SUMMARY OF RECOMMENDATIONS

The Commission recommends that:

1. There should be reform of the *Matrimonial Property Act* of Nova Scotia.

2. There should be federal law reform to deal with the situation of separating couples resident on Aboriginal reserves. The appropriate Aboriginal associations should be consulted in the reform process.

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

4. The Government should consolidate jurisdiction over all family law matters in one court.

5. A new law should contain the following goals:

   (a) recognize that contributions to domestic relationships should be treated equally regardless of their form, entitling each party to an equal part of the shareable assets; and

   (b) provide for the orderly and equitable settlement of the financial affairs of couples on the ending of a relationship.

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

7. A new law called the *Domestic Property Division Act* should be passed.

8. The draft *Domestic Property Division Act* apply to both married and cohabiting couples, including same-sex couples.

9. The draft *Domestic Property Division Act* allow couples to "opt out" in a domestic contract subject to the existing powers of the court to review domestic contracts.

10. The draft *Domestic Property Division Act* should apply to:

    (a) persons who are legally married; and to
    (b) two adults in a personal relationship where one provides personal or financial commitment and support of a domestic nature for the benefit of the other, where the parties have cohabited for a period of at least one year.

11. Consistent with its expanded coverage, the draft *Domestic Property Division Act* should use the terms "shareable assets" and "shareable property" rather than matrimonial property or matrimonial assets.

12. The basis for dividing shareable property is the economic interdependence which characterizes the relationship of couples covered by the *Act*. Shareable property should continue to be divided on a presumptively equal basis, and in general, property division should follow the approach currently set out in the *Matrimonial Property Act*.

13. The principles regarding apportionment of debts should be codified in the draft *Domestic Property Division Act*. Debts should be subtracted from assets and any net equity shared. The court may make an unequal division of debts only in light of the factors relevant to the making of an unequal division of assets. Where the parties' net worth is at or near zero, however, the court may take ability to pay into account in attributing responsibility for debts.

14. The valuation date should be stated as the date of separation, but this should be framed as a presumption rather than a rule. The court should be able to use an earlier or later date where circumstances warrant.

15. The draft *Domestic Property Division Act* should continue to provide for an unequal division of assets in specified cases. The list of factors to be considered should be amended in certain respects.

16. The court should be empowered to postpone the sale of the shared home to permit the completion of the reasonable education of any child of the relationship, without it being shown that the conditions for an unequal division are present.

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

18. Gifts and inheritances should remain in principle excluded from division, and the exemption should be strengthened. In particular, it should be stated that gifts and inheritances used by the parties or their children for domestic purposes will lose the exemption only to the extent that they are actually used for such purposes.

19. Personal injury settlements, accident and disability insurance benefits should remain exempt property under a new *Act.* Disability pensions should also be considered exempt property until the recipient reaches normal retirement age.

20. The exempt status of business assets should be ended. All business assets, whenever acquired, should be considered shareable assets. A majority of the Commission recommends that the increases in the value of the assets over the course of the relationship should be divided, rather than ownership rights in the business itself.

21. A reasonable amount of furniture and personal effects necessary for the maintenance of a child of the relationship should be excluded from division under the draft *Act*.
22. The term "matrimonial home" be replaced by "shared home" in a draft *Domestic Property Division Act.*

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

24. The Commission notes the recommendation in its Final Report *From Rhetoric to Reality: Ending Domestic Violence in Nova Scotia* that domestic violence be considered as a factor to be taken into account as a basis for granting orders for exclusive possession of the shared home, and recommends that an *ex parte* civil remedy be available in such circumstances.

25. Pensions should continue to be treated as a shareable asset and subject to division.

26. The existing options available for pension division on the ending of a relationship should all be located in a draft *Domestic Property Division Act* and pensions should be divided only in accordance with that *Act*.

27. Pensions should, as far as possible, be treated like other shareable assets, in particular with regard to the period of contribution included, the presumption of equal sharing and the principles applicable to an unequal division.

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

29. A member of a pension plan should be able to pay out the non-member's entitlement to another locked-in retirement savings vehicle where the parties agree.

30. With regard to valuation of a pension entitlement for purposes of an asset transfer/cash buyout or a payout to another retirement savings vehicle, an accepted standard for calculating the value of the non-member's entitlement should be adopted by regulation. Future enhancements to the pension plan should be taken into account in the valuation process.

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

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

33. A testator should be able to provide that will benefits are conditional on the survivor of the couple not making an application under the draft *Domestic Property Division Act.*

34. When an application is made for a division of shareable property where the other member of the couple has died testate, and the testator has not put the applicant to an

election, the applicant may claim under the draft *Domestic Property Division Act* and under the will.

35. There should be a consequential amendment to the *Testators' Family Maintenance Act* which clarifies that an application may be made by an eligible spouse under that *Act* if, after receiving an entitlement under the draft *Domestic Property Division Act* and any benefits available under the will of the deceased, he or she is left without adequate provision for proper support.

36. When an application is made for a division of shareable property where the other spouse has died intestate, the applicant is required to elect between his or her claim under the draft *Domestic Property Division Act* and his or her preferential share under the *Intestate Succession Act*. The applicant may still claim a distributive share under the *Intestate Succession Act* after the election.

37. The draft *Domestic Property Division Act* should state that any entitlement under that *Act* takes priority over any claims by creditors or orders under the *Testators' Family Maintenance Act*.

38. Surviving members of couples covered by the draft *Domestic Property Division Act* should be entitled to apply under it in the same way that married parties can. The definition of "spouse" in the *Intestate Succession Act* and the *Testators' Family Maintenance Act* should be reviewed if the other recommendations in this *Report* are accepted.

39. Court-connected publicly funded mediation should be available to deal with all family law disputes in appropriate cases, including domestic property division.

40. Mediation should be encouraged by lawyers and all participants in the justice system, but not made a pre-requisite to litigation.

41. Marriage contracts should be called "domestic contracts" in the draft *Domestic Property Division Act* and should be available on the same basis as they currently are under the *Matrimonial Property Act*.

42. The current power of the court to overturn a domestic contract where it is unduly harsh, fraudulent, unconscionable or contrary to the best interests of a child should be maintained, and this power should be extended to cover cases where a party has failed to make full disclosure of assets and liabilities prior to entering the contract.

43. There should be a new provision dealing with the need for independent legal advice to each of the parties. This provision should state that where such advice has not been obtained, the court may disregard the contract or any term found to be inequitable in the circumstances.

IV DRAFT DOMESTIC PROPERTY DIVISION ACT

An Act to Reform the Law Respecting the Property of Persons Cohabiting in Domestic Relationships

I Purpose, Interpretation and Application

Short Title

1 This Act may be cited as the *Domestic Property Division Act*.

Purpose

2 The purpose of this Act is to provide for the orderly and equitable settlement of the financial affairs of couples on the termination of a domestic relationship. To achieve that end, it is recognized that contributions to domestic relationships should be treated equally regardless of their form, entitling each party to an equal part of the shareable assets.

Interpretation

3 In this Act

(a) "business assets" means real or personal property used to generate income or profit in an entrepreneurial manner, but does not include

(i) money in an account with a financial institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes;

(ii) property which is held primarily for the purpose of providing security in retirement or against future loss of income;

(b) “child” means a child born within or outside marriage and includes

(i) a person adopted by both parties, and

(ii) a person whom both parties have demonstrated a settled intention to treat as their child

but does not include a person placed with them as foster parents for consideration by a person having lawful custody;

(c) "court" means the Supreme Court of Nova Scotia unless the context otherwise requires;

(d) "dwelling" includes a house, condominium, apartment, cottage, mobile home, trailer or boat occupied as a residence;

(e) "domestic contract" means a contract pursuant to Part V, and includes a separation agreement;

(f) "domestic relationship" means

(i) a marriage;

(ii) a voidable marriage that has not been annulled by a declaration of nullity;

(iii) a relationship where the parties have gone through a form of marriage with each other, in good faith, that is void and are cohabiting or have cohabited within the preceding year;

(iv) a relationship where two adults have cohabited for at least one year in a personal relationship in which one provides personal or financial commitment and support of a domestic nature for the benefit of the other;

(g) “party” means a person in a domestic relationship as defined in s. 3(f) where required by the context;

(h) “shared home” means the dwelling and real property occupied by two parties to a domestic relationship as their common residence and in which either or both of them have a property interest, and may include more than one such dwelling;

(i) “spouse” means either of a man and a woman who is a party to a relationship defined in s. 3(f)(i), (ii) or (iii).

"Shareable assets" and “Exempt Assets” Defined.

4(1) In this Act, "shareable assets" means the shared home or homes, pension entitlements, and all other real and personal property acquired by either or both parties before or during cohabitation.

(2) All interests in property owned by either party to a domestic relationship are shareable assets, with the following exceptions

(a) gifts, inheritances, trusts or settlements received from a person other than the other party except to the extent to which they are actually used for domestic purposes by the parties or their children, provided that any part of such property not actually used for those purposes shall remain exempt property;

(b) an award or settlement of damages in court, except to the extent that it includes compensation for wages lost during a period of cohabitation, or is paid in respect of a shareable asset;

(c) an interest in, or payments made pursuant to, a disability pension, except after the party receiving the pension reaches normal retirement age;

(d) money paid or payable under an insurance policy, except to the extent that it is paid in respect of a shareable asset;

(e) reasonable personal effects;

(f) property exempted under a domestic contract;

(g) property acquired after separation unless the parties resume cohabitation for a period of longer than 90 days, where such cohabitation had reconciliation as its primary purpose.

(3) All interests in property owned by either party to a domestic relationship which are not shareable assets, are exempt assets.

(4) Where property owned by a corporation would, if it were owned by a party to a domestic relationship, be a shareable asset, then shares in the corporation owned by the party having a market value equal to the value of the benefit the party has in respect of that property are matrimonial assets.

Application of Act

5(1) This Act applies to spouses whatever the date of their marriage, unless otherwise specified.

(2) This Act does not apply to persons who have received a decree absolute of divorce before the first day of October, 1980.

(3) This Act applies to all parties to domestic relationships other than spouses, provided that they separated after the date this Act came into force, and there is no reasonable prospect of the resumption of cohabitation.

(4) Notwithstanding subsection (3), this Act applies where a proceeding to determine the rights in respect of property as between parties to a domestic relationship has been commenced and not finally decided before the day this Act is proclaimed in force.

(5) This Act does not apply to parties to a domestic relationship in relation to property provided for in an agreement entered into by them before the coming into force of this Act.

Application in Case of Successive Domestic Relationships

6(1) In cases where there is more than one potential applicant under this Act with respect to the shareable assets of another, no claim by a later party may be filed until any application by an earlier eligible party has been dealt with by final court order, settlement, or release.

(2) Notwithstanding subsection (1), where an earlier eligible party refuses to make an application under this Act, or to enter into a settlement or release with respect to those rights which would be determined in such an application, that person shall be joined as a party defendant in any action commenced by a later applicant, and the court shall make such order with respect to the earlier party's entitlements under this Act as seems just in all the circumstances.

(3) Notwithstanding subsection (1), where an earlier eligible party is known to exist but cannot be found after a reasonable search has been made, the court may make such order for the preservation or otherwise of the entitlements of such person as seems just in all the circumstances.

II The Shared Home

Equal Right of Possession of the Shared Home.

7(1) A party to a domestic relationship is equally entitled to any right of possession of the other in a shared home.

(2) Where property that includes a shared home is used for other than residential purposes, the shared home includes only that portion of the property that can reasonably be regarded as necessary for the use and enjoyment of the common residence.

(3) The ownership of a share or an interest in a share of a corporation entitling the owner to the occupation of a dwelling owned by the corporation is deemed to be an interest in the dwelling for the purposes of this section, and for the purposes of section 12.

(4) Subject to an order of the court under this or any other Act and subject to a separation agreement that provides otherwise, a right of a spouse to possession by virtue of subsection (1) ceases upon the spouse ceasing to be a spouse; or, in the case of party

who is not a spouse, one year after the parties have separated and there is no reasonable prospect of the resumption of cohabitation.

Designation of Shared Home

8(1) Parties may designate, by instrument in writing executed by both of them, any property as their shared home and following the registration of such a designation in the registry of deeds for the registration district in which the property is located any other property that otherwise would be a shared home and is not so designated ceases to be a shared home.

(2) Parties may, by instrument in writing executed by both of them and registered in the registry of deeds, change or cancel a designation made under subsection (1).

(3) A designation, change or cancellation of a designation made under this Section shall be proved as required by the *Registry Act*.

(4) A designation made under this Section is deemed to be cancelled upon registration of

(a) a court order cancelling the designation;

(b) proof of death of one of the parties; or

(c) a conveyance disposing of the property designated as a shared home.

(5) Upon the cancellation of a designation made under this Section, property rights as between the persons who made the designation shall be determined as if the designation had never been made.

Disposition of Shared Home

9(1) No party to a domestic relationship shall dispose of or encumber any interest in a shared home unless

(a) the other party consents by signing the instrument of disposition of encumbrance, which consent shall not be unreasonably withheld;

(b) the other party has released all rights to the shared home by domestic contract;

(c) the proposed disposition or encumbrance is authorized by court order or an order has been made releasing the property as a shared home; or

(d) the property is not designated a shared home and an instrument designating another property as a shared home is registered and not cancelled.

(2) Where a party disposes of or encumbers an interest in a shared home contrary to subsection (1), the transaction may be set aside by the other party upon an application to the court unless the person holding the interest or encumbrance acquired it for a valuable consideration, in good faith and without notice that the property was a shared home.

(3) An affidavit of the person making a disposition or encumbrance verifying that

(a) the person is not a party to a domestic relationship within the meaning of this Act at the time of making the disposition or encumbrance;

(b) the property disposed of or encumbered has never been occupied by the person and the other party to the domestic relationship as their shared home; or

(c) the other party to the domestic relationship has released all rights to the shared home by a domestic contract or designation made pursuant to this Act

is, unless the property is designated or the person to whom the disposition or encumbrance is made had notice to the contrary, deemed to be sufficient proof that the property is not a shared home.

(4) The court may by order, on the application of a party to a domestic relationship or any other person having an interest in the property,

(a) determine if all or part of the property is a shared home;

(b) authorize the disposition or encumbrance of a shared home where the party whose consent is necessary

(i) cannot be found or is not available,

(ii) is not capable of giving consent, or

(iii) is unreasonably withholding consent,

subject to such terms and conditions as the court considers appropriate;

(c) dispense with the giving of a notice to a party required by section 10;

(d) direct the setting aside of any disposition or encumbrance of an interest in a shared home and the revesting of the interest or any part of the interest upon such terms and subject to such conditions as the court considers appropriate.

(5) The court may, on the application of a person subject to an order under clause (b) of subsection (4), discharge, vary or suspend any terms and conditions imposed in the order.

Notice to Both Parties to Domestic Relationship

10(1) Where a person is proceeding to realize upon a lien, encumbrance or execution or exercises a forfeiture against property that is a shared home, any person who has a right of possession by virtue of this Act has the same right of redemption or relief against forfeiture as the party who holds title, and has and is entitled to any notice respecting the claim and its enforcement or realization to which the other party is entitled.

(2) Any notice to which a party is entitled by virtue of subsection (1) is deemed to be sufficiently served if served personally or by registered mail addressed to the person, upon whom notice is to be served, at the person's usual or last known address, or, where none, the address of the shared home, and, where notice is served by mail, the service is deemed to have been made on the fifth day after the day of mailing.

(3) Where a party to a domestic relationship makes any payment by way of or on account of redemption or relief against forfeiture under the right conferred by subsection (1), the payment shall be applied in satisfaction of the claim giving rise to the lien, encumbrance, execution or forfeiture.

(4) Notwithstanding any other Act, where a person who commences a proceeding to realize upon a lien, encumbrance or execution or to exercise a forfeiture does not have sufficient particulars of a party entitled under subsection (1) for the purposes of the proceeding and a notice given under subsection (2) is not responded to, the proceeding may continue in the absence of that party and without regard to their interest, and any final order in the proceeding terminates the rights of the party under this Section.

Powers of Court Respecting Shared Home

11(1) Notwithstanding the ownership of a shared home and its contents, the court may by order, on the application of a party to a domestic relationship

(a) direct that one party be given exclusive possession of a shared home, or part thereof, for life or for such lesser period as the court directs and release any other property that is a shared home from the application of this Act;

(b) direct the party to whom exclusive possession is given under clause (a) to pay such periodic or other payments to the other party as is prescribed in the order;

(c) direct that the contents of a shared home that are shareable assets, or any part thereof, remain in the home for the use of the person given possession;

(d) determine the obligation to repair and maintain the shared home and to pay for other liabilities arising in respect of the shared home;

(e) authorize the disposition or encumbrance of the interest of a party in a shared home who has not been granted exclusive possession;

(f) where a false affidavit is made respecting a shared home or where a shared home or any interest therein is disposed of contrary to the provisions of this Act, direct

(i) the person who made the false affidavit,

(ii) any person who knew at the time the affidavit was false and thereafter conveyed the property, or

(iii) any person who improperly disposed of the shared home or interest therein,

to substitute other real property for the shared home or to set aside money or security to stand in its place, subject to such terms and conditions as the court considers appropriate.

(2) The authority of the court under clause (f) of subsection (1) is in addition to and not in substitution for any other remedy at law.

(3) Where a shared home is leased by one or both parties under an oral or written lease and the court makes an order giving exclusive possession of the home to one of them, that party shall be deemed to be the tenant for the purposes of the lease and primarily liable for the rent; but this subsection shall not discharge the original tenant from secondary liability for the rent, subject to his or her right of contribution from the deemed tenant.

(4) Where a surviving party to a domestic relationship does not reside in the shared home at the time of the death of the other party and a child resides in that shared home at that time, the court may, on the application of the child, direct that the child be given possession of the shared home

(a) until he or she reaches the age of majority, or

(b) while the child is attending a post-secondary educational institution, until the age of twenty-four years

and the court may make such other orders under subsection (1) that it deems appropriate.

(5) In determining whether to make an order for exclusive possession, the court shall consider

(a) the best interests of the children affected;

(b) the financial position of both spouses;

(c) any domestic contract between the parties;

(d) the availability of other suitable and affordable accommodation; and

(e) any violence committed by a party to a domestic relationship against the other party or the children.

(6) An order may be made under this section on an ex parte application, returnable within 72 hours, if the court is satisfied that there is a danger of injury to the applicant or to any other person residing in the shared home as a result of the conduct of the respondent.

(7) Where the court is satisfied that there has been a material change in the circumstances, it may discharge, vary or suspend an order made under clause (a), (b), (c) or (d) of subsection (1) or subsection (3), upon the application of a party to the original application.

(8) In an application under section 12, the court may postpone sale of the shared home in order to allow a child of the relationship to complete his or her reasonable education**,** and such a postponement shall not be treated as an unequal division.

III Application for Division of Shareable Assets.

12(1) Where

(a) a petition for divorce is filed;

(b) an application is filed for a declaration of nullity;

(c) the parties to a domestic relationship have been living separate and apart and there is no reasonable prospect of the resumption of cohabitation; or

(d) one of the parties to a domestic relationship has died;

either party is entitled to apply to the court to have the shareable assets divided in equal shares, notwithstanding the ownership of these assets, and the court may order such a division.

(2) In this part, "survivor" means a surviving spouse or the surviving party to a domestic relationship where the parties have cohabited until the death of one of them.

(3) An application for the division of shareable assets shall be made by a survivor within six months after probate or administration of the estate of the deceased party is granted by a court of probate and not thereafter.

(4) Notwithstanding subsection (3), where the court is satisfied that the survivor did not know of the grant of probate or administration or did not have an adequate opportunity to make such an application, the court may extend the time for making the application but such an application shall relate only to shareable assets remaining undistributed at the date of the application.

(5) Money paid or property transferred to a survivor pursuant to the provisions of this Act is deemed never to have been part of the estate of the deceased with respect to claims made against the estate by beneficiaries under the will or intestacy of the deceased, by a dependant under the *Testators' Family Maintenance Act*, or by any creditor of the deceased or of the estate, unless the court otherwise directs in the order.

(6) Nothing in this Act affects the right of a surviving spouse to make an application under the *Testators' Family Maintenance Act*.

(7) For the purposes of an application under subsections (1)(a),(b), or (c), assets shall be valued as of the date of separation, unless the court concludes that an earlier or later date is justified by the circumstances.

(8) For the purposes of an application under subsection (1)(d), assets shall be valued as of the date of death, unless the court concludes that an earlier or later date is justified by the circumstances.

(9) Where shareable assets have generated income between the date of the event in s. 12 and the time of division, any net income so earned shall be divided equally between the parties unless the court otherwise orders.

(10) Where a shareable asset is a business asset, the court shall determine the increase in value of the asset, if any, over the course of the relationship, and shall attribute that increase in value to each party in presumptively equal shares unless an unequal division is justified under s. 13.

Factors Considered on Division

13(1) Upon an application pursuant to Section 12, the court may make a division of shareable assets that is not equal or may make a division of exempt assets where the court is satisfied that the division of shareable assets in equal shares would be unfair or unconscionable taking into account the following factors:

(a) the unreasonable impoverishment by either party of the shareable assets;

(b) the amount of the debts and liabilities of each party and the circumstances in which they were incurred;

(c) a domestic contract between the parties;

(d) the length of time that the parties have cohabited with each other;

(e) the date and manner of acquisition of the assets;

(f) the contribution by one party to the education or career potential of the other;

(g) the needs of a child;

(h) whether the value of the assets substantially appreciated during cohabitation;

(i) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured party;

(j) the value to either party of any pension or other benefit which, by reason of the termination of the relationship, that party will lose the chance of acquiring;

(k) all taxation consequences of the division of shareable assets.

(2) Debts shall be divided equally unless the court is satisfied that an equal division of debts would be unfair or unconscionable taking into account the factors outlined in s. 13(1).

(3) Notwithstanding s. 13(2), where the value of the shareable assets of the parties is approximately zero after deducting all relevant debts, the court may apportion responsibility for payment of the debts in unequal shares in accordance with their respective abilities to pay.

Application of Act Where Party Dies Testate

14(1) A party to a domestic relationship may provide that the survivor of the couple shall elect between taking any benefits provided under the will of the deceased, and making an application for a division of assets under this Act.

(2) Any election made under this Part shall be made in the form prescribed by the regulations made under this Act and shall be filed in the office of the Director of Probate for Nova Scotia within six months of the death of the first party, or within such extended time as may have been granted under s. 12(4).

(3) Where the court extends the time within which an application may be made under section 12(4), the time for making an election shall be similarly extended, but the application shall relate only to shareable assets remaining undistributed at the date of the application.

(4) Where a testator has provided for an election as described in subsection (1) but no election has been made within six months of the grant of letters probate, and no application for an extension of time has been made within that period, the survivor shall be deemed to have taken the benefits provided under the will of the deceased, and shall not be entitled to make an application under this Act.

(5) Where a party dies testate and provides for no election between benefits left by will to the survivor and an application for division of assets under this Act, the survivor may take the will benefits and make an application under this Act.

Where Spouse Dies Intestate

15(1) Where a spouse dies intestate, the surviving spouse must elect between making an application under this Act and receiving his or her preferential share under the Intestate Succession Act within the time period specified in Section 12(3).

(2) Where the court extends the time within which an application may be made under section 12(4), the time for making an election shall be similarly extended, but the application shall relate only to shareable assets remaining undistributed at the date of the application.

(3) Notwithstanding the result of the election under subsection (1), the surviving spouse is entitled to a distributive share under the Intestate Succession Act.

Agreements and Settlements by Executor or Administrator

16(1) An executor or administrator of a deceased party may enter into an agreement or settlement with the survivor of that party's domestic relationship as to the ownership or division of property under this Act.

(2) Where an executor or administrator of a deceased spouse is the survivor, the court may appoint a person to act in the place of the executor or administrator under subsection (1).

(3) Where, in the opinion of the court, the public disclosure of any information contained in a statement filed under subsection (1) would constitute a hardship to a party to a domestic relationship, the court may order that the statement and any cross-examination thereon be treated as confidential and not form part of the public record.

Statement of Particulars of Property

17(1) When application is made for division of shareable assets, each party shall file with the court and serve on each other a statement, verified by affidavit, disclosing particulars of all property of that party.

(2) A statement pursuant to subsection (1) shall be made in the manner and form required by the rules of the Supreme Court.

(3) Where, in the opinion of the court, the public disclosure of any information contained in a statement filed under subsection (1) would constitute a hardship to either party, the court may order that the statement and any cross-examination thereon be treated as confidential and not form part of the public record.

Powers of Court upon Division

18 On an application for the division of shareable assets, the court may order

(a) that the title to any specified property granted by the court to a party be transferred to or held in trust for that party for such period, or absolutely, as the court may decide;

(b) the partition or sale of the property;

(c) that payment be made out of the proceeds of a sale ordered under clause (b) to one or both parties, and the amount thereof;

(d) that any property forming part of the share of either or both parties be transferred to or held in trust for a child to whom one of the parties must provide support;

(e) that either or both parties give such security, including a charge on property, that the court orders, for the performance of any order made under this Section;

(f) that one party pay to the other such amount as is set out in the order for the purpose of providing for the division of the property;

and make such other orders and directions as are ancillary thereto.

Determination of Question Between Parties to Domestic Relationships

19(1) Either party to a domestic relationship may apply to the court for the determination of any question between them as to

(a) the ownership or right to possession of any particular property;

(b) whether property is a shareable asset or an exempt asset;

except where an application has been made and not determined or an order has been made respecting the property under this Act.

(2) Where an application is made under subsection (1), the court may

(a) make a declaration as to the ownership or right of possession in the property;

(b) make a declaration as to whether the property is a shareable asset or an exempt asset;

(c) where the property has been disposed of, order that a party pay compensation for the interest of the other party;

(d) order that the property be partitioned or sold;

(e) order that either or both parties give such security, including a charge on property, that the court orders, for the performance of any order under this Section;

and may make such other orders and directions as are ancillary thereto.

Sales of Security

20 The court may, on application, direct the sale of property charged as security under this Act upon such terms and conditions as the court considers appropriate.

Contribution to Exempt Asset

21 Where one party has contributed work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of an exempt asset

of the other party, the contributing party may apply to the court and the court shall by order

(a) direct the other party to pay such an amount on such terms and conditions as the court orders to compensate the contributing party therefor; or

(b) award a share of the interest of the other party in the business asset to the contributing party in accordance with the contribution.

Interim Order

22 The court may make such interim order as it considers necessary for the proper application of this Act, pending the bringing or disposition of an application under this Act.

Registration of Order Respecting Real Property

23(1) An order made under this Act respecting real property may be registered in the registry of deeds in the registration district in which the property is located and, where it is not so registered, it does not affect the acquisition of an interest in that real property by a person in good faith without notice of the order.

(2) An order made under this Act respecting personal property may be filed in the Personal Property Registry and, where it is not so filed, it does not affect the acquisition of an interest in that personal property by a person in good faith without notice of the order.

(3) An order made under this Act respecting shares of a company may be filed in the office of the Registrar of Joint Stock Companies if the company is registered in the Province and, where it is not so filed, it does not affect the acquisition of the shares affected by the order by a person in good faith without notice of the order.

Presumption Respecting Ownership Between Spouses

24(1) The rule of law applying a presumption of advancement in questions of the ownership of property as between husband and wife is abolished and in place thereof the rule of law applying a presumption of a resulting trust shall be applied in the same manner as if they were not married, except that

(a) the fact that property is placed or taken in the name of parties to a domestic relationship as joint tenants is *prima facie* proof that each of them is intended to have a one-half beneficial interest in the property; and

(b) money on deposit in a chartered bank, savings office, loan company, credit union, trust company or other similar institution in the name of both parties shall be *prima facie* proof that the money is on deposit in their names as joint tenants for the purposes of clause (a).

(2) Subsection (1) applies notwithstanding that the event giving rise to the presumption occurred before the first day of October, 1980.

IV Division of Pension Entitlement

Interpretation

25.1(1) In this Part,

"commuted value" means the value of a benefit determined in accordance with the Pension Benefits Act;

"defined benefit plan" means a plan that is not a defined contribution plan or a hybrid plan;

"defined contribution benefit" means a pension benefit determined with reference to and provided by contributions, and the interest on contributions, paid by or for the credit of a member and determined on an individual account basis;

"defined contribution plan" means a plan where all benefits are defined contribution benefits, and includes any retirement savings arrangements prescribed under this Act;

"extra provincial plan" means a plan that is not a local plan;

"former member" means a person who has terminated employment or membership in a pension plan and

(i) is entitled to a deferred pension payment from the pension fund,

(ii) is in receipt of a pension payable from the pension fund,

(iii) is entitled to commence receiving payment of pension benefits from the pension fund within one year after termination of employment or membership, or

(iv) is entitled to receive any other payment from the pension fund;

"hybrid plan" means a plan under which some, but not all, the benefits, are determined as if the plan were a defined contribution plan and some, but not all, the benefits, are determined by a defined benefit formula;

"limited member" means a person designated as a limited member of a local plan under section 25.3(1);

"local plan" means one of the following:

(a) a plan that is established by the Province;

(b) a plan that is registered under the *Pension Benefits Act*;

(c) a plan that is subject to this Part by the terms of the plan, by the operation of legislation that regulates the plan, or by reason of a reciprocal agreement under the Pension Benefits Act;

"matured pension" means a pension under which benefits are being paid to a retired member or a beneficiary and includes a payment of a disability pension when the member reaches a prescribed age;

"member" means a member of the pension plan, and includes a former member;

"notice" means a notice in the form prescribed by the regulations;

"party" means a party to a domestic relationship as defined by this Act, and includes a former party;

"pension" means a series of payments that continue for the life of a member, whether or not it is afterward continued to any other person;

"plan" means a plan, scheme or arrangement organized and administered to provide pensions for members, and refers to a local plan except in section 25.8;

"post-retirement survivor benefit" means lump sum or periodic benefits paid by a plan to a beneficiary when a member dies after the pension matures;

"pre-retirement survivor benefit" means lump sum or periodic benefits paid by a plan to a beneficiary when a member dies before the pension matures;

"proportionate share" means a fraction calculated in accordance with the regulations, the agreement of the party and member under section 25.12, or a court order;

"retirement" means the date a member commences to receive a pension under a plan, whether or not the receipt of benefits has been deferred;

"separate pension" means the share of a member's pension which is established in a separate account in favour of a party;

"transfer" means, when referring to the payment of a proportionate share of the commuted value of a pension to the credit of a party, a transfer made in accordance with the regulations.

Application

25.2(1) Subject to subsection (4), if a party is entitled under Part III to an interest in a pension, the share of the pension, and the manner in which the party's entitlement in the pension is to be satisfied, must be determined in accordance with this Part.

(2) Except where inconsistent with this Part, pension entitlements are to be divided in the same manner as any other shareable asset.

(3) Without limiting the generality of subsection (2), the provisions of Part III respecting the presumption of equal sharing and the circumstances to be considered in making an unequal division apply to a division of pension entitlement.

(4) This Part applies only if a party

(a) was entitled under Part III to an interest in a pension before the coming into force of this Part and on the day this Part comes into force there is no allocation of the pension by agreement between the party and the member or by court order, or

(b) becomes entitled under Part III to an interest in a pension after the coming into force of this Part.

Limited Membership

25.3(1) If a pension to be divided is an unmatured pension in a defined benefit plan, or a matured pension, a party may be designated a limited member of the plan by delivering a notice to the plan administrator.

(2) A limited member has the following rights

(a) to receive from the plan direct payment of a separate pension or a proportionate share of benefits paid under the pension, as the case may be, as determined under this Part;

(b) to enforce rights against the plan and recover damages for losses suffered as a result of a breach of a duty owed by the plan to the limited member;

(c) except as modified by this Part, all of the rights of a member under the *Pension Benefits Act*;

(d) such additional rights as are set out in this Part.

(3) Subject to an order of the Supreme Court, a designation of pre-retirement survivor benefits or post-retirement survivor benefits under the member's pension in favour of a limited member may not be changed without the limited member's consent.

(4) Subsection (3) applies until the limited member ceases to be a limited member or becomes entitled to a separate pension.

(5) If the commuted value of the party's share in the pension is transferred under this Part to the credit of the party, the party ceases to be a limited member of the plan.

Unmatured Defined Contribution Plan

25.4 Where an unmatured pension in a defined contribution plan is to be divided, a party, by delivering a notice to the administrator, is entitled to have a portion of the member's account balance transferred from the plan according to the agreement of the parties or as determined by the court.

Unmatured Defined Benefit Plan

25.5 Where an unmatured pension in a defined benefit plan is to be divided, a party, by delivering a notice to the administrator

(a) is entitled to have a proportionate share of the commuted value of the pension transferred from the plan to the credit of the party, or

(b) is entitled to receive a separate pension from the plan determined in accordance with the regulations

at the earlier of the date that the party reaches the age of 65, and the member's normal retirement date.

Unmatured Hybrid Plan

25.6 Where an unmatured pension in a hybrid plan is to be divided,

(a) to the extent that the pension is based on, or the member may choose to have it based on, principles applicable to a defined contribution plan, the pension must be divided as if it were in a defined contribution plan; and

(b) the remainder of the pension must be divided as if the pension were in a defined benefit plan.

Division of Matured Pension

25.7(1) Where a matured pension is to be divided, a party, by delivering a notice to the administrator, is entitled to receive from the plan a proportionate share of benefits paid under the pension until the death of the party or the termination of the pension, whichever occurs first.

(2) Notwithstanding subsection (1), a party who is a designated beneficiary of a post-retirement survivor benefit under the pension is entitled to the whole of the post-retirement survivor benefit.

(3) Where benefits are paid under this section, the plan must make separate source deductions with respect to deductions required under the Income Tax Act (Canada) for the party's share and the member's share of the benefits.

(4) Despite section 25.2(4), a party who, before this Part came into force, was entitled to receive benefits under a matured pension, may, by delivering a notice to the administrator, require the plan to administer the division in accordance with this section.

Division of Pension in Extraprovincial Plan

25.8(1) Where a pension in an extraprovincial plan is to be divided, a party is entitled to receive from the plan a proportionate share of benefits paid under the pension until the death of the party, or the termination of the pension, whichever occurs first, and the member is a trustee of the proportionate share of benefits for the party.

(2) Despite subsection (1), if no other party is entitled to receive a proportionate share of benefits paid under the pension, the party who is the designated beneficiary of a post-retirement survivor benefit under the pension is entitled to the whole of the post-retirement survivor benefit.

(3) Subject to subsection (4), subsection (1) does not apply if the plan, or legislation establishing or regulating the plan, provides an alternative method of satisfying the interest of the party in the pension.

(4) If, having regard to the principles that apply to pension division under this Part, the alternative method under subsection (3) would operate unfairly, the Supreme Court may order the party's share in the pension to be satisfied under subsection (1).

Where Required Method of Division Inappropriate

25.9 Where the method of division required under this Part is inappropriate because of the terms of the plan, the Supreme Court may, despite the Pension Benefits Act or any other Act purporting to limit the jurisdiction of a court to make an appropriate order respecting pension entitlement of the member and the party on termination of their relationship, direct an appropriate method of division of the pension and the order of the court is binding on the plan.

Where Member Dies Before Share Received by Limited Member

25.10(1)If a member dies before the limited member receives a share of the pension under section 25.5, the limited member is entitled to a proportionate share of any pre-retirement survivor benefit payable under the member's pension.

(2) If a member dies after the limited member receives a share of the pension under section 25.5, the limited member is entitled to no further share of the member's pension except to the extent that the member has designated the limited member to be a beneficiary of the pension.

(3) If a limited member dies before the member and before receiving a share of the pension under section 25.5, the plan must transfer to the credit of the limited member's estate a proportionate share of the commuted value of the pension.

Where Interest Below Threshold for Administration by Plan

25.11 Where a limited member is entitled to a separate pension or a proportionate share of benefits paid under the pension, a plan may require the limited member to accept a transfer of the commuted value of the interest in the same manner that a plan can require a member to do so under s. 58 of the Pension Benefits Act.

Agreements

25.12(1)A party may enter into a written agreement with a member respecting any of the following matters

(a) where there has been no division of a pension between the member and the party, an arrangement for sharing the pension;

(b) a waiver by the party of any right to or interest in a member's pension or any benefit under it;

(c) the satisfaction of the party's interest in the pension by the payment of compensation in money or money's worth by the member to the party.

(2) Where party and the member cannot agree on how an entitlement to an unmatured defined benefit plan will be shared, payment of a separate pension to the party will be the presumed method of satisfaction unless the court otherwise orders.

(3) If the party and member agree, or the Supreme Court makes an order that the member must pay compensation to the party in satisfaction of part or all of the spouse's interest in the pension, the compensation payment must be calculated in accordance with the regulations unless the party and member otherwise agree or the court otherwise orders.

(4) If the plan and a party enter into an agreement under which the party accepts from the plan compensation, or a transfer of a share of the pension, in satisfaction of the party's interest in any circumstances not specifically dealt with under this Part, the compensation payment or amount transferred must be calculated in accordance with the regulations unless the Supreme Court otherwise orders.

Administrative Costs

25.13 The party and the member are responsible for paying to the plan, in equal shares, a prescribed amount to offset administrative costs incurred by the plan in satisfying the share of the party under this Part.

Information From Plan

25.14 A limited member, or a party claiming an interest in a pension who has delivered to the plan a notice in the prescribed form, is entitled to receive from the administrator at the time of breakdown of a domestic relationship, and on an annual basis, prescribed information in respect of the plan.

Trust of Survivor Benefits

25.15 If a party is entitled to a share of pre-retirement survivor benefits or post-retirement survivor benefits paid to another person, the recipient holds them in trust for the party.

V Domestic Contracts

Domestic Contracts

26 Two parties to a domestic relationship may enter into a domestic contract, in which they agree on their respective rights and obligations

(a) during their marriage;

(b) during cohabitation;

(c) upon separation;

(d) upon an annulment or dissolution of the marriage;

(e) upon the death of either party.

Formal Requirements

27 A domestic contract is void unless it is in writing and is signed by the parties and witnessed.

Capacity of Minor

28 A minor who has capacity to contract marriage has capacity to enter into a domestic contract that is approved by the court, whether the approval is given before or after the contract is entered into.

Best Interests of Child

29 The court may disregard any provision of a domestic contract affecting a child where, in the opinion of the court, it is in the best interests of the child to do so.

Enforcement on Death

30 A domestic contract, or a provision thereof, that has its effect on the death of the parties thereto may be enforced by or against the estate of the deceased.

Harsh or Fraudulent Domestic Contract

31(1) Upon an application by a party to a domestic contract, the court may, where it is satisfied that any term of the contract or agreement is unconscionable, unduly harsh on one party or fraudulent, make an order varying the terms of the contract or agreement as the court sees fit.

(2) The court may disregard any provision of a domestic contract if the party who challenges the provision entered into the domestic contract without receiving legal advice from a person independent of any legal advisor of the other spouse, where the court is of the opinion that to apply the provision would be inequitable in all the circumstances of the case.

(3) Subsection (2) applies only with regard to those contracts made after the coming into force of this Act.

Arbitration

32(1) Parties to a domestic contract may, where both persons consent, refer any question as to their rights under this Act or the contract for determination by arbitration and the *Arbitration Act* then applies.

(2) A copy of an arbitration award made pursuant to this Section, certified by the arbitrator to be a true copy, may be made an order of the court by filing it with the prothonotary of the court who shall enter the same as a record and it thereupon becomes and is an order of the court and is enforceable as such.

VI Miscellaneous

Enforcement of Order of Award for Possession

33 It is the duty of a peace officer to enforce a court order made, or an arbitration award filed with the court, pursuant to this Act as it relates to peaceable possession of residential premises where

(a) the peace officer's assistance is requested by a person named in the order, and

(b) the peace officer is satisfied as to the existence of the court order or court record of the arbitration award.

Dower and Courtesy Abolished

34(1) Dower and curtesy at common law are abolished.

(2) This Section does not apply in respect of a right to dower where the husband died before the first day of October, 1980.

(3) Where money has been paid into court as an indemnity in respect of a right to dower and the husband is alive on the first day of October, 1980, the husband of the person in respect of whose dower right the money was paid into court is entitled to be paid the money upon application to the prothonotary of the court, without order.

Conflict of Laws

35(1) The division of assets and the ownership of moveable property as between spouses, wherever situated, are governed by the law of the place where both parties to the domestic relationship had their last common habitual residence or, where there is no such residence, by the law of the Province.

(2) The ownership of immoveable property as between parties to a domestic relationship is governed by the law of the place where that property is situated.

(3) Notwithstanding subsection (2), where the law of the Province governs the division of assets, the value of the immoveable property wherever situated may be taken into consideration for the purposes of a division of assets.

Regulations

36 The Governor in Council may make regulations for the carrying out of this Act.

APPENDIX A

Members of Advisory Group

Anne Bishop	Henson College, Dalhousie University
Douglas Campbell, Q.C.	Barrister
Patrick Casey	Barrister
Julia Cornish	Barrister
Donna Franey	Barrister, Dalhousie Legal Aid
Katherine MacDonald	N.S. Advisory Council on the Status of Women
Kit Waters	N.S. Department of Justice
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A. Chapman & K. Greenwood	Chair and Vice-Chair, Real Property Section, Canadian Bar Association (N.S.)
J. Cornish	Barrister
M. Dechman	Nova Scotia Women's Directorate
G. Dragone	Hantsport
V. Dunlop	Lower Sackville
J. Embree	Westville
H. Foote and J. Cornish	Chair and Vice-Chair, Family Law Section, Canadian Bar Association (N.S.)
S. Foreman	Halifax
Justice W.R.E. Goodfellow	Supreme Court of Nova Scotia
W.B. Gillis, Q.C.	President, Annapolis County Barristers' Society
C. Gloade	President, Nova Scotia Native Women's Association
Justice D. Hallett	Nova Scotia Court of Appeal
S. Jain	Windsor, Ontario
K.M. Kahansky	Towers Perrin, Toronto, Ontario
K. LeBlanc	Halifax
W.L.C. Myers	Halifax
J. Williams	Acting Superintendent of Pensions, Department of Finance (N.S.)

APPENDIX B

SUMMARY OF SUGGESTIONS (FROM DISCUSSION PAPER)

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

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

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

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

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

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

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

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

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

9. The *Act* should apply to:

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

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

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

12. The current practice of the courts regarding debts should be codified in the new *Family Law Act*, if the integrated approach to family property division is retained. However, all debts other than purely personal ones should be deducted from the gross value of each spouse's property if the economic partnership model is adopted.

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

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

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

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

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

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

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

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

21. The Commission notes the recommendation in its Final Report *From Rhetoric to Reality Ending Domestic Violence in Nova Scotia* that domestic violence be taken into account as a basis for granting orders for exclusive possession of the family residence,

and suggests that an *ex parte* civil remedy be available in such circumstances. However, the Commission notes that there is some concern about whether the adoption of this approach might reinstate fault as an element in property division and soften the criminal aspect of domestic violence. The Commission seeks comment on these concerns.

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

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

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

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

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

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

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

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

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

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

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