A DISCUSSION PAPER

THE LEGAL STATUS OF THE CHILD BORN OUTSIDE OF MARRIAGE IN NOVA SCOTIA

Law Reform Commission of Nova Scotia
August 1993

The Law Reform Commission of Nova Scotia was established by the Government of Nova

Scotia under the ***Law Reform Commission Act,*** in February 1991.

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THE LEGAL STATUS OF THE CHILD BORN OUTSIDE MARRIAGE IN NOVA SCOTIA

WHAT DO YOU THINK?

The Law Reform Commission is very interested in knowing what you think about the issues raised in this Discussion Paper: *The Legal Status of the Child Born Outside Marriage in Nova Scotia.*

If you would like to have any of the issues in this Paper explained more fully or if you would like to arrange a meeting with the project researcher, please call 423-2633.

We have attempted, as much as possible, to describe the law and the problems with the present system in a way that can be understood by people who are not lawyers and who are not familiar with the legal system. Your criticism and comment will assist us in preparing a Final Report to the Minister of Justice on how the law dealing with *The Legal Status of the Child Born Outside Marriage in Nova Scotia* can be reformed.

This Discussion Paper is not a Final Report and it does not represent the final views of the Commission. This Discussion Paper is designed to encourage discussion and public participation in the work of the Commission.

If you would like to comment on our suggestions and questions, please call or write to us. In order for us to fully consider what you think about these issues before we prepare our Final Report, please contact us before **October 30th, 1993**. You may write to us at the following address:

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LAW REFORM COMMISSION OF NOVA SCOTIA

DISCUSSION PAPER ON THE LEGAL STATUS OF THE CHILD BORN OUTSIDE MARRIAGE IN NOVA SCOTIA

SUMMARY

The laws and legal system in Nova Scotia still treat some children differently depending on whether or not a child's parents are married to each other at the time of the child's birth or conception or at any time after the child is born. The different treatment occurs mainly in connection with the legal rights and responsibilities that exist between a parent and child, such as guardianship, inheritance and maintenance (financial support). As a result, children born outside of marriage may be at a disadvantage under the current legal system.

Treating children differently, depending on whether or not a child's biological parents are married to each other, is no longer acceptable or justified. There are significant legal and social changes which support the equal treatment of children, regardless of birth status. One such development is an international human rights agreement, the United Nations *Convention on the Rights of the Child*. This Agreement protects children from discrimination on the basis of "birth or other status" with respect to the specific rights set out in the *Convention*. The *Convention on the Rights of the Child* is important because the Government of Canada has committed itself to carry out, in cooperation with the provinces and territories, the obligations contained in the *Convention*.

Apart from the *Convention on the Rights of the Child*, provincial governments have an additional obligation, under the Canadian *Charter of Rights and Freedoms*, to ensure that provincial laws do not interfere with the right of the individual to "equal protection and equal benefit of the law without discrimination". A number of courts have interpreted this statement to require the equal treatment of all children, whether born within or outside of marriage.

Aside from the discriminatory effects of the law, children born outside of marriage have, in the Anglo-Saxon cultural traditions, been subject to the social stigma attached to "illegitimacy". The changes that are occurring in family structures, including social and legal recognition of "common law" relationships and children born outside of marriage, suggests public support for law reform in this area. In addition, there are many people who choose to be single parents, or to make use of assisted conception technologies which may involve sperm and/or ovum donors.

Although the laws of Nova Scotia may regulate the lives of all people in Nova Scotia, except those whose lives are regulated primarily by the *Indian Act,* the laws of Nova Scotia do not necessarily represent the cultural values, traditions and experiences of all Nova Scotians.

There is a need to reform the law to recognize as much as possible the full range of values and situations which exist in Nova Scotia.

The law in Nova Scotia still discriminates between children depending on whether or not the child's biological parents are married to each other. This has been changed in some, but not all, cases. This results in uncertainty for people in determining their legal rights and responsibilities.

While the question of changing the law to ensure equal treatment for children regardless of the marital status of their parents might appear to be fairly simple, it raises some fundamental social questions about the nature of the parent-child relationship in Nova Scotian society today. Presently, the law in Nova Scotia recognizes the biological parents of a child as the parents for most purposes. The law presumes that a child born within marriage is the biological child of the man and woman, and as a result, marriage is viewed as establishing the relationship of parent and child. The result is that the fact of marriage rather than the biological connection has become the focus for determining a parent-child relationship under the law. It is through the parent-child relationship that the child's most basic needs are met and fundamental rights are established. *There is no similar means of generally recognizing the biological connection between parent and child for children born outside of marriage.*

The child born *within marriage* has the following rights in relation to persons who are presumed to be the child's biological parents:

- the right to be legally recognized as the child of both parents and to bear the name of either parent;
- the right to know and be cared for by both parents;
- the right to have both parents make decisions in regard to education and medical care, give or refuse consent to the marriage or adoption of the child, and be notified of the child being taken into protective care;
- the right to be supported financially by both parents, or by the estate of a deceased parent;
- the right to inherit from both parents either through a Will or without a Will;
- the right to bring a claim for damages against a person responsible for the death of either parent.

The child born *outside of marriage* has most of the same rights as the child born within marriage, in relation to his or her *biological mother* **BUT** the child born outside of marriage *does not have any rights from his or her biological father* unless paternity has been proved or acknowledged. This means that the child cannot automatically assume, because of the biological connection, that he or she has any legal relationship with the biological father.

Where paternity has not been proved or formally acknowledged, the child has:

- no right to be legally recognized as the biological father's child or to use the name of the father;
- no right to be financially supported by the biological father or by the estate of the biological father;
- no right to inherit where there is no Will providing for the child;
- no right to have the biological father give consent to marriage;
- no right to have his or her biological father notified of adoption of the child;
- no right to have his or her biological father notified if the child is taken into protective care;
- no right to bring a claim for damages against a person responsible for the death of the child's father.

Where paternity is proved (usually in court) or formally acknowledged, the child has many of the same rights as the child of married parents. The main difference between children born within and outside of marriage is that the rights and responsibilities, which are largely based on a biological connection, are presumed to exist where the parents are married but do not automatically arise where the parents are not married.

If marriage is understood as only one of a number of possible situations where a biological connection could be presumed then there should be a determination of the range of circumstances which could also lead to a conclusion that the biological relationship is likely to exist. These presumptions, as with marriage, will also unavoidably reflect some ideas or judgements as to nature of the parent-child relationship. However, they are only presumptions, which means they can be shown to be incorrect if challenged.

Some of the issues considered in this Discussion Paper are:

- Should the law be reformed to remove the distinction between children born within and outside marriage?
- How should the law be changed?
- What is the basis of the parent-child relationship?
- If the parent-child relationship is based on biology are there any exceptions?
- How can this biological connection be established?
- Should any other relationships be recognized as parental for some purposes?

The Law Reform Commission has reached the following tentative conclusions based on research and consultation:

- Children should not suffer disadvantages as a result of the behaviours and choices of others; in this case, the child's biological parents.

- In all cases, the governing consideration should be the best interests of the child.

- In today's society, it is no longer appropriate that marriage be the only basis for establishing rights and responsibilities which flow between either parent and the child.

- The child's rights in relation to either parent should be recognized regardless of whether the parents are married to each other.

- The biological parent of the child should be recognized as the parent for all purposes of the law. There are two exceptions to this:

  - the case of both legal and custom adoptions (adoptions within the Aboriginal traditions);
  - some cases of assisted conception, where there is a donation of sperm or ova.

  In both these situations, persons who are not biologically related to a child will be recognized as parents.

- A majority of the Commission suggests that the biological connection between a child and his or her biological mother and father be recognized in adoption proceedings. The child should have the right to have both biological parents given an opportunity to establish a parental relationship with the child. However, in the interest of the child, there should be a time limit placed on the requirement for notice of the adoption proceedings. This time limit on notice should apply equally to cases where the father is married to the mother of the child.

- The biological connection between parent and child should be recognized in the law of inheritance. *The Intestate Succession Act* should be changed and laws which discriminate should be clarified to support the rights of the biological connection. In order to meet concerns about locating and identifying unknown heirs there should be clear time limits established to allow the executor or administrator to distribute the estate of a deceased person.

- Donors of sperm and ova should not be recognized as the "parents" of a child born as a result of assisted conception. However, the Commission seeks public comment on this topic and in particular as to whether a woman giving birth to a child in the context of assisted conception should automatically be regarded as the biological mother unless adoption has taken place.

- A majority of the Commission suggests the following tests for establishing biological paternity in Nova Scotia:

  - marriage to mother of child at time of birth of child;

  - married to mother of child by marriage terminated by death, nullity or divorce, within 300 days, or longer period as the court may allow, before birth of child;

  - marriage to mother of child after birth of child and acknowledgement of paternity;

  - cohabitation with mother of child in a "relationship of some permanence" at time of child's birth or conception, where child born within 300 days or longer time as court may allow after cohabitation has ceased;

- filing of statutory declaration of paternity or joint request with mother of child under the *Vital Statistics Act* or similar legislation in another province;

- judicial finding or recognition of paternity during lifetime of father;

- recording of name on the Indian Register as the father of a child entitled to be registered.

- In some instances, the definition of parent should be extended to include people who have taken on a role in the child's life which would entitle them to be recognized as a "parent" although they may not have formally adopted the child and are not biologically related to the child.

- There should be a new law passed which clearly and comprehensively deals with the legal status of the child born outside marriage. It should state that any distinction between the status of a child born within marriage and a child born outside marriage is abolished. This law should provide time limitations for establishing biological connections where they are not easily determined. There should also be changes made to existing laws to make them consistent with this new law.

COMMISSION DE RÉFORME DU DROIT DE LA NOUVELLE-ÉCOSSE

DOCUMENT DE RÉFLEXION SUR LE STATUT LÉGAL DE L'ENFANT

NÉ(E) EN DEHORS DES LIENS DU MARIAGE

[1]SOMMAIRE

Encore aujourd'hui, les lois et le système légal de la Nouvelle-Écosse traitent de façon différente l'enfant dont les parents ne sont pas mariés au moment de sa conception ou de sa naissance, ou même après sa naissance. La différence de traitement devient particulièrement apparente dans le domaine des droits et obligations caractérisant la relation parent-enfant, tels l'obligation alimentaire, le droit successoral et la tutelle. Sous le système légal actuel, les enfants nés(ées) en dehors des liens du mariage risquent d'être désavantagés.

Il est désormais inacceptable de traiter un(e) enfant différemment selon que ses parents biologiques sont mariés ou non. D'importants changements sociaux et légaux militent en faveur du traitement uniforme des enfants, indépendamment de leur statut à la naissance. Un de ces changements consiste en la signature d'une entente internationale sur les droits et libertés de la personne, la *Convention sur les droits de l'enfant* des Nations Unies. Cette convention protège les enfants contre la discrimination basée sur le statut à la naissance ou tout autre statut, par rapport aux droits fondamentaux énumérés dans la *Convention*. La *Convention sur les droits de l'enfant* revêt une importance particulière puisque le Gouvernement canadien s'est engagé, en collaboration avec les provinces et les territoires, à remplir les obligations contenues dans la *Convention*.

Mis à part la *Convention sur les droits de l'enfant*, la Charte canadienne des droits et libertés, impose aussi aux provinces l'obligation de s'assurer que les lois provinciales ne briment pas le droit des personnes "à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination". Suivant l'interprétation donnée par les tribunaux, ceci signifie que les enfants doivent être traités(ées) de façon identique qu'ils(elles) soient nés(ées) en dehors des liens du mariage ou non.

En plus de la discrimination dont les enfants nés(ées) en dehors des liens du mariage sont l'objet, la société traditionnelle anglo-saxonne leur applique les règles drastiques de

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[1] Traduit de l'anglais par Me Nathalie Bernard, LL.B (Université Laval), LL.M (Dalhousie University)

"l'illégitimité". Les modifications importantes apportées à la structure familiale traditionnelle, telles la reconnaissance légale des unions de fait de même que les enfants nés(ées) de ces unions, indiquent un support grandissant de la part du public en général en faveur d'une réforme touchant ces questions. En outre, de nombreuses personnes choisissent d'élever leur enfant seules ou même d'avoir recours à des méthodes de reproduction artificielle basées sur des dons de sperme et/ou d'ovules.

Quoique les lois de la Nouvelle-Écosse visent à régir la vie des Néo-Écossais, sauf ceux et celles régis(es) par la *Loi sur les Indiens(Indian Act)*, ces lois ne reflètent pas nécessairement les valeurs culturelles, les traditions et le vécu des Néo-Écossais. Les besoins de la société exigent une réforme du droit dans le but de reconnaître autant que possible l'éventail des valeurs et réalités existant en Nouvelle-Écosse.

Le système légal de la Nouvelle-Écosse traite encore de façon différente les enfants dont les parents biologiques ne sont pas mariés ensemble. Néanmoins, dans certaines situations particulières, cette discrimination a été éliminées. Ceci a pour résultat d'empêcher de déterminer avec certitude les droits et obligations des individus.

Quoique l'idée de modifier les lois afin de garantir l'égalité entre enfants indépendamment de l'état civil de leurs parents puisse sembler simple, elle soulève des questions fondamentales à propos de notre société et de la relation parent-enfant en Nouvelle-Écosse. Actuellement, le système légal de la Nouvelle-Écosse reconnaît les parents biologiques d'un enfant comme étant ses "parents" aux fins légales. Le droit présume que l'enfant né(ée) à l'intérieur des liens du mariage est l'enfant biologique de la femme et de l'homme formant ce couple. En d'autres mots, le concept du mariage sous-tend la relation parent-enfant. Ceci a pour résultat que le mariage, et non la présence d'un lien biologique, détermine l'existence légale de la relation parent-enfant. C'est de cette relation que découlent les droits fondamentaux de l'enfant incluant l'obligation de répondre à ses besoins primaires. *Il n'existe pas de mécanisme similaire pour déterminer le lien biologique entre les parents et l'enfant né(e) en dehors des liens du mariage.*

L'enfant né(ée) *à l'intérieur des liens du mariage* jouit des droits énumérés ci-dessous par rapport aux personnes qui sont présumées être ses parents biologiques:

* le droit d'être reconnu devant la loi comme étant l'enfant des deux parents et le droit de porter le nom de l'un ou l'autre;

* le droit de connaître et de recevoir les soins et l'attention des deux parents;

* le droit des parents de prendre les décisions qui s'imposent concernant l'éducation de l'enfant et les soins médicaux, le droit de consentir ou non au mariage ou à l'adoption de l'enfant et le droit d'être informés si

l'enfant est mis sous protection d'une agence gouvernementale;

* le droit d'être supporté financièrement par les deux parents ou par la succession du parent décédé;

* le droit d'hériter des deux parents qu'il y ait un testament ou non;

* le droit de poursuivre en justice la personne responsable du décès de l'un ou de l'autre des parents et de réclamer des dommages-intérêts.

L'enfant né(e) *en dehors des liens du mariage* jouit à peu près des mêmes droits que celui ou celle né(e) du mariage par rapport à sa *mère biologique*. CEPENDANT, l'enfant né(e) en dehors des liens du mariage *ne jouit d'aucun droit par rapport au père biologique* sauf si la paternité a été prouvée ou, dans certains cas, au moins admise par le père. Ceci signifie que l'enfant ne peut automatiquement prendre pour acquis l'existence d'une relation légale avec son père biologique simplement en raison du lien biologique.

Lorsque la paternité n'a pas été prouvée ou admise par le père biologique, l'enfant ne jouit pas:

* du droit d'être reconnu(e) devant la loi comme étant l'enfant du père biologique ou de porter son nom;

* du droit d'être supporté(e) financièrement par le père biologique ou sa succession;

* du droit d'hériter du père biologique si cela n'est pas prévu par testament;

* du droit du père biologique de consentir au mariage de l'enfant;

* du droit du père biologique d'être informé que l'enfant a été adopté(e);

* du droit d'avoir le père biologique informé si l'enfant est mis sous la protection d'une agence gouvernementale;

* du droit de poursuivre en justice la personne responsable du décès du père biologique et de réclamer des dommages-intérêts.

Dans le cas où la paternité a été prouvée (habituellement devant les tribunaux) ou officiellement admise, l'enfant possède sensiblement les mêmes droits que l'enfant dont les parents sont mariés. La différence principale entre les enfants nés(ées) à l'intérieur des liens

du mariage et ceux qui ne le sont pas, réside dans le fait que les droits et responsabilités basés sur le lien biologique existent automatiquement lorsque les parents sont mariés alors qu'ils sont inexistants lorsque les parents ne sont pas mariés.

Si le lien biologique est présumé exister en raison du mariage des parents, alors tout une autre série de circonstances devrait pouvoir aussi mener à la conclusion que ce lien biologique existe. Ces présomptions, tout comme celle découlant du mariage, refléteront inévitablement certaines idées et valeurs attribuées à la relation parent-enfant. Néanmoins, elles ne sont que des présomptions et peuvent être repoussées le cas échéant.

Les questions qui suivent ont été soulevées dans le cadre de ce document de réflexion:

* la distinction entre enfants nés(ées) en dehors des liens du mariage et ceux ou celles nés(ées) à l'intérieur des liens du mariage devrait-elle être abolie?

* Comment le droit devrait-il être modifié?

* Quelle est la base de la relation parent-enfant?

* Si cette relation est basée sur l'existence d'un lien biologique, devrait-il y avoir des exceptions à cette règle?

* Comment ce lien biologique peut-il être prouvé?

* D'autres types de relations devraient-elles être reconnues comme une relation parent-enfant à certaines fins?

Après certaines recherches et consultations, la Commission de réforme du droit en est arrivée aux conclusions préliminaires suivantes:

* Les enfants ne devraient pas être désavantagés(ées) en raison du comportement et des choix d'autres personnes; dans le présent cas, des parents biologiques.

* En toutes circonstances, le critère prédominant est le meilleur intérêt de l'enfant.

* Dans notre société actuelle, il n'est plus approprié de considérer le mariage comme étant à la base de l'ensemble des droits et obligations existant entre un parent et son enfant.

* Les droits d'un enfant par rapport à ses parents devraient être reconnus indépendamment du fait que ses parents soient mariés ou non.

* Le parent biologique d'un enfant devrait être considéré comme son parent aux yeux de la loi en toutes circonstances, sauf dans les cas suivants:

  - dans le cas d'adoption légale et d'adoption suivant une coutume particulière (adoption dans la tradition Amérindienne)
  - dans certains cas d'insémination artificielle où il y a eu don de sperme ou d'ovule.

  Dans les cas énumérés ci-haut, des personnes qui ne sont pas liées biologiquement à l'enfant seront considérées comme ses parents.

* La majorité des Commissaires de la Commission de réforme du droit, considère que le lien biologique entre un enfant et sa mère ou son père biologique devrait être reconnu dans le cadre de la procédure d'adoption. L'enfant devrait posséder le droit de voir ses parents biologiques donné une opportunité d'établir une relation parent-enfant avec lui ou elle. Néanmoins, dans l'intérêt de l'enfant, l'obligation d'envoyer un avis au père biologique l'informant des procédures d'adoption devrait s'éteindre à l'expiration d'un laps de temps bien précis. Cette limite de temps s'appliquerait aussi dans le cas où le père est marié avec la mère de l'enfant.

* Le lien biologique parent-enfant devrait être reconnu par le droit successoral. La *Loi sur les succession ab intestat(Intestate Succession Act)* devrait être modifiée. De plus, les autres lois ayant un effet discriminatoire devraient être amendées afin de promouvoir les droits découlant du lien biologique. Quant au problème causé par l'identification et l'obtention des coordonnées d'héritiers potentiels, toute réclamation devrait être limitée dans le temps afin de permettre à l'exécuteur(trice) de la succession de distribuer le produit de cette succession.

* Les donneurs de sperme et les donneuses d'ovules ne devraient pas être reconnus(es) comme étant les parents de l'enfant né(e) suivant une insémination artificielle. Cependant, la Commission invite le public à lui faire parvenir ses commentaires sur ce point, plus particulièrement concernant la question de savoir si une femme qui donne naissance à un(e) enfant devrait automatiquement être considérée comme sa mère biologique sauf en cas d'adoption.

* La majorité des Commissaires de la Commission de réforme du droit propose les tests suivants dans le but d'établir la paternité en Nouvelle-Écosse:

  - le père est marié à la mère de l'enfant au moment de la naissance de l'enfant;

- le père est marié à la mère de l'enfant suivant un mariage qui s'est terminé par un décès, un divorce ou une annulation, dans les 300 jours, ou pour une période plus longue à la discrétion du tribunal, précédant immédiatement la naissance de l'enfant;

- le père est marié à la mère de l'enfant après la naissance de l'enfant mais admet sa paternité;

- le père a cohabité avec la mère de l'enfant de façon relativement permanente jusqu'au moment de sa conception ou de sa naissance, à condition que l'enfant soit né(e) dans les 300 jours, ou une période plus longue à la discrétion du tribunal, suivant la fin de la cohabitation;

- par le dépôt d'une déclaration statutaire de paternité ou une requête conjointe avec la mère sous la *Loi sur les registres de l'état civil(Vital Statistics Act)* ou toute autre loi similaire existant dans une autre province;

- jugement établissant la paternité ou admission de la paternité durant la vie du père;

- inscription du nom du père sur le Registre des Indiens comme étant le père d'un(e) enfant ayant le droit d'y être inscrit(e).

* Dans certains cas, la définition de "parent" devrait pouvoir comprendre les personnes ayant joué un rôle similaire à celui du père ou de la mère dans la vie d'un enfant, et ce même si elles n'ont pas légalement adopté l'enfant ou n'y sont pas biologiquement liées.

* Une nouvelle loi devrait être promulguée ayant pour objet de régir de façon complète et non-équivoque le statut légal de l'enfant. Il devrait y être prévu que toute distinction qui était traditionnellement faite entre l'enfant né(e) en dehors des liens du mariage et celui ou celle né(e) à l'intérieur des liens du mariage est abolie. Cette nouvelle loi devrait aussi prévoir des limites de temps à respecter lors de l'établissement du lien biologique dans les cas où cette preuve est difficile à faire. En outre, les lois existantes devraient être modifiées, le cas échéant, afin de s'harmoniser avec cette nouvelle loi.

I. INTRODUCTION

1. The Rights of the Child

Under the United Nations *Convention on the Rights of the Child* every child has the right to be protected from discrimination on the basis of birth or other status.[2]

The *Convention on the Rights of the Child* is important because the Government of Canada has promised, internationally, to carry out the obligations contained in the *Convention*. The *Convention on the Rights of the Child* expressly protects children from discrimination on the basis of "birth or other status" with respect to the specific rights set out in the *Convention*. These rights[3] include, the right of a child:

- to "know and be cared for by his or her parents" recognizing that both parents have common responsibilities and primary responsibility for the upbringing and development of the child;

- to "preserve his or her identity, including nationality, name and family relations as recognized by law...";

- where separated from one or both parents "to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests".

All of the rights specified in the *Convention* are governed by the "best interests of the child". The opening paragraphs of the *Convention* also recognize that a child should be brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, including the spirit of "equality".

In order to fulfil its international obligations, Canada must ensure that federal and provincial/territorial laws are consistent with the rights set out in the *Convention*. To achieve this, the provinces and territories have been asked to cooperate by making the necessary changes to laws over which they have control. The Government of Nova Scotia has agreed to assist the Government of Canada to meet its international commitment under the *Convention*.

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[2]The *Convention on the Rights of the Child* was adopted by the United Nations on November 20, 1989 and came into force on September 2, 1990. On December 11, 1991, Canada announced its intention to implement the *Convention*. Canada expressed two reservations when it formally accepted the *Convention*. These reservations related to young offenders and to the recognition of the practices of Aboriginal peoples in Canada.

[3] The *Convention* sets out a great number of rights. The examples listed here are taken from Articles (sections) 7.1, 18.1, 8.1, 9.3, and 3.1.

It is important to note that, at the time of agreeing to the *Convention*, Canada made a formal statement concerning the interpretation and application of the *Convention* in matters relating to the Aboriginal peoples of this country. This means that when interpreting the rights of children under the *Convention* the particular practices and needs of the Aboriginal people must be taken into account.

Apart from the *Convention on the Rights of the Child*, provincial governments have an additional obligation, under the Canadian *Charter of Rights and Freedoms*, to ensure that provincial laws do not interfere with the right of the individual to "equal protection and equal benefit of the law without discrimination". A number of courts have interpreted this statement, which is found at section 15 of the *Charter*, as guaranteeing the equal treatment of all children, whether born within or outside of marriage. In fact, increasingly, provincial laws which discriminate against the children of unmarried parents have been declared unconstitutional by the courts when challenged under this section of the *Charter*[4].

A distinction in legal status between children may also be in conflict with the provisions of the *Human Rights Act*[5] of Nova Scotia. This Act prohibits discrimination in respect of a number of stated grounds, including "family status" or "marital status". While it has not been tested, it is possible that discrimination against a child born outside of marriage could be challenged under these sections of the *Human Rights Act*.

Aside from the discriminatory effects of the law, children born outside of marriage have, in the Anglo-Saxon cultural traditions, been subject to the social stigma attached to "illegitimacy". However, the changes that are occurring in family structures, and the increasing social and legal recognition of "common law" relationships and children born outside of marriage suggests public support for law reform in this area. In addition, there are many people who choose to be single parents, or to make use of assisted conception technologies which may involve sperm and/or ovum donors.

It is important to understand that, although the laws of Nova Scotia may regulate the lives of all people in Nova Scotia except those whose lives are regulated primarily by the *Indian Act,* the laws of Nova Scotia do not necessarily represent the cultural values, traditions and experiences of all populations in Nova Scotia. Under the laws inherited from Britain and Europe, the traditional basis for establishing a "parenting" relationship has been marriage between the mother and father of a child. By contrast, the extended family plays a much greater role in the upbringing of children in other cultures, such as that of the Black and Aboriginal population in Nova Scotia. There is a need to reform the law to recognize as much as possible the full range of values and situations which exist in Nova Scotia. Where a

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[4] See, for example, the cases of *Re D.T.* (1992), 113 N.S.R. (2d) 74 (C.A.); *P.A.D.* v. *L.G.* (1988), 89 N.S.R. (2d) 7 (Fam. Ct.), (Williams, F.C.J.); *Surrette v. Harris Estate* (1989), 91 N.S.R. (2d) 418 (T.D.); and *M.(L.M.S.) v. Alberta* (Attorney-General) (1990), 74 D.L.R. (4th) 403 (Alta. Q.B.).

[5] R.S.N.S. 1989, c. 214, as amended, ss. 5(r), (s).

society is made up of people with many different cultural traditions this poses one of the more significant challenges to achieving equality between people.

The law in Nova Scotia still discriminates in some cases between children depending on whether or not a child's biological parents are married to each other. This means that some of the laws that affect people's rights in Nova Scotia are not consistent with the principle of human rights regarding legal equality regardless of birth status. The fact that the law has been changed in some, but not all, cases, also means that there is uncertainty for people in determining their legal rights and responsibilities.

2. The Discussion Paper

The Law Reform Commission of Nova Scotia began work on this law reform project in July, 1992. The reasons for choosing this project included many of those set out above. In addition, the unevenness of the law in its treatment of children depending on the birth status of the child, provided some problems for those giving legal advice.[6] Consideration was also given to the fact that most of the provinces in Canada have changed their laws to include some of the reforms suggested by an advisory body, the Uniform Law Conference of Canada, in its *Uniform Child Status Act.*[7] The Nova Scotia Department of Justice had initially considered this issue several years ago and supported the view of the Commission that it was an important area for law reform. This Discussion Paper is the result of research and consultations with people involved in administering the laws which would be affected by reform in this area, as well as with people drawn from various communities in Nova Scotia. This Discussion Paper deals with some of the specific issues outlined above, and also some of the solutions that have been developed across Canada. There are four charts found at the end of this Discussion Paper which will assist readers to compare in detail the differences in Nova Scotia and across Canada. The charts deal with the following four issues:

Chart 1.	Comparison of the Legal Status of Children Born Within and Outside of Marriage in Nova Scotia
Chart 2.	Comparison of Parentage/Paternity Tests Throughout Canada
Chart 3.	Tests for Paternity/Parentage in Nova Scotia
Chart 4.	Comparison of "Child Status" Laws Throughout Canada

This Discussion Paper includes suggestions that the Commission is considering as to how

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[6]Morris J. Haug, Q.C., "Nova Scotia Statutes and the Charter: A Legitimate Concern", *Nova Scotia Law News*, Volume 17, No. 3, April 1991, at 119-120.

[7]*Uniform Child Status Act*, 1982, as am., 1991. See Chart 4 at the end of this Paper which outlines the legal status of children born outside of marriage, for each of the provinces and territories.

the law might best be reformed in Nova Scotia to ensure that the laws and legal system do not discriminate against children on the basis of birth status. While these changes will not necessarily remove the social stigma which may still attach to birth outside of marriage, they will, at least, ensure that discriminatory treatment is not supported or maintained by our legal system.

3. Language

This Discussion Paper attempts to present the legal information in as clear a way as possible so that people who do not have legal training can understand and provide comments. However, there are still some legal terms which are used and which may not be familiar to all readers. These terms are important because they reflect certain legal concepts or are part of the title of a particular law. In this Discussion Paper:

> "**Guardianship**" means: the rights and responsibility for the control and custody of a child under the age of 19, including the right to make decisions regarding the care and upbringing of the child. The law generally recognizes these rights and responsibilities as belonging to the parents or legal guardian of a child.
>
> "**Intestate Succession**" means: the right of blood relatives or persons related by adoption to inherit the property or belongings of a person who has died without a Will.
>
> "**Maintenance**" means: financial support of the child whether by court order or by agreement.

In addition, the following non-legal terms are used throughout this Paper:

> "**assisted conception**" is used to describe cases where a child is created as the result of donated sperm, ova or embryos.
>
> "**birth status**" is used in this Paper to refer to a child's birth "within marriage" or "outside marriage", and to the differing treatment of the child which may result.
>
> "**within marriage**" is used to describe a child born to a woman who is married to a man at the time she conceived or gave birth to the child, or where the woman married the father of the child at any time after the child's conception or birth.
>
> **"outside marriage"** is used to describe a child born to a woman who is not married to a man at the time she conceived or gave birth to the child and

includes situations where the woman does not marry the father of the child at any time after the conception or birth.

In most cases, the legal and factual issues involve determining who the father of a child is, that is, the "paternity" of a child. However, the term "parentage" is used as much as possible in this Paper to reflect the fact that, with the rapid changes that have occurred in assisted conception technology, there will be cases where the biological and legal "father", "mother" and "parents" are different.

Both the legal and social disadvantages experienced by children born outside of marriage are reflected in, and maintained by laws which refer to these children as "illegitimate". This is so, even though the legal situation is not theirs but the choice of their parents. To avoid adding to this stigmatization, the terms "legitimate" and "illegitimate" will be used in this Discussion Paper only when quoting or paraphrasing another source, such as a law. Where it is otherwise necessary to distinguish between children, this Discussion Paper will refer to the child born "within" or "outside" of marriage.

II. THE LAW IN NOVA SCOTIA AFFECTING THE LEGAL STATUS OF A CHILD

1. Introduction

Under the law in Nova Scotia, a child who is born or conceived *within marriage* is given full recognition as a member of the family group to which he or she belongs, together with the legal rights of inheritance, guardianship and maintenance from both the mother and father. This reflects the social presumption that the husband of the woman who gives birth is, in fact, the biological father of the child. Children born or conceived within marriage were commonly described as "legitimate". This term is still in use today.

Where a child was born to a woman who was not married at the time of the child's conception or birth then, even if the biological father was known, the child was commonly described as "illegitimate", or by other slang terms.

Historically, if a child was born at a time when his or her parents were not married to each other, the child could never achieve the status of a child born within marriage. This was so even if the child's biological parents later married each other. In Nova Scotia, this discrimination was removed in 1951 by the *Children of Unmarried Parents Act*[8]. This law stated that any child whose parents later married each other was "legitimate" for all purposes of the law, from the time of birth. It also provided for the "legitimation" of children born of a "void" or "voidable" marriage, that is, a marriage which, for some reason, did not comply with the technical requirements of the law. The *Children of Unmarried Parents Act* was

[8] S.N.S. 1951, c. 3.

replaced in 1980 by the *Family Maintenance Act*[9], which continues to provide for the "legitimation" of children.

The differing legal treatment of children was also reflected in the way in which the courts interpreted words in laws or in documents such as Wills. For example, any reference to a "child" in a law or legal document was understood to mean only a "legitimate child", unless it was clearly stated that it included children born outside of marriage. This rule of interpretation has been changed by the Supreme Court of Canada, so that any reference in a law or document to a "child" is assumed to refer to all children regardless of birth status, unless the contrary is proved.[10]

1. Changes to the Law

The legal position of children born outside of marriage has been altered in many cases by changes to specific laws in Nova Scotia.[11] For example, the law now recognizes that both the biological parents of a child, regardless of their status within or outside of marriage, have legal responsibilities for guardianship with respect to the child.[12] These responsibilities may include the custody of the child, and the responsibility for making decisions concerning the child's welfare as, for example, in the areas of education and medical care.

2. Additional Changes to the Law Needed

As a result of changes to some laws, children born outside of marriage now enjoy most of the same rights with respect to guardianship, maintenance and inheritance from their *mothers* as do children born within marriage. However, not all of these changes have been made with respect to the legal relationship between children born outside of marriage and their biological *fathers*. For example, some aspects of guardianship, while available to the mothers of children born outside of marriage, have not been extended to *all* fathers of such children. In child protection proceedings and agency adoptions under the law, it is only where the biological father of a child born outside of marriage has established some additional tie or connection with the child that he will be considered a "parent" for the

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[9] R.S.N.S. 1989, c. 160, ss. 47-51.

[10] See the cases of *Gingell v. R.*, [1976] 2 S.C.R. 86 and *Plummer* v. *Air Canada* (1979), 25 N.R. 118; (S.C.C.).

[11] Nova Scotia laws which expressly give the same rights to "illegitimate" children as to "legitimate" children, include: the *Victims Rights and Services Act* S.N.S 1989, c. 14, as am., s. 2(a) and (a)(a); *Workers' Compensation Act* R.S.N.S 1989, c. 508, s. 2(f) and (o); *Testators' Family Maintenance Act* R.S.N.S. 1989, c. 465, s. 2(a) and (b); and the *Family Maintenance Act* R.S.N.S. 1989, c. 160, ss. 18(1), (2) and (4). Other laws make no distinctions between children born within and outside of marriage, because of broadly-worded definitions. These laws include: the *Education Act* R.S.N.S. 1989, c.136, s.2(k); *Guardianship Act* R.S.N.S. 1989, c. 189, s.2(c); *Reciprocal Enforcement of Custody Orders Act* R.S.N.S. 1989, c. 387, s. 2(a); and the *Family Court Act* R.S.N.S. 1989, c. 159, s. 7(1).

[12] *Family Maintenance Act*, s. 18(4).

purpose of receiving notice that these proceedings will be occurring.[13] Where the child is born within marriage then he or she will be entitled to have both the father and mother notified of the proceedings even if the only connection between the parent and the child is biological. Although changes in many areas of the law means that this is not an issue which affects a large number of Nova Scotians in its application, there is a value in clarifying and legally recognizing the social changes relating to families and the variety of cultures and traditions which make up Nova Scotia.

Apart from actual differences in the way children born outside marriage are treated at law, there is also the problem of interpretation of words used to refer to children and their relatives. As stated earlier, the term "child" is now generally interpreted by the courts to include all children, regardless of birth status. However, the Nova Scotia courts have not had occasion to consider terms such as "issue" and "next-of-kin", both of which are found in provincial laws[14]. Whether or not these terms would now be considered to include children born outside of marriage remains uncertain. For example, under section 31 of the *Wills Act*, where a person dies before his or her parent, and that person stood to inherit under the parent's Will, a child of the person who dies will be entitled to receive the inheritance from the grandparent (as the "issue" of the parent). However, this will apply only in the case of a child born within marriage. Where the child is born outside of marriage, he or she will not automatically be entitled to the gift under the grandparent's Will, because of the language used the *Wills Act*. The Act describes the children of the person who died as "issue". Issue is defined as the "*lawful* lineal descendants of the ancestor". The child born outside of marriage would not be considered "lawful" since the law in Nova Scotia does not presently recognize the full legal rights of these children. The effect of a law eliminating the status distinction between children on the basis of birth would be to make all "issue" of the deceased person "lawful" and, therefore, entitled to inherit under the grandparent's Will to the same extent as the child born within a marriage.

An example of a specific distinction between children may be found in the *Settlement Act*. In this law, the place of settlement of a child dictates the particular municipal unit in the province which has responsibility for providing the child with necessary financial support. The law indicates that the settlement of a "legitimate" child is that of the child's father, while the settlement of an "illegitimate" child is that of the child's mother. Clearly, creating a law eliminating the status distinction between children would not, in itself, remove the differences in treatment established by the *Settlement Act*. The solution may be to apply the

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[13] *Children and Family Services Act*, S.N.S. 1990, c.5, ss. child protection proceedings - 3(1)(r); 27(1)(a); 33(2); 36(1)(b); 39(1); agency adoptions - 67(1)(f); 68(3),(8).

[14] Some of the phrases found in provincial laws are: *Intestate Succession Act* R.S.N.S. 1989, c. 236, s. 2(b), "issue"; *Presumption of Death Act* R.S.N.S. 1989, c. 354, s. 2(b)(i), "next of kin"; *Probate Act* R.S.N.S. 1989, c. 359, ss. 21, 36(1), 79 and 95, "next of kin"; *Public Trustee Act* R.S.N.S. 1989, c. 379, ss. 23(1)(a) and (b), and 23(2), "next of kin"; *Wills Act* R.S.N.S. 1989, c. 505, ss. 2(a), "issue", and 3(2), 6(c), and 31, "next of kin".

provision in the *Act* which now makes the settlement of the child the child's birthplace, where the child "has no settlement by parentage". Alternatively, it may be seen as appropriate to make the child's settlement that of either the child's mother or the child's father, in all cases. Regardless of the specific solution, some means of equalizing the treatment of children born within and outside of marriage will be achieved only through changes to the *Settlement Act* itself.

The major focus of this Discussion Paper is the rights of the child, but it should be noted that the parent-child relationship sometimes confers benefits on parents. For example, the parent of a child born within marriage may be entitled to acquire the property of his or her child when the child dies without having left a Will. Similarly, the parent may be entitled to receive maintenance from his or her child born within marriage. If the law is reformed then the extent to which these rights apply to the parents of children born outside of marriage would be the same as they are for parents of children born within marriage.

Some of the differences in the legal treatment children experience as a result of their birth within or outside marriage can be summarized follows:

> The child born ***within marriage*** has the following rights in relation to persons who are presumed to be the child's biological parents. The child has:
>
> - the right to be legally recognized as the child of both parents and to bear the name of either parent;
> - the right to know and be cared for by both parents;
> - the right to have both parents make decisions in regard to education and medical care, give or refuse consent to the marriage or adoption of the child, and be notified of the child being taken into protective care;
> - the right to be supported financially by both parents, or by the estate of a deceased parent;
> - the right to inherit from both parents, either through a Will or without a Will;
> - the right bring a claim for damages against a person responsible for the death of either parent.

The child born outside of marriage has *all of the same rights in relation to his or her biological mother* as the child born within marriage, except the right to inherit as "issue" of the mother *BUT* the child born outside of marriage *does not have any rights from his or her biological*

father unless paternity has been proved or, in some cases, has been acknowledged. This means that the child cannot automatically assume because of the biological connection that he or she has any legal relationship with the biological father.

Where paternity has not been proved or, formally acknowledged, the child has:

- no right to be legally recognized as the biological father's child or to use the name of the father;
- no right to be financially supported by the biological father or by the estate of the biological father;
- no right to inherit where there is no Will providing for the child (although case law says that this rule is not correct);
- no right to have his or her biological father give consent to a marriage of the child if she or he is a minor;
- no right to have his or her biological father notified of adoption of the child;
- no right to have biological father notified of the child being taken into protective care;
- no right to bring a claim of damages against a person responsible for the death of the child's father.

Where paternity is proved (usually in court) or formally acknowledged then the child will have many of the same rights as the child of married parents. The main difference between a child born within and outside marriage is that the rights and responsibilities, which are largely based on a biological connection, arise automatically where the parents are married but not where the parents are unmarried.

Chart 1 at the end of this Discussion Paper summarizes in greater detail some of the distinctions which the law in Nova Scotia makes between children based on their birth status within or outside of marriage. The Chart compares the legal position of children born within and outside of marriage in relation to most of the important issues which may affect a child. The first issue considered is "Guardianship". This includes the child's general right to be cared for and raised, as well as the corresponding responsibility of the parent or guardian to ensure that the child's needs are met. Some of the specific issues which may arise within this category include bringing the child into protective care; the adoption of a child; giving consent to a minor child to marry; changing the child's name; and the child's birth registration.

The second major category dealt with in Chart 1, is maintenance or financial support for the child. This issue is considered from the perspective of maintaining the child during the parents' lifetime, as well as after the parents' death.

The child's right to inherit money and property from his or her parents is discussed as the third major category in Chart 1. Different laws apply depending on whether the parent has died leaving property to his or her children by way of a Will, or whether he or she has died without having made any provision for disposing of property. Both circumstances are discussed.

Finally, the treatment of children in relation to areas which do not fall within any of the other categories are dealt with in the section entitled "Other Legislative Effects". Some of the rights of the child which did not exist until created by law, are discussed in this section.

III. SUGGESTIONS FOR LAW REFORM

The first two parts of this Discussion Paper have set out the legal situation of children in Nova Scotia as affected by the marital status of the child's parents. This part deals with specific questions for law reform that the Commission has considered and sets out some of the preliminary views of the Commission on ways in which the law can be changed to result in more equal treatment of children by the law.

1. Should the legal distinction between children in Nova Scotia based on birth status be removed?

It was pointed out in the Introduction that Canada and Nova Scotia have committed themselves under the United Nations *Convention on the Rights of the Child* to protect children from discrimination based on their status at birth. The laws and legal system in Nova Scotia still treat children differently depending on whether or not the child's parents are married to each other. This discrimination occurs mainly in connection with the legal rights and responsibilities that exist between a parent and child, such as guardianship, inheritance, and maintenance (child support). All of the other provinces and territories have already made at least some of the necessary changes to their laws, in order to meet these obligations.

Some of the laws of Nova Scotia which discriminate against children born outside of marriage may be in conflict with the "equality rights provisions" in Canada's supreme law, the *Canadian Charter of Rights and Freedoms*. For example, in a recent case in Nova Scotia, the Supreme Court declared that a section of the *Intestate Succession Act* was unconstitutional because it provided that an "illegitimate" child can inherit property only from the estate of the child's mother and not from the estate of the father. (The *Intestate Succession Act* deals only with situations in which a person dies without having made a

Will.) The court said that this law discriminated against children "based on their legitimacy" and said that:

> The right of children to inherit from their parents regardless of their legitimacy should, I find, be the reasonable expectation of children and society. Deprived of recognition and the father's name, they should surely be recognized through inheritance on an intestacy."[15]

Despite this clear statement there have, to date, been no changes made to the *Intestate Succession Act*.

The changes to the family and family structures in society also support the view that it is no longer appropriate to distinguish between children on the basis of the marital status of the child's parents. This view is already reflected in changes to many laws in Nova Scotia but has not yet been clearly dealt with for all legal matters concerning the relationship between the child and his or her biological parents. In addition, the need to take account of diverse cultural and social situations requires that changes be made to ensure some consistency in the treatment of children by the law.

The Commission suggests that:

The distinction between children based on their birth within or outside of marriage should not be maintained in the laws or legal system of Nova Scotia.

[15] Comments of Mr. Justice Grant, in the case of *Surrette* v. *Harris Estate (supra)* at p. 422.

2. What changes are needed to remove the legal distinction between children?

Once it is accepted that the law is in need of reform, the question arises as to the changes which should be made. The issue for law reform is how to remove the distinction between children based on whether or not they were born to parents who were married to each other. The guiding principle in these cases is the best interests of all children. This means that changes to try to create a more equal situation for children who have been disadvantaged under the law should focus on removing the discrimination or disadvantage rather than altering the situation of children who have been privileged traditionally. For example, in the context of removing discrimination based on the marital status of a child's parents, it does not seem to be in the best interests of children to conclude that the fact of marriage will have no effect at all in establishing parent and child relations. Instead it is preferable to ensure that situations other than marriage are equally recognized.

While the question of changing the law to ensure equal treatment for children regardless of the marital status of their parents, might appear to be fairly simple, it raises some fundamental social questions about the nature of the parent-child relationship in Nova Scotian society today. Presently, the law in Nova Scotia recognizes the biological parents of a child as the parents for most purposes. The law presumes that a child born within marriage is the biological child of the man and woman. As a result, marriage is viewed, legally, as establishing the relationship of parent and child. In effect, marriage has become the public acknowledgement of this biological connection. The result is that the fact of marriage rather than the biological connection has become the focus for determining a parent-child relationship under the law. *There is no similar means of generally recognizing the biological connection for children born outside of marriage.*

If marriage is only one of the possible ways to establish that the relationship of parent and child exists, then there must be a determination of the situations outside of marriage which will also be considered equally appropriate for finding that this legal relationship exists. The policy issue raised here is whether the parent-child relationship should be based only on biological connection or whether there should be some further acknowledgement or behaviour establishing the relationship? The difficulty posed by this question is that even if a biological connection is taken to be sufficient, it will be necessary to develop presumptions which may be used to establish the biological connection. The presumptions should recognize situations which, like marriage, make it likely that a man and woman are the biological parents of a child.

There is a further complication in reforming the law on this issue since passing a law declaring all children equal will not necessarily result in equal treatment in every case. This is because those laws which make distinctions between children on the basis of the marital status of a child's parents do so in several ways:

1. Some laws expressly distinguish between children based on whether they are

born within or outside of marriage. These laws would require specific changes in order to permit equal treatment of children.[16] Since there may be some valid policy reasons for these specific distinctions, careful consideration will be needed to ensure that the changes made will serve the best interests of the child. Some of the areas which are involved are adoption, inheritance and assisted conception. The issues which arise in these cases are discussed below in detail.

2. Some laws in Nova Scotia relating to the rights and responsibilities between parents and children, set out various tests for determining who a child's father is, depending on whether the child is born within or outside of marriage.[17]

3. In some laws where the words of the law might appear to be non-discriminatory e.g., "children", historically they have been interpreted by the courts to include only children of parents who are, or have been, married to each other. Although this interpretation has been rejected by most courts, it may still affect the application of the law in some cases. This problem would be resolved by passing a law declaring all children equal.

In view of the difficulties in reforming the law in this area, a law removing the status distinction between children would help to ensure equal treatment but a consistent, fair and simple means of recognizing and establishing parentage is also necessary to fully ensure equal treatment. For example, the child's right to be supported financially by both parents is established by birth within marriage. By contrast, the right to maintenance of the child born outside of marriage may not arise until a court order is issued declaring the child's father to be a "possible father" of the child, under the *Family Maintenance Act*. If legal recognition was given to a larger range of situations which make it likely that a man is the father of the child, some of the difficulties associated with proving paternity would be avoided. One such situation may be cohabitation with the mother of the child, for a significant period, around the time of the child's birth or conception.

In order to remove the distinction between children on the basis of marriage it should be clearly established that the biological parents are the parents of the child and that all

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[16] Nova Scotia laws which fall within this category include: the *Solemnization of Marriage Act* R.S.N.S 1989, c. 436, s.20(1); *Settlement Act* R.S.N.S. 1989, c. 423, s. 5(1) and (2); *Children and Family Services Act* S.N.S. 1990, c. 5, ss.3(1)(r), 67 (1)(f), and 2(2); *Vital Statistics Act* R.S.N.S. 1989, c.494, s. 4(2)(b); and the *Public Service Superannuation Act* R.S.N.S. 1989, c. 377, ss. 2(c) and 17(1)(b); and the *Intestate Succession Act*, *(supra)*,s.16.

[17] Nova Scotia laws which fall within this category include: the *Children and Family Services Act (supra)* , ss. 3(1)(r)(i) and (iii)-(vii), 67(1)(f)(i) and (iii)-(vi) and the Regulations under this Act; *Change of Name Act* R.S.N.S 1989, c. 66, s. 8(1)-(4); *Vital Statistics Act* R.S.N.S. 1989, c.494, ss. 4(6)-(9); *Family Maintenance Act*, ss. 2(i),(j), 8, 11(1) and 13; *Fatal Injuries Act* R.S.N.S. 1989, c. 163, ss. 2(a), 11, 12(a) and (b); and the *Tortfeasors' Act* R.S.N.S. 1989, c. 471, s. 2(a) and 3.

biological parents should, in principle, have full and equal rights and obligations in respect of their children. The law could then maintain some exceptions to this for specific instances such as adoption, either under law or custom, and assisted conception involving donated sperm or ova. In those cases the biological parent will not be the child's legal parent. The definition of parent may also include those persons who have assumed a parental role in all aspects of the child's life, even though they are not biologically related to a child.

It is important to take account of the fact that some people in Nova Scotia also have their legal status regulated by a federal law, the *Indian Act.* Under this law the legal rights and recognition of Aboriginal status is based, primarily, on genetic or blood relationships, rather than marriage. Recognition of the biological connection as established under the *Indian Act* and parenting relationships established by the customary practices of the Aboriginal people of Nova Scotia are an essential aspect of any reform to the laws of Nova Scotia. The unique situations posed for people whose lives are regulated by both federal and provincial laws in terms of property and civil rights must be carefully considered to ensure that changes do not disadvantage Aboriginal peoples. On this matter, it is important to note, again, the statement filed by Canada on signing the *Convention on the Rights of the Child.* The statement was to the effect that Canada's obligations under the *Convention* must be understood in the context of the Aboriginal peoples of this country. It was observed that the legal situation of this population must be considered in light of their inherent right to enjoy their own culture.

The Commission suggests that:

The biological parent of the child should be recognized as the parent for all purposes of the law. There are two exceptions to this:

- **the case of legal and custom adoptions;**
- **some cases of assisted conception, where there is a donation of sperm or ovum.**

In both these situations, persons who are not biologically related to a child will be recognized as parents.

3. In adoption proceedings how should the relationship between the child and the biological parents be recognized?

There is a current exception to the rule that the relationship between parent and child is established in law by a biological connection. This exception is the case of legal and Aboriginal custom adoptions where the adoptive parents are the legal parents for all purposes. In the case of custom adoptions the situation is less clear under provincial laws although custom adoptions are recognized under the federal law.

Although it would seem to be in the best interests of children that they have a relationship with both biological parents, this approach does involve a number of policy matters which must be carefully taken into account. In all cases, the overriding interest is that of the child. In the area of adoption, for example, it may sometimes be seen as a benefit to a child to be without two parents who must consent to the adoption. Under the current law, biological fathers of children born outside marriage are given notice of a proposed adoption *only* where the father has previously established some additional tie or connection with the child, such as providing maintenance, or seeking or exercising custody or access to the child.

The reasons for not giving notice to all biological fathers may include the fact that the identity of the father and his whereabouts are unknown or not easily discovered. In such cases, the parties to the adoption may wish to obtain a court order dispensing with the consent of the father; however, obtaining such an order is both costly and time-consuming. As a result, the time delays may hamper the ability of the child and his or her adoptive parents to bond.[18] This has created a concern that children not be left in an unstable or changing situation for any longer than necessary while the legal procedures associated with adoption are carried out. Further, if a woman was required to state the identity of the biological father of the child she might choose not to become involved in the adoption process.

There is currently consideration being given to making confidential birth and adoption records available to children who may have been adopted, or to parents who placed children for adoption. Doing so may allow children and their biological parents to locate each other later in life.[19] However, there may be a concern that if identification of the birth parent is linked to the provision of formal notification of adoption proceedings, then the mother of a child may choose to conceal the true identity of the father. This may have the effect of preventing later contact between the father and child.

When considering the reasons for not giving notice of a proposed adoption to all biological

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[18] The Nova Scotia Court of Appeal in *Re D.T.* (1992), 113 N.S.R. (2d) 74, considered this question when it upheld a trial court decision to refuse the biological father of a child the opportunity to challenge adoption proceedings under the *Children and Family Services Act*.

[19] This has been suggested by Parent Finders-Nova Scotia in *The Opening of Adoption Records in Nova Scotia For Adult Adoptee and Birth Relatives: Proposals and Recommendations to Create Revenue*, a brief presented to the Minister of Community Services, February, 1993.

fathers, it is important to consider the extent to which these factors are based on a stereotype about some fathers of children born outside of marriage. The stereotype assumes and, indeed, encourages the idea that men in this situation are irresponsible and that it is not in the child's interest to allow them an opportunity to be involved in a parental role. As noted above, the father does, of course, have the opportunity to receive notice of the adoption if he has established some sort of tie or connection with the child. The issue is whether, in the absence of any behaviour establishing a connection, he should still be entitled to notice.

Of fundamental concern in adoption proceedings, as with all issues involving the welfare of the child, is the "best interests" of the child. In keeping with this principle, it may be reasonable to conclude that it is in the best interests of the child that the adoption proceed expeditiously. But it can also be seen that it is important to the welfare of the child that the biological father have an opportunity to present a plan for parenting, even where he has not previously established a connection with the child, as required by the law. The biological father's involvement in the child's life may have particular significance for a child born within the Aboriginal, Black and Acadian communities in Nova Scotia. For these children, the preservation of their cultural, racial and linguistic heritage may be achieved through knowing the birth parent who shares that particular background with the child, particularly if the mother does not. Indeed, the law which governs legal adoptions in the province, the *Children and Family Services Act*, specifically recognizes the significance of these aspects of a child's life. With respect to adoption proceedings, a court is required to consider these factors as part of the "best interests" determination, when deciding whether to dispense with the consent to adoption of a parent entitled to notice, and when issuing the adoption order itself.[20] To some extent, of course, these factors will be met where the court places a child with adoptive parents of the same cultural, racial and linguistic background as the child.

The current law is discriminatory in that *all* fathers of children born *within* marriage will be entitled to notice, even if the father has been absent, or has displayed a lack of involvement similar to that exhibited by an unmarried father. By contrast, not all fathers of children born *outside* marriage will be entitled to notice of the adoption proceedings. Although there is a concern about the potential abuse of rights by biological parents, the fact that parental rights usually carry responsibilities, such as maintenance and care of the child, should provide some constraint.

The provision of notice of adoption proceedings has, so far, been discussed in relation to the biological parent. The approach taken by the Commission so far has been to give notice to biological parents without considering whether or not there is an actual connection between the parent and child. This broadens the range of people who have an opportunity for involvement and does not remove any existing rights. An alternative approach could be to base parental rights and responsibilities on the connection and relationship between people,

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[20] *Children and Family Services Act*, Preamble, twelfth recital; best interests of child respecting adoption - s.3(3); dispensing with consent - s. 75(4); adoption order - s. 78(1)(c).

without any particular emphasis being placed on a biological connection. This approach would require a more fundamental change to the existing situation and would still require some decision as to what constitutes a "parental" role. The effect would be that, in some cases, a man who is married to the mother of a child will not have any rights or obligations regarding the child if they have not taken an active role in the child's life. This could occur despite the fact of the man's biological connection with the child. Indeed, the same considerations will apply to the mother of a child. However, if the interest in genetic relationships and the importance of ensuring that people take responsibility for the care and maintenance of children is considered, it would not be useful to discount a biological connection.

On balance, it seems that the removal of existing parenting relationships would not operate to the advantage of any child. Although this approach could technically provide for equality of treatment between children it is better to correct a situation by assisting the person who is suffering from the disadvantage. Rather than defining as parents only those persons who have formed some kind of relationship with the child, a better approach would be to include persons who have formed an appropriate relationship with the child, as well as the biological father and mother of the child. Concerns about hampering the ability of the child to bond with adoptive parents and delays arising from the legal process in the case of agency adoptions could be met through limits on the scope of the search for the biological father and

the time limits on the notice required. These limits should apply also to notice requirements for fathers of children born within marriage.

A majority of the Commission suggests:

That the biological connection between a child and his or her biological mother and father be recognized in relation to notice of an adoption. The child should have the right to have both biological parents be given an opportunity to establish a parental relationship with her or him. However, in the interests of the child there should be a time limit placed on the requirement for notice of the adoption. This time limit on notice should apply equally to cases where the father is married to the mother of the child.

4. How should the biological connection be dealt with in the law relating to inheritance?

Another area which raises issues of policy is the right of parents and children to inherit from one another. As with adoption, the problems stem from the practical difficulties in applying the principle that the relationship between children and parents arises out of a biological connection. Although this is, in fact, the underlying assumption in the law, historically it has been established by ascertaining whether the people were married and whether there were children of the marriage. If the children of people who are not married are also taken into account, a problem arises in that these children may not be known. The situation faced by a person who has responsibility for distributing the assets of an estate when someone has died provides a good example of the problem. When dividing up the assets of an estate this person (an administrator) must follow the rules established by the laws of inheritance, which include the right of blood relatives to inherit from each other when a person dies without a Will. Until fairly recently, the process of determining the persons who were entitled to inherit was simplified by the fact that persons born outside of marriage were excluded. This was because the law did not legally recognize such persons. Traditionally, where there was some record of a child having been born, the executor would keep part of the estate aside to provide for the possible children of the deceased. If all children are included, a difficulty arises in that there simply may be no record in existence of the child or of the relationship between the child's parents. This may be a particular problem if the birth resulted from an extra-marital relationship. Because of the social stigma and personal consequences of adultery, the fact of the child's birth may not be known to the administrator of the estate or to the Public Trustee, as the case may be. In the case of a deceased person, determining this matter is clearly a problem. However, interpretation of the law in light of the *Charter of Rights and Freedoms* may have the effect of extending the scope of inheritance rights to include persons born outside of marriage and both their parents.[21]

It may be possible to meet the problem of locating the heirs of an estate by setting out a law which states that the executor or administrator is entitled to distribute the estate after reasonable efforts have been made to locate possible children. The law could establish a specific time period which would allow for advertising and response. Where such measures have been followed, executors, administrators and the Public Trustee should be protected from liability if an estate has been distributed and an unknown child subsequently appears. Without safeguards of this nature, an estate may not be distributed in a timely manner, or at all.

As with the case of adoption it would be possible to achieve some equality if a test for parentage (and inheritance) was developed that was solely dependent on establishing some

[21] See, for example *Surrette v. Harris Estate.*

connection or tie with a child. But this approach would effectively alter the law of inheritance as it presently stands, in that not all blood relations would be entitled to inherit. Again, the objective of this law reform project is not to make changes through the removal of existing rights but, rather, by ensuring the removal of legal disadvantages.

The Commission suggests:

The biological connection between parent and child should be recognized in the law of inheritance. The *Intestate Succession Act* should be changed and laws which discriminate should be clarified to support rights based on a biological connection. In order to meet concerns about locating and identifying unknown heirs there should be clear time limits established to allow the executor or administrator to distribute the estate of a deceased person.

5. How should developments in reproductive technology be dealt with?

The rapid changes and lack of any developed view in Canadian society regarding the nature of reproductive technologies/assisted conceptions and the relationships that might arise from their use provides a challenge to the law. The term "assisted conception" is used to describe situations where a child is created as a result of donated sperm, ova or embryos. A difficulty arises in cases of assisted conception when the definition of parent is extended to all biological fathers and mothers. If this is applied strictly then the donor of genetic material would be accorded parental rights to the exclusion of the man or woman who assumes full parental responsibilities. Since the objective of assisted conception is to permit people to become parents who cannot, for some reason, be biological parents this would defeat the purpose of the activity. The issue is not totally resolved by concluding that the rules relating to adoption would apply with respect to the non-biological parent in that, in some cases, the child may be genetically linked with one partner. In addition there is some concern about the role of the woman who carries a child produced through a donated ovum and sperm.

In attempting to deal with this problem, the Uniform Law Conference, *Uniform Child Status Act*, introduced amendments dealing with assisted conception, in 1991. This Act denies parental status to the donor of sperm used in artificial insemination, where the donor is unlikely to play a parental role in the child's life. At the same time, the Act provides that the "presumed father" of a child, (usually, the partner of the woman who gives birth), will be the legal father of the child. The *Uniform Child Status Act* also states that a woman who gives birth to a child is deemed to be the mother of the child, regardless of whether the woman's ovum was used. One effect of this provision is that a "surrogate mother" would remain the legal mother of a child, unless the child was placed for adoption. This may provide a problem in that, because of changes in technology, the genetic connection between the

woman and child, may not be established by birth. If a genetic or biological connection is accepted as the primary basis for establishing parenting relationships then this situation would require specific consideration.

This is an area of law reform that clearly merits extensive and considered review, separate from the specific matters dealt with in this paper[22]. The Commission suggests that provisions somewhat similar to the *Uniform Act* may be appropriate in cases where sperm or ova have been anonymously donated through established programs[23]. Public comment is sought on this matter. The provisions in relation to sperm donation should also be applied to ovum donation. These laws would be an exception to the general tests for parentage, which would include all biological parents.

The Commission suggests:

Donors of sperm and ova should not be recognized as the "parents" of the child born as a result of assisted conception. However, the Commission seeks public comment on this topic and, in particular, as to whether a woman giving birth to a child in the context of assisted conception should automatically be regarded as the biological mother unless adoption has taken place.

6. How can the parent-child relationship be established?

If the law stated that the biological parents of a child should be recognized as the legal parents, regardless of marriage, several questions regarding proof arise. Except in the case of donated ova the issue generally arises only in connection with determining who the father of a child is. Aside from blood or DNA testing, how could the biological connection between a father and child be established?

(i) Tests for Parentage in Other Provinces

In attempting to establish tests for parentage or paternity, it is useful to examine the tests that are used in other provinces. All of the provinces and territories, with the exception of British Columbia, have included in their laws a uniform set of tests for establishing paternity.

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[22]The Royal Commission on New Reproductive Technologies will be releasing a 2 year Study (16 Volumes in length) in November 1993. The complexity of the issues is reflected in the 20 Background issues and 130 research Studies carried out by the Commission.

[23]The Nova Scotia Advisory Council on the Status of Women made similar recommendations to the federal Royal Commission on New Reproductive Technologies during public hearings held in Halifax on October 17, 1990: Advisory Council on the Status of Women, *Annual Report for the fiscal years 1989-1992*, at 35-38.

With respect to each of these tests, the law has established a set of circumstances which make it likely that a person is the biological father of a child. If the matter comes to court, and the court is satisfied that a person has met a particular test, it will issue an order declaring the person to be the father of the child. The situations used in most provinces are: marriage, cohabitation with a woman before the birth of a child, public declaration of paternity made in a register of births, or judicial finding of paternity. A declaration of paternity by the court, based on these "presumptions of paternity", operates for all purposes of the law of the province or territory to establish that this person has the rights and duties of a father toward the child.

Chart 2 sets out the tests for paternity in the child status legislation of each of the provinces and territories, as well as in the *Uniform Child Status Act*. The current situation in Nova Scotia has also been included, despite the fact that there are no standard tests or presumptions of paternity which apply for all purposes of the law of Nova Scotia.

(ii) Tests for Parentage in Nova Scotia

a. Current Tests

In Nova Scotia, there are already a number of "tests" which are used to determine parentage. Most of these "tests" relate to biological parentage, and to the determination of paternity rather than maternity. The tests generally reflect social presumptions relating to cohabitation and marriage. However, some of the "tests" or factors may be extended to persons other than biological mothers or fathers. It will also be seen that the "tests" differ, depending on the subject matter of the particular law.

Chart 3, which is found at the end of this Discussion Paper, sets out some of the "tests" currently in use in Nova Scotia for assessing whether someone is a "parent". In general the "tests" tend to be based on assumptions regarding specified situations. The most common among these are marriage between the parents, or a public declaration of paternity. The tests are found either in the laws or in the case law.

(b) Proposed Tests for Parentage in Nova Scotia

The Law Reform Commission of Nova Scotia has considered the tests which could be used in Nova Scotia to establish parentage. Where applicable, the tests would decide the question of parentage for all purposes in Nova Scotia, except where a broader definition is considered appropriate in a particular case.

The suggested tests were chosen on the basis that the situations described in the tests make it reasonable to presume that a particular person is the biological parent of a child. These tests are presumptions only, which means that they could always be challenged. For example if a person was married but did not believe he was the father of a child he could contest this

claim in a court of law. As pointed out earlier, there should be an exception made with respect to adoptions and assisted conceptions so that the rights and duties of parenthood will not attach to the biological parents in these cases.

The suggested tests are, for the most part, consistent with the other provinces. However because part of the population of Nova Scotia includes people who are also regulated by federal laws regarding status, included within the tests for biological parentage is a recognition of the registration of status under the *Indian Act*[24]. When an Aboriginal child is born, the child's birth is generally recorded in the Indian Register that his or her parent(s) are registered with. The Indian Register operates to establish status for the purposes of the *Indian Act* by recording the names of persons entitled by reason of blood relationship to be registered. The information recorded, including the names of the child's parents, is based on information contained in the child's birth certificate, or in any other records regarding the child or the child's family as maintained under the *Indian Act.* In some cases, where the name of the child's father is not recorded on the birth certificate, a sworn statement from both parents will be accepted to establish the child's parentage for the purposes of the Indian Register.[25] It is the view of the Commission that the names of the parents of the child, as recorded on the Indian Register, should be viewed as a reliable test for establishing the biological parentage of a child, without further proof.

[24]R.S.C. 1985, c. I-5, as am. by R.S.C. 1985, c. 32 (1st supp.), s. i(i).

[25]Telephone interviews with an official with Indian and Northern Affairs, Canada, at Amherst, Nova Scotia, February 23, 1993, and June 24, 1993.

The majority of the Commission suggests the following tests for establishing the presumption of biological paternity in Nova Scotia:

1. **marriage to mother of child at time of birth of child;**

2. **married to mother of child by marriage terminated by death, nullity or divorce, within 300 days, or longer period as the court may allow, before birth of child;**

3. **marriage to mother of child after birth of child and acknowledgement of paternity;**

4. **cohabitation with mother of child in a "relationship of some permanence" at time of child's birth or conception, where child born within 300 days or longer time as court may allow after cohabitation ceased;[26]**

5. **filing of statutory declaration of paternity or joint request with mother of child under the *Vital Statistics Act* or similar legislation in another province;**

6. **judicial finding or recognition of paternity during lifetime of father;**

7. **recording of the name on the Indian Register as father of a child entitled to be registered.**

7. Should people who carry out a parenting role but are not the biological or adoptive parents of a child be recognized as parents for some purposes?

Currently adoptive parents are recognized as parents for all purposes of the law even though they may not be biologically related to the child. It is recommended that the definition of parent include persons who have adopted a child in accordance with Aboriginal custom. Custom adoptions are based on the traditions of a particular Aboriginal community, and involve the placement of an Aboriginal child for care and upbringing with a person or persons who may not be the biological parent of the child. Custom adoptions are recognized in the federal *Indian Act* and are subject to registration with the Department of Indian and Northern Affairs. However, there appears to be relatively little recorded information about

[26]The phrase, "in a relationship of some permanence", has been considered by the courts in Ontario, for the purpose of determining the entitlement to support of certain persons who have cohabited. The courts have considered the length of the relationship; the extent of the mutual commitment; and, possibly, whether there was talk of marriage, as being relevant factors: *Re Donheim & Irwin* (1978), 6 R.F.L. (2d) 242 (Ont. Prov. Ct.); *Re Labbe and McCullough* (1979), 23 O.R. (2d) 536 (Prov. Ct.). It appears that the Nova Scotia courts have not yet considered the meaning of this phrase for the purpose of interpreting Nova Scotia laws.

how the custom adoption relationship is recognized within the Aboriginal community itself. The Law Reform Commission is currently carrying out research on the customary adoption traditions of Nova Scotia's Aboriginal people.

The Commission is also suggesting that in some cases involving assisted conception, the definition of parent be extended to persons who are not biologically related to the child. The law in Nova Scotia already recognizes that persons who may not be biologically related to a child, and are not adoptive parents, should be recognized as parents for limited purposes under the *Children and Family Services Act*. For example, a person other than a child's biological parent may qualify as a "parent" for the purpose of receiving notice of child protection proceedings, or that the child has been placed with a childrens' services agency for adoption. In these cases, the law requires that the person have a demonstrated connection with the child, in order to qualify as a parent. This could occur where the person has maintained custody, exercised access, or provided financial support to the child. Where such a connection is established, the person will have the legal right and responsibility to be involved in the child's life. In many cases, persons who have this "parental" connection with a child are also the biological parents of a child. However, this will not always be true.

The Commission suggests:

In some instances, the definition of parent should include people who have taken on a role which entitles them to be recognized as a "parent" although they may not have formally adopted the child and are not biologically related to the child.

8. Should the changes be made in a new law, or should changes be made only to existing laws, or should there be both?

Once paternity has been determined, there should be legal recognition of the effects of this finding, whether reached as a result of presumptions, or because of other evidence presented to a judge. This can be done either through changes to various laws in Nova Scotia or by creating a new law which deals with all of these issues in one place. Although the Commission is concerned that new laws not be unnecessarily added to the many laws which presently exist in Nova Scotia, there are significant reasons for passing a single law to deal with the issue of child status. Passing a law which comprehensively deals with the issue is important, both as a way of clearly stating the law and alerting people to the issue, and also as a way of educating society as to its importance. Further, there is no single law in Nova Scotia which deals with most areas relating to children. Therefore, the choice of which law would be appropriate to include changes in relation to birth status, is not readily apparent.

Chart 4 sets out the child status provisions currently in place in other provinces and

territories in Canada, as well as in the *Uniform Child Status Act*. The current situation in Nova Scotia is also summarized for purposes of comparison, despite the fact that Nova Scotia does not have a law in place to deal comprehensively with the status of children born outside of marriage.

All of the provinces have dealt with this issue in a comprehensive manner, although not necessarily in a single law devoted exclusively to the matter. All of the provinces and territories, except Alberta, have expressly removed from their laws, discrimination against children based on their status at birth[27]. The laws in these provinces state that "all children are the children of their natural parents, their status being independent of the child's birth inside or outside marriage." All of the provinces, except British Columbia, have also provided universal tests for determining paternity, and provisions for making them effective[28].

One issue which deserves specific consideration here is the provision of time limitations for determining parentage in the proposed legislation. This becomes a significant issue when the legal definition of parent is extended to include all biological parents. Because records are not always kept concerning the parentage of children born outside of marriage, it may be difficult to determine who a child's biological father is.[29] Further, even where it is known with reasonable certainty who a child's father is, it may be difficult to locate the person. (To a lesser extent, this may also be a problem where a child has been born within marriage.) For these reasons, any law which eliminates the distinction between children born within and outside of marriage must provide for certainty and finality in determining parentage. As previously discussed, an example of a problem which may arise is the provision of notice of adoption proceedings to a biological parent. Another significant area is the distribution of estates.

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[27]Changes to the law as a result of the *Family and Domestic Relations Amendment Act, 1991*, S.A. 1991, c. 11, remove most of the distinctions between children born within and outside of marriage. Exceptions to this include the absence of a definition of "child" or "issue" for purposes of the *Wills Act*, and the unavailability of presumptions of paternity for purposes of an application to terminate a permanent custody agreement with the director under the *Child Welfare Act*.

[28]British Columbia has eliminated "affiliation" proceedings to obtain an order declaring a person to be the father of a child. However, the courts may determine parentage as part of proceedings for an order of child support under the *Family Relations Act*, R.S.B.C 1979, c. 121. For this purpose, the Act provides for a number of presumptions of paternity. These presumptions are more fully outlined in Chart 2.

[29]In addition to the fact that there will be no marriage or divorce records where a child is born outside of marriage, the requirements with respect to birth records also differ. In order for the name of a child's father to be recorded on the child's birth certificate, the parents of a child born outside of marriage must complete a "statutory declaration" jointly requesting that this be done. In other cases, where the parents do not make such a request, but the mother indicates the father's name on the birth registration, the father's name will, nevertheless, not be shown on a birth certificate. With respect to a child born to parents who are married to each other, both parents names, and other identifying information, will automatically be recorded on the child's birth certificate.

The Commission suggests that:

There should be a new law passed which clearly and comprehensively deals with the status of the child. The law should include tests for paternity and should treat children equally without discrimination based on the child's birth within or outside of marriage. This law should state that any distinction in status between children born outside marriage is abolished and the relationship of parent and child and kindred relationships flowing from that relationship shall be determined in accordance with this law. This law should provide some time limitations for establishing biological connections where they are not easily determined. There should be changes made to existing laws to make them consistent with this law.

SUMMARY OF COMMISSION RECOMMENDATIONS

1. The distinction between children based on their birth within or outside of marriage should not be maintained in the laws or legal system of Nova Scotia.

2. The biological parent of the child should be recognized as the parent for all purposes of the law. There are two exceptions to this:

- **the case of legal and custom adoptions**
- **some cases of assisted conception, where there is a donation of sperm or ova.**

In both these situations, persons who are not biologically related to a child will be recognized as parents.

3. A majority of the Commission suggests that the biological connection between a child and his or her biological mother and father be recognized in relation to notice of an adoption, and that the child have the right to have both biological parents be given an opportunity to establish a parental relationship with the child. However in the interest of the child, there should be a time limit placed on the requirement for notice. This time limit on notice should apply equally to cases where the father is married to the mother of the child.

4. The biological connection between parent and child should be recognized in the law of inheritance. The *Intestate Succession Act* should be changed and laws which discriminate should be clarified to support rights based on a biological connection. In order to meet concerns about locating and identifying unknown heirs there should be clear time limits established to allow the executor or administrator to distribute the estate of a deceased person.

5. Donors of sperm and ova should not be recognized as the "parents" of the child born as a result of assisted conception. However, the Commission seeks public comment on this topic and, in particular, as to whether a woman giving birth to a child in the context of assisted conception should automatically be regarded as the biological mother unless adoption has taken place.

6. The majority of the Commission suggests the following tests for establishing biological paternity in Nova Scotia:

- **marriage to mother of child at time of birth of child;**
- **married to mother of child by marriage terminated by death, nullity or divorce, within 300 days, or longer period as the court may allow, before birth of child;**
- **marriage to mother of child after birth of child and acknowledgement of paternity;**
- **cohabitation with mother of child in a "relationship of some permanence" at time of child's birth or conception, where child born within 300 days or longer time as court may allow after cohabitation ceased;**
- **filing of a statutory declaration of paternity or joint request with mother of child under the *Vital Statistics Act* or similar legislation in another province;**
- **judicial finding or recognition of paternity during lifetime of father;**
- **recording of name on the Indian Register as the father of a child entitled to be registered.**

7. In some instances, the definition of parent should include people who have taken on a role which entitles them to be recognized as a "parent" although they may not have formally adopted the child and are not biologically related to the child.

8. There should be a new law passed which clearly and comprehensively deals with the status of the child. The law should include tests for paternity and should treat children equally without discrimination based on the child's birth within or outside of marriage. This law should state that any distinction in status between children born outside marriage is abolished and the relationship of parent and child and kindred relationships flowing from that relationship shall be determined in accordance with this law. This law should provide some time limitations for establishing biological connections where they are not easily determined. There should be changes made to existing laws to make them consistent with this law.