The Story of Law Reform in Nova Scotia: A Perilous Enterprise

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The basic or overarching question addressed by the author is why institutional law reform in Nova Scotia has experienced such operational difficulties and challenges, particularly in relation to funding, to the point where it can be described as a perilous enterprise. In the process of searching for an answer to this question, the author examines the origins and development of organized law reform in Nova Scotia over the last 65 years, with special attention paid to the experience of Nova Scotia's two statutory commissions. As a backdrop to the discussion, the author examines the complicated process of law reform itself and suggests reasons why governments are not the most suitable agencies to carry out this type of work. Finally, the author provides suggestions as to why governments appear to have such difficulty providing consistent and adequate funding for independent law reform commissions.

La question fondamentale ou primordiale abordée par l’auteur est de savoir pourquoi la réforme du droit institutionnel en Nouvelle-Écosse a connu de telles difficultés et défis opérationnels, particulièrement en ce qui concerne le financement, au point qu’elle peut être décrite comme une entreprise périlleuse. Dans le processus de recherche d’une réponse à cette question, l’auteur examine les origines et l’évolution de la réforme du droit organisé en Nouvelle-Écosse au cours des 65 dernières années, en accordant une attention particulière à l’expérience des deux commissions d’origine législative de la Nouvelle-Écosse. Comme toile de fond de la discussion, l’auteur examine le processus complexe de la réforme du droit en tant que telle et propose des raisons pour lesquelles les gouvernements ne sont pas les mieux placés pour mener à bien ce type de travail. Enfin, l’auteur propose des hypothèses expliquant pourquoi les gouvernements semblent avoir autant de difficulté à fournir un financement cohérent et adéquat pour les commissions de réforme indépendantes.

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Introduction
I. Some preliminary considerations
   1. Law reform—What is it? What does it mean?
   2. How law reform commissions approach law reform
   3. Limitations on law reform commissions: Lawyers’ law or social policy law or both?
   4. How law reform commissions do their work
   5. The machinery of government and law reform
II. The pre-commission era and law reform
   1. Conference of Commissioners on Uniformity of Legislation in Canada
   2. Nova Scotia Legislative Research Centre: Dalhousie Law School
   3. The Nova Scotia Barristers’ Society
III. The first Law Reform Advisory Commission 1969-1981
   1. Bill-43 and the reasons for it
   2. The workplan—Doing law reform
   3. Some ongoing problems
   4. Accomplishments of the first commission
   5. Why was the commission abandoned?
   6. An assessment of the Nova Scotia Law Reform Advisory Commission
IV. The second Law Reform Commission—The independent Commission
   1. Bill-70, 1990
   2. How the Commission saw itself
   3. Accomplishments or productivity of the Commission
   4. Three perennial concerns of the Commission
   5. Significant events in the life of the second Commission
   6. Why is stable funding for law reform commissions not sustainable in Nova Scotia?
V. Possible reasons for the demise of the first Law Reform Commission and government withdrawal of funding for the second
Conclusion
VI. Postscript
Appendices
The Story of Law Reform in Nova Scotia: 341
A Perilous Enterprise

Introduction
The legal system and its constituent parts, like an old automobile, require constant attention, maintenance and repair. Principles and rules that make up the substance of the law, together with the supporting institutions, practices and procedures that provide our society with law and order and the way to settle our disputes, need to be constantly monitored and updated. The process of doing this we call law reform. It is a process that is crucial to the support and maintenance of the rule of law. Law reform can be carried out by different agencies or organizations and can be sporadic or continuous. In this paper we will focus our attention upon two Nova Scotia agencies created by statute to carry out continuous law reform. Called Law Reform Commissions, the first was created in 1969 and given the title of an “Advisory Commission.”1 The second was brought to life in 1990 and described as “An Independent Commission.”2 Although our main emphasis will be upon the operations of these two statutory bodies, we will also explore some general themes or issues inherent in the law reform process as a whole in order to provide a general backdrop against which to examine the roles, achievements and experiences of our two commissions.

The whole process of carrying on or doing law reform work is far from simple and usually involves issues or problems that are common to all law reform agencies. The car analogy mentioned above tends to give the impression that law reform is a simple process, but it is not. We begin our more general discussion of the law reform process with a closer look at such issues as how law reform commissions approach their work, the work method they employ and the limits of law reform. Also discussed will be the machinery of government and its role in law reform, why governments cannot do a proper job of law reform, and the general characteristics of law reform commissions. In the context of law reform in Nova Scotia specifically, we will examine early attempts at law reform in the province prior to the creation of the first law reform commission in 1969. We will then proceed to a fairly detailed review and analysis of the two law reform commissions. An overarching question, based upon the experience in Nova Scotia and elsewhere, is whether continuous law reform, as carried out by a law reform commission, is a sustainable activity in Nova Scotia particularly and if not, why not?

In the late 1960’s and early 70’s in Canada each of the common law provinces and the federal government had statutorily created law reform commissions or other institutions established to carry out continuous law reform. By 2015, (and some 45 years later) only six of the original ten organizations remain in operation. Of the six, only three remained as government-created and government-funded institutions. Nova Scotia was one of these, the other two being Manitoba and Saskatchewan. British Columbia’s commission had been terminated and reinstated as a non-statutory non-governmental body, as was the case in Ontario. Only two of the original ten commissions could boast of continuous, non-interrupted operation (Manitoba and Saskatchewan) both of which were small in size and budget.

In Nova Scotia, the first Advisory Commission lasted ten years before it succumbed in 1981 because appointments of commissioners were allowed to lapse and new ones were not appointed. The Second Commission was created in 1990 and continued in full operation until 2016 when the government withdrew its funding. Under the original non-statutory arrangement established in 1990, the Nova Scotia government committed itself to providing $150,000.00 or 50 percent of the Commission’s total budget of $300,000.00 with the Law Foundation of Nova Scotia agreeing to pay a matching amount of $150,000.00, if revenues permitted. However, an unexpected substantial drop in interest rates shortly after the Second Commission began operations in 1991, forced the Law Foundation to decrease its funding to the extent that it could only provide 33 percent of the Commission’s budget for the first ten years of operation. As a result, the government’s contribution increased from 50 percent to 66.6 percent, but the average budget of the Commission for the first ten years was $248,672.00, rather than the $300,000.00 originally planned. Over

5. On 8 June 2015, the Liberal government of Nova Scotia notified the Commission that government funding of the Commission would cease as of 31 March 2016. This decision is not mentioned in the Commission’s Annual Report, covering the period 1 April 2015 to 31 March 2016 (but it is referred to in a letter from the Commission’s President to the Premier dated 24 September 2015 [unpublished]).
6. The Law Foundation of Nova Scotia is a public fund created by an amendment to the Barristers and Solicitors Act in 1976, SNS 1976, c 22. The foundation is largely funded by the interest which lawyers receive on money held in trust for clients.
the entire span of twenty-six years (1990–2016) government funding has averaged 53.4 percent of the Commission’s budget. The decision in 2016 by the government to terminate funding appeared to deliver a fatal blow to the Commission. Although not legally dead, since 1 March 2016, the Commission has been on life support and, if resuscitated, is not expected to resume operations in the same form as the statutory body. The Nova Scotia government had previously withdrawn funding in 2001, but the commission was able to maintain its operations with the critical financial support of the Law Foundation.7

The above short, historical account cannot help but raise the question why is institutional law reform so precarious an enterprise in Nova Scotia? Why is government funding, in particular, so questionable or uncertain? After reviewing in more detail the operations and activities of both Nova Scotia commissions, an attempt will be made to answer these questions.

I. Some preliminary considerations

1. Law reform—What is it? What does it mean?

The question invariably evokes a variety of different answers by writers and speakers on the subject.8 One legal commentator has suggested that the term “has no exact, objective meaning,”9 but usually refers to some program for changing the law with the implication that the change is for the better.10 Hurlburt, in his excellent book, Law Reform Commissions in the United Kingdom, Australia, and Canada adopts a definition found in the Oxford Companion to Law which places the same emphasis upon “the alteration of the law in some respect with the view to its improvement.”11 This definition will be used as a working definition throughout this paper.

Law reformers propose changes to the law with the intention and hope that the changes will improve the law. But what constitutes improvement in their minds? Do they have a concept of some ideal law that embodies the qualities of fairness, justness, efficiency, and clarity; and is enforceable; that maximizes freedom and accords with prevailing social values and needs of society; against which to measure their proposed improvements? It would be comforting to think so, but is that actually the case? We also

8. The problem is discussed at some length by Hurlburt, Law Reform Commissions in the United Kingdom, Australia, and Canada (Edmonton: Juriliber, 1986) at 3-9.
10. Ibid.
need to realize that there are important differences between the process involved in proposing changes to the law, the actual changes that result therefrom, and the consequences of the proposed changes, if and when the proposals become legislated into law. Intention to make changes can be known, as well as the proposed changes themselves, but the consequences of the proposed changes cannot always be known in advance with any degree of certainty. Improvements in the law that are intended and hoped for do not always happen as planned.

The concept of law reform, therefore, is not quite as simple as one might think, and, to compound the difficulty, the concept or meaning of law itself in the abstract is just as difficult to pin down. Furthermore, the word “law” can also mean different things to different people in different contexts. Anglo-Canadian usage of the term law usually refers to it as a collection of rules or principles of conduct established either by legislative authority, court decisions or established custom. Another definition, in the same Anglo-Canadian tradition, emphasizes the fact that these rules and principles are imposed upon individuals and enforced with sanctions if not followed, as is illustrated by the following definition of law as: “A body of rules for the guidance of human conduct which are imposed upon, and enforced among, the members of a given state.”

A less positivistic or philosophic view of the law is that expressed by a Canadian legal academic who stressed that:

Law is not brute fact, but is a fragile human accomplishment, which is at once a powerful and dynamic human institution. It reflects, at the same time as it helps to shape, the character of a society. Law is a powerful lense through which citizens are able to view and judge their society. Over time, it comes to express citizens’ beliefs and convictions as well as their prejudices and pathologies.

However, we have to remember that law is merely one part, although a very important part, of an overall functioning legal system.

When the discussion about law turns to the nature and purposes of law the meaning of law tends to change. As a former federal minister of justice has explained “…law is not just a ‘technical body of rules’; it is

12. Gerald L Gall, The Canadian Legal System (Toronto: Carswell Company, 1977) at 13, citing Derham, Maher & Waller, An Introduction to Law (Sydney: Law Book Company, 1966) at 182 suggests several different definitions of law that have been used historically.
13. Hurlburt, supra note 8 at 9.
the organizing principle for the re-configuration of society. Law is not just an agency of social control; it articulates the values by which men seek to live.” 16 Another description of the function of law emphasizes two purposes. First, the law serves to regulate the affairs or interrelationships of all persons in society, whether individuals, corporations or governments. Second, law sets a standard of conduct and morality for the guidance of citizens in a society. 17 As one renowned American legal scholar has explained, law is the “quest for good and workable arrangements for facilitating human interaction.” 18

Because our society is based upon the principle of the rule of law, the health or condition of that law is and should be of vital importance to us. Virtually all aspects of a person’s life are affected by the over-arching pressure of the law. That law and the legal system for its administration must command the respect of its citizens if it is to be effective. A legal system that corrodes or deteriorates and ceases to provide justice will inevitably engender disrespect in the population. The concept of the rule of law involves the principle that all persons in society, whether private individuals or government officials, are equally subject to the law. No one is above the law. “History shows that a nation which neglects the ordinary care of its laws is neglecting something which is very important to its national well being.” 19

2. How law reform commissions approach law reform
Ideally, a law reform commission embarking on the task of reforming the law should start with a well-thought-out plan of action. The plan will usually be based to a large extent on the kind of statutory mandate the commission has been given. That mandate might be very broad, as illustrated by that of the United Kingdom Law Reform Commission, which was charged with “keep[ing] under review all the law with which they are... concerned with a view to its systematic development and reform.” 20 A similar broad mandate was given to the Law Commission of Canada which required the Commission to “study and keep under review... the laws of Canada with a view to making recommendations for their improvements, modernization

17. Gall, supra note 12 at 1.
20. Law Commissions Act 1965 (UK), C 22, s 3(1).
and reform, …responsive to the changing needs of modern Canadian society and of individual members in that society.”

By way of contrast, a statutory mandate may be much more limited, as is the case in Nova Scotia, where the first Advisory Commission was limited to reviewing very specific parts of the law as requested by the Department of the Attorney General and to recommending proposals for change. If a commission’s mandate is a broad one, such as “to review all the law of the province,” the commission, as part of its action plan, would have to consider a series of important questions such as the following: What is to be included in the term “law”? What meaning should the commission attribute to it? Where does a systematic review of “the law” begin? What is to be considered a defect or deficiency in the law? How are defects or deficiencies to be identified? What changes in the law will need to be made in order to cure or correct the flaws and make “the law” better (or to improve it?)

Each of the above questions requires elaboration.

The law
Somehow commissioners will have to reach a consensus about their understanding of what “the law” entails. As already noted, the concept of “law” is understood differently, depending upon the philosophical outlook of the person considering the question. As a practical matter this question may not be expressly addressed by some commissions at all with commissioners just assuming that there is a common understanding of the term.

The starting point—Identifying defects
How does a commission with a broad mandate select the starting point for its reform work? It may decide to establish an order of priority by selecting an area of law that is thought to be most in need of reform, but what criteria will it use to determine this and other areas? How will deficiencies be identified? The answer, of course, is that the commission will have to do extensive background research and collect data, both legal and nonlegal to outline the nature and scope of the defects. Some defects may involve language that is ambiguous or out of date. In other situations the legal rules may be in conflict with each other and in need of reconciliation. In still other circumstances the rule or rules may have been drafted in a way

22. Supra note 1, s 4.
23. As was the directive given by the Nova Scotia Legislature to the 2nd Independent Law Commission in section four of the Law Reform Commission Act, supra note 2.
that makes them unduly complicated or complex making them difficult for the reader to understand. In some cases the problem may be not in the language or its construction, but in the fact that there is a gap in the law, revealing an area of human activity that requires legal regulation but which has somehow escaped legal coverage. The oversight may be the fault of the drafters or it may be that social conditions have changed.

Finding solutions
Once the legal defect or defects have been identified the commission must then decide how to remedy the defect by creating and providing an effective legal solution that will improve the law. In cases where the issue or problem is a matter of form, involving ambiguous, unduly complex or out-of-date language, or even a gap in the law, the solution may be easily found. But in other situations the difficulty may be in the fact that existing laws are unsuitable because they produce unjust results, in some cases because serious ethical or moral considerations are involved, reflecting basic social values. In these cases, in our pluralistic society it might be difficult to find a social consensus to support a proposed solution. In cases where the commission has been able to identify more than one potential solution, it may have to choose between them and try to assess, as best it can, which one will improve the law the most.

As one experienced law reformer has explained: “Law reform is the process of identifying and clarifying standards of performance for the legal order and of finding and implementing ways of maximizing achievements of those standards.”

Because many persons who serve as commissioners are legally trained, as either practitioners, judges, retired judges, or academics, it is likely they will be guided in making these difficult decisions by values they are familiar with, such as fairness, efficiency, justness, clarity and enforceability. In addition, the ideal law should try to maximize individual freedom and conform to social values. But social values in general are “as unruly a herd of horses as are those values which are embodied in what is technically called ‘public policy.’” Values that law reformers claim or appear to be pursuing are sometimes inconclusive or vague. Law reformers will also be influenced in their decision making by their unspoken personal values.


25 Hurlburt, supra note 8 at 295 who also outlines some of the general values which often serve as a guide for law commissioners as they make their difficult decision at 267-269.
The foregoing discussion should make it clear that the law reform process requires law reform commissions to address and to try to answer a series of very difficult questions. Law reform is not for the faint of heart. The extent to which individual commissioners consciously develop an action plan and address these questions in an organized way will no doubt vary, and in some cases a plan may not be developed at all. Some commissions may be totally reactive, that is, they respond primarily to suggested reforms as passed on to them by other people rather than attempting at the outset to develop a philosophy of reform or criteria for selecting areas to be reformed.

3. Limitations on law reform commissions: Lawyers’ law or social policy law or both?

Law reform commissions do have their limits in that they are primarily oriented towards reform of the law, as well as legal and government institutions and how they operate, with their most common output being proposed legislation. They are not expected to solve all the social problems of society by pursuing a program of social reform. Because commissions are usually composed of a majority of legally-trained persons, with just a sprinkling of nonlawyers, they tend to be more comfortable dealing with what is known as lawyers’ law, technical law or private law. They are more at home dealing with rules that they encounter professionally and the practices and institutions associated with the administration and application of those rules. Lawyers are less inclined to delve into reform measures that involve significant social policy issues. These are reform issues that are designed to accomplish changes in the social order, such as a transfer of economic, political or social power from one group to another to correct a perceived imbalance in society. This kind of law change in a democratic system of government is generally reserved to an elected legislature and often involves issues of political partisanship. Changing the eligibility of citizens to vote, changing the tax laws or social entitlements

26. This point is forcibly made by Hurlburt in response to criticism levelled at law commissions for not addressing fundamental social problems by critics such as Professor R.A. Macdonald in his article “Recommissioning Law Reform,” supra note 3. Hurlburt also discusses the limits of law reform commissions in his article, “A Case for the Re-Instatement of the Manitoba Law Commission,” supra note 4. See also RA Samek, “A Case for Social Reform” (1977) 55:3 Can Bar Rev 409.

27. In his excellent book, Hurlburt discusses what the creators of law reform commission expect from their creations, as well as the values applied by the Commissions. Supra note 8 Ch 5 at 250 ff.

28. Professor Geoffrey Sawer has suggested that “…in lawyers’ law, policy or social purpose is encapsulated in propositions—principles, rules, concepts and maxims—and an attempt is made to proceed by propositional logic within that system whereas, in what I call the law of social administration, social policy and purpose are directly apprehended and an attempt is made to proceed by reference to them.” See Sawer, “The Legal Theory of Law Reform” (1970) 20:2 UTLJ 183 at 192-193.
are some examples of social policy changes that commissions try to avoid. There are other examples, such as the right-to-die legislation or same-sex marriage provisions that not only invoke social policy but have the added complication of raising serious ethical and moral principles as well. Lawyers are thought to be no more better equipped to make decisions with regard to these issues than are ordinary citizens and yet they may well be called upon to do so as members of a law reform commission.

The predominance of lawyers on reform commissions has made the appointment of nonlawyers an important issue for commissions and those creating them. It is no wonder that critics of law reform commissions are of the view that they have too narrow a focus when it comes to selecting law reform projects and that they shy away from examining reform projects that involve significant social policy decisions. It goes without saying that most changes in the law, including even technical law, will have some social consequences and in this sense involve some degree of social policy. In the final analysis, what differentiates so called social policy law from lawyers' law is the importance and significance of the social policy changes that might result from the proposed reform. As Hurlburt points out in his very valuable book, we must recognize that “... in relation to the nature and function of law these categories are artificial because all law embodies social policy; that for the same reason the term ‘technical law’ can even be misleading; that the drawing of boundary between technical law and social policy-law at any time involves much subjective judgment; and that the boundary is constantly shifting.” As the author goes on to say, in order to have a useful discussion of the process of law reform in general and the work and function of law reform commissions in particular, such a distinction is necessary.

4. How law reform commissions do their work

Law reform commissions usually work on a project-by-project basis since it is impossible to reform all of the law at once. But, if they are large

29. See, for example, Lyon, supra note 24, Macdonald, supra note 23, Samek, supra note 26, and RA Macdonald, “Jamais deux sans trois...Once Reform, Twice Commission, Thrice Law” (2007) 22:2 CJLS 117.

30. Hurlburt, supra note 8 at 13-14, suggests that “technical law” be defined as “… law which society at any given moment leaves to lawyers and which is comparatively ‘rule bound’ or which is encapsulated in propositions in a system within which the law proceeds by propositional logic in its attempted achievement of social purpose.” Hurlburt goes on to define “social-policy law” as “…law which society at any given moment reserves for development by Parliament and by the ordinary machinery of government and which is comparatively free in its attempted achievement of social purposes.”

31. Ibid at 14.

32. Hurlburt, supra note 4 at 232.
enough and have sufficient resources, they may be able to work on several projects at the same time. Whether a commission is requested by the Attorney General to review a particular part of the law of a particular statute or they have by some process decided which part of the law to review on their own, the commission goes through a series of well-recognized steps or stages before issuing a final reform proposal.

The first stage and perhaps the most important, is that involving the collection of research data, both legal and nonlegal, that is relevant to the particular reform project underway. Accurate and complete research data is, therefore, the starting point and foundation for a law reform commission’s reform process. It is clearly necessary first to determine the state of the existing law in the area being reviewed, then to carefully delineate the deficiencies, and finally, to explore potential solutions. Research data usually includes legal information in the form of cases, statutes, and regulations applicable to the legal area under review. It often includes empirical data in the form of statistical information, social facts, and social values. Legal data is normally easy to obtain, unlike empirical information which often takes much time and effort to collect. Research data can also include facts that describe potentially applicable solutions that will eliminate deficiencies in the law. These potential cures are often found in the reports of other law reform commissions which are frequently consulted as part of the research process. It is also important to note that the collection or compilation of research data is often the result of extensive consultation with other law reform agencies and individuals who have relevant knowledge in the area.

After the research stage is completed and research reports, often called working papers, initial reports or sometimes study papers, are prepared either by commission staff or external researchers, the commission goes through a process of intensive discussion with research staff which usually results in the production of a commission document often labelled a discussion paper. This paper outlines the existing legal situation, the deficiencies found, and offers tentative suggestions for change. The discussion paper is circulated to interested and affected parties and their comments are invited. After receiving feedback from the public and other persons, the commission reviews it in detail and, if changes are required to the discussion paper, they are made and a final report is then produced. This report containing the proposals for reform is usually forwarded to the Attorney General and circulated to the public as well. The Attorney General and his or her staff review the commission proposals and either act upon them, in whole or in part by drafting legislation to implement them, or they are set aside without reason given to the commission for
rejection. On occasion, commission reports are returned to the commission for further review and further recommendations. Regretably, the primary measure used to judge whether a commission is successful and worthy of continued financial support is the number of commission proposals that result in legislative change.

5. The machinery of government and law reform

If law reform is so important, how does it get done in a modern state without a law reform commission? Does the machinery of government become engaged in law reform at all? One important aspect of good government involves maintaining the provincial law in good condition and responsive to the needs of society. The one institution of government primarily responsible for the good governance of the province is the provincial legislature operating within its constitutional jurisdiction. Responsible government, as a theory, means that the responsibility for legislative action rests primarily in the executive branch of government spearheaded by the cabinet. Part of this responsibility involves initiating new laws when deemed necessary, as well as making changes to existing laws that are considered to be unsuitable. Unsuitable in this context may mean laws that produce unjust or undesirable results, those that are out of date in terms of language, or those that no longer produce satisfying social results in tune with contemporary social interests or needs.

In theory, legislatures could organize themselves to design and carry out a continuous program of law reform, but they have never done so. Legislative law making and law reform by contemporary legislatures consist of examination and review of legislative proposals submitted to the representative institutions by the cabinet which are either accepted or rejected by the legislative body. Legislative bodies do enact reforms of the law, but they usually do not have the capacity to do so in any substantial or continuous way. The legislatures usually rely upon the executive to originate legislation that changes the law, but the dominant purpose of the executive is to devise and implement policies that will carry out a political agenda, not to review the body of general law so that it will be more perfect and function better for the benefit of those affected by it. The cabinet as a whole pays little attention to systematic and continuous law reform. If a government does involve itself in law reform at all, the reforms it

33. For an excellent discussion of the machinery of government and its potential for law reform see Hurlburt, supra note 4 at 218-220.
34. Hurlburt, supra note 8 at 447.
35. Hurlburt, supra note 4 at 219.
36. Hurlburt, supra note 8 at 447.
usually initiates are most likely to be ad hoc reforms which are considered to be important and necessary by those who control the political process.\textsuperscript{37} Sometimes a government department will carry out a review of an area of law for which the department is administratively responsible when it thinks that reform is needed.\textsuperscript{38}

Legislatures and the executive may wish to delegate some of their powers to subordinate bodies such as administrative tribunals or administrators. But they cannot pass off the ultimate responsibility for good government and effective laws to such bodies. It is true that the subordinate creatures of the legislature can create law by passing regulations as part of their task of implementing and applying legislative provisions. Subject to judicial review, these regulations can change the law they create insofar as it involves administrative practices, procedures and policies. However, their primary role is not to change the law but rather to carry out the administrative task assigned to them in the legislation by the legislature, to flesh out and add detail to the general legislative provisions in their parent statute.\textsuperscript{39}

Judges do make law, and, occasionally they make changes in the law. In this sense they reform the law. \textit{Donoghue v. Stevenson}\textsuperscript{40} is a prime example of how the courts bought about a major reform of the law of torts by lowering the standard of fault required to support a claim in negligence. But the court did not create the new standard for the sole purpose of reforming the law \textit{per se}. They changed the law to bring about what they considered to be a more just result in the case before them. Courts are established to adjudicate and any changes they make in the law are usually incidental to adjudication. The judicial method is not a reforming method. As one experienced law reform commissioner has expressed it:

\begin{quote}
The Judge should reason from legal principle and should not apply his own view about social goals. While the judge’s role in law making and law reform is important, it is circumscribed by legal principle and by statute, and it rarely extends to the systematic development of the law.\textsuperscript{41}
\end{quote}

In addition to the normal or usual agencies of government such as the legislature, the executive, and the administration, there are other external bodies that engage in some aspect of what might be considered to be

\begin{itemize}
\item \textsuperscript{37} Hurlburt, \textit{supra} note 4 at 220.
\item \textsuperscript{38} Hurlburt, \textit{supra} note 8 at 447-448.
\item \textsuperscript{39} Hurlburt, \textit{supra} note 4 at 220.
\item \textsuperscript{40} \textit{Donoghue v Stevenson}, [1932] UKHL 100 (BAILII), [1932] AC 562, cited by Hurlburt, \textit{supra} note 4 at 219.
\item \textsuperscript{41} Hurlburt, \textit{supra} note 8 at 447.
\end{itemize}
law reform. For example, royal commissions, commissions of inquiry, select committees of the House or the Legislature and task forces can be used as fact finders and charged to investigate difficult problems, making recommendations and findings. Royal commissions, for example, are very suitable for dealing with complex, difficult problems that require the collection of large amounts of information that must be reviewed and assessed to produce an independent and well considered report. Similarly, commissions of inquiry can be given “wide ranging investigative authority to uncover facts concerning matters of public importance.” They are often able to “investigate, reform and educate in ways superior to the mechanisms available to the judicial and legislative branches of government.”

In situations where a government requires continuing advice upon a subject, whether for use in the legislative process or otherwise, a standing committee is often created. It can provide the government with scientific or non-scientific advice based upon information or opinions provided by experts. A task force may also be assembled to investigate and provide either factual data or opinion, or both, regarding a specific subject matter—such as court restructuring. What distinguishes law reform carried out by law reform agencies from reform efforts carried out by these various advisory bodies is the commission’s systematic, continuous review and analysis of the entire body of laws, as well as legal institutions and practices, with the purpose of revealing defects or shortcomings and proposing solutions.

It has been argued that the ordinary machinery of government, even as supplemented by the useful work of external bodies, is still not able to provide the kind of law reform needed to improve areas of the law that are unsuited to the conditions to which they apply. What is lacking is a systematic, continuous review of the law and the legal system as a whole, one that is “not wholly dependent upon the exigencies of the political process,” the kind of approach to reform that only a body like a law reform commission dedicated to the task can provide. Canada’s former minister of justice went so far as to declare that the process of law reform goes to the core of defining the kind of society we will have as a Canadian people and the kinds of rights we will enjoy as individuals.

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42. As Hurlburt points out _ibid_ at 449-450, where the author discusses the law reform roles and capabilities of these external agencies.
45. See the assessment by Hurlburt, _supra_ note 8 at 450-453.
46. Hurlburt, _supra_ note 4 at 220.
47. See Turner, _supra_ note 16 at 2, quoted by Hurlburt, _supra_ note 8 at 181.
These words were uttered with reference to the work of the Federal Law Reform Commission, but they apply with equal validity to provincial law commissions and to provincial laws.

Special features of law reform commissions
What is it about law reform commissions that sets them apart from other organizations that engage in law reform and makes them particularly suitable for systematic law reform work? The following special features or characteristics have been identified and suggested as particularly important for indepth research and extensive public consultation that is such an important part of the modern law reform process.

- Commissions are, to a great extent, separate from the ordinary machinery of government and independent of government bureaucracy or any other group or sector of the community. 48
- They are intended to operate continuously over extended periods of time with either full-time or part-time staff members. 49
- They are usually small in size compared with other government or non-governmental institutions. 50
- The commissions are primarily composed of lawyers or judges with only a minority of nonlawyers. 51
- The decisions made by commissions are collective decisions arrived at after intense discussion of issues by a team of carefully selected individuals working together for extensive periods of time. Commissioners are not necessarily experts in law reform but gain law reform experience as they serve their terms as commissioners. 52
- Commissions do not legislate or make law except to the extent that they put forth proposals for changes in the law that might become law eventually, if accepted by the government and passed as legislative enactments by the legislatures. However, their reports, whether adopted or not by the government, become authoritative, accurate statements of the existing law. 53
- Commissions operate in the public arena in that their reports become public documents and subject to public scrutiny and discussion. These features or characteristics not only allow a law reform commission to do the kind of fundamental research work and consultation that is so

49. Hanford, *supra* note 3 at 507.
52. Hanford, *supra* note 3 at 508-509.
essential if effective reform of the law is to be achieved, but it also
provides for public input to the process and, hopefully, reduces public
suspicion of the process itself. It may engender public approval as well.54

II. The pre-commission era and law reform

1. Conference of Commissioners on Uniformity of Legislation in
   Canada

The Conference, a national agency, was organized by governments of the
provinces in 1918 under the sponsorship of the Canadian Bar Association.55
It has met annually since 1918 with the exception of one year, 1940.
It is composed of representatives from each of the ten provinces, the
territories, and the Government of Canada who each appoint three or more
representatives. In the past, they have included judges, members of the
offices of attorneys general, most often legislative counsel, practising
lawyers and law faculty members.

The purpose of the Conference was declared to be that of the
“simplification, systematization, and in a very considerable degree,
unification of the positive law of the provinces on a large variety of topics
affecting the transactions of every day business.”56 The Conference was
intended to produce “uniform legislation on subjects common to all,
model acts of the best type, well drafted and carefully considered.”57 The
Conference was particularly concerned to eliminate conflicting decisions
of courts from different provinces dealing with the same legal issue and
arising out of identical or similar facts or different judicial interpretations
of the same or similar statutory provisions.58

Although the expressed primary purpose of the Conference was to
achieve uniformity of legislation in Canada, the very process of preparing

54. Ibid.
56. Ibid at 235, quoting Hon Lyman P Duff (Address delivered at the First Annual Meeting of the
Canadian Bar Association, 20 March 1915), Report of the Canadian Bar Association: 1915 at 58. See
57. Read, supra note 55 at 235-36; quoting President Teed (President’s Address delivered at the
Sixth Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada,
30 August 1925), Proceedings of the Conference of Commissioners on Uniformity of Legislation in
Canada at 20.
58. Read, ibid. The more specific purposes were declared to be “(a) to secure uniformity in the
lex scripta of provincial enactments governing the same activity or thing in commercial or kindred
subjects”; and “(b) to obviate conflicting decisions of courts from different provinces upon the same
question arising out of identical or similar facts and under statutes substantially alike in principle or
varying slightly only in phrases expressing those principles.”
“model acts” involving the rephrasing and rearranging of existing statutory provisions inevitably resulted in some degree of reform, even if not intended. In some cases, revisions of older uniform acts was deliberately reformative, while in other situations the Conference developed model legislation on subjects not covered by statute in the common law provinces, and, in this sense, reformed the law. In 1965, the then President of the Conference openly declared that the task of the Conference was “to reform the law and not merely to codify it.” The view was not, however, shared by all.

By 1961, Nova Scotia had adopted nineteen “Model Acts.” As one well known Canadian legal scholar, John Willis, observed, the Conference had its greatest success getting uniform proposals adopted by the provinces when “ironing out minor variations in statutes that are substantially common to all provinces” and that it had the least amount of success when it wandered into what he called “a mild form of law reform,” citing the Contributory Negligence Act as an example. Professor Willis also noted that the Conference deliberately avoided dealing with areas of law like taxation or regulatory legislation because these areas involved so much policy which provinces wanted to control.

Practices or procedures of the Conference

Proposals or suggestions for subjects for model acts could be brought to the Conference by the Canadian Bar Association, provincial attorneys general or by conference members. In order to be acted upon proposals had to have the support of at least four governments for a uniform act to be drafted and an expressed willingness to enact it.

The actual preparation of model acts went through many stages, starting with the research stage undertaken by designated commissioners. Their research report contained information that outlined the desirable features as well as the deficiencies of existing law in Canada and elsewhere.

59. Ibid.
60. Ibid.
61. Ibid, such as the Contributory Negligence Act and the Human Tissue Act.
62. Hurlburt, supra note 8 at 174; quoting WF Bowker (President’s Address delivered at the 47th Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, 23 August 1965).
63. Ibid, in a brief to the Attorney General of BC regarding the establishment of a law reform commission, members of the faculty of UBC expressed this view.
64. Read, supra note 55 at 236.
66. Ibid at 364-365
67. Described by Read, supra note 55 at 237-238 nn 26, 28.
in particular areas. The report also recommended in a general way the type of legislation it was believed to be desirable, making special mention of the features to be included (as well as those to be excluded). Following the initial research report the process continued with discussion in principle; preparation of a draft act if the research report was accepted; followed by a second draft; discussion of a second draft; more discussion of the main principles; final approval by the Conference of the draft act; publication of the tentatively approved draft by the Conference; submission to the attorneys general, the Canadian Bar Association and other interested parties for feedback; consideration of comments received; final approval of the draft act; and ultimately publication of the draft act as a model act in the proceedings of the Conference and the recommendation of the model act to the provincial attorneys general. It was a long but thorough process. It will become obvious that many, but not all, of the stages of the creation of a model act were also adopted and followed by later Nova Scotia commissions.

Assessment of the Conference

In spite of the fact that the Conference did, in fact, bring about changes in provincial laws, some of which were quite significant, it was not created to deliberately achieve systematic law reform. Rather, its main goal was to achieve some degree of legal consistency and uniformity in Canada by convincing provinces to adopt uniform model acts. In addition, its very structure and practices could not enable it to carry out systematic law reform even if it wanted to do so. The Conference had no permanent staff and met only once a year, although particular subcommittees working on specific model acts did meet throughout the year. Research funds were small and research was carried out by its members as best they could. Still, the Conference was able to produce a considerable number of model acts, a good many of which served as important background sources for research carried on by our two Nova Scotia Law commissions.68

2. Nova Scotia Legislative Research Centre: Dalhousie Law School

In 1950, Dr. Horace Read, Dean of the Dalhousie Law School established the Nova Scotia Legislative Research Centre at the Dalhousie Law School. The Centre was intended to allow students to engage in the preparation of actual government bills under the supervision of the teacher of the course in legislation and the Legislative Counsel of the province. This “laboratory work,” to use Dean Read’s words, was intended to help students appreciate

68. Hurlburt, supra note 8 at 174 makes a similar assessment. Between 1921 & 1961, the Conference prepared and recommended for enactment fifty model acts. Read, supra note 55 at 236.
and understand the process of legislation itself and to comprehend the many steps that have to be taken in order for a bill to be ready for presentation to the legislature. By obtaining a better understanding of how statutes are created, the hope was that the students would also better understand the later process by which courts had to interpret legislative provisions using the so-called rules of statutory interpretation.69

Dean Read had a second purpose in mind for the Centre. He wanted to make the results of student research and drafting available to the government and relieve those public servants charged with the preparation of government bills of some of the research they would have to do themselves in the preparation of these bills. It was Dean Read’s hope that the Centre’s activities would someday “grow into an embryonic law reform commission, keeping the laws of Nova Scotia under continuous, objective, and politically disinterested study with the aim of discovering how to develop them to best fit the needs of the province.”70

The Nova Scotia Legislative Research Centre at Dalhousie had been modelled upon a similar experiment developed by Dean Read at the University of Minnesota law school in which students researched and drafted private members’ bills. According to John Willis, the service provided to the various groups and organizations who wanted to present these private bills to the legislature was so popular that “the laboratory was just about to become an institute” with Dean Read as director when Dr. Read was appointed Dean of Law at Dalhousie. The plan for the Minnesota Institute was replicated as a centre for legislative research in Halifax with the support and encouragement of the then Premier Angus L. MacDonald.71

A large portion of the student work at the Dalhousie Centre involved comparative research which required students to investigate and make comparative analyses of the methods by which other countries and jurisdictions tackled the same or similar legislative problems. Students also consulted with welfare agencies, provincial civic organizations, the social sciences and government departments. Students’ duties also included preliminary drafting of legislation.72

During the first ten years of operation Dal students made substantial contributions to the research on which approximately half a dozen statutes

69. In the author’s personal experience.
70. Willis, A History of The Dalhousie Law School (Toronto: University of Toronto Press, 1979) at 177-178.
71. Ibid.
72. Based upon the author’s personal experience as both a student and instructor in the course of Legislation.
were based. Students also worked on several projects of the Conference of Commissioners on Uniformity of Legislation in Canada. John Willis saw the accomplishments of the Centre a little differently as he explained "the students had done much of the purely scissors and paste work involved in producing Revised Statutes, 1954 and some of the groundwork for a few reform measures but that was all." Whatever the correct perspective might have been, the number of suitable projects from the government for the Centre to work on gradually diminished to the point where Dean Read in his 1955–59 Report to the president of the University was forced to concede that "the work [being] done by the students in the...Centre [was] no more than a valuable supplement to the classroom work of his course in legislation." What went wrong? A major reason for the Centre’s lack of success was the fact that students were being asked to work on proposed government legislation rather than private members’ bills. The difference being that government bills normally are more complex and tied to a legislative time schedule that is much more time sensitive than private bills. The amount of careful research and drafting that can be done by forty or fifty students in an academic year is limited. As John Willis explained “...the needs of the civil servants did not usually mesh with the students’ available time and capability.” A second contributing factor was insufficient supervision. No matter how bright and intelligent students might be, their lack of experience researching and drafting legislation necessitated close supervision. Acting both as Dean of the Law School and as an instructor / director of the Centre, Dean Read was unable to provide the necessary supervision which is particularly important for those students who were not prepared to do the required “bull work” or leg work involved in finding out how the present law was actually working and exposing any obvious defects. Dean Read’s hope for a small beginning, an embryonic law reform commission, failed to materialize, but the seeds of law reform had been planted in Nova Scotia: The need was there but a successful mechanism to carry out reform had yet to be developed.

74. Willis, supra note 70 at 178.
75. Ibid.
76. Ibid.
3. *The Nova Scotia Barristers’ Society*

There was a growing awareness within the legal community in Nova Scotia that every lawyer had some responsibility for the improvement of the law and its administration in the province. This concern manifested itself in 1953 when the Council of the Nova Scotia Barristers’ Society created a Board of Legal Research. The Board, sometimes referred to as the Legal Research Law Reform Committee, had been established as a result of a Council resolution “to establish a body which would promote improvement in private law and procedure and which would inquire and report on suggestions for law revision, amendment or enactment that were referred to it by Council or by the Council’s legislation committee.” The Board brought together practicing lawyers, legal academics from the law school as well as law students from the Legislative Research Centre at Dalhousie. It operated for almost 20 years with the last reference to it appearing in Council minutes in 1973.

During this 20 year period the Bar Council also had a Legislative Committee which studied potential statutes and drafted statutory amendments or new laws, copies of which were forwarded to the Attorney General. If particular topics required lengthy or indepth analysis beyond the capabilities of the Committee, they would be referred to the Board. Over time, attempts were made to integrate the activities of the Committee and the Board by sharing the same personnel. After 1973, lack of any reference to a separate Research Board in Council Minutes suggests that the Board’s activities had been assumed by the Legislative Committee.

The Committee/Board did make a significant contribution to the improvement of Nova Scotia law by its work on the Bill entitled “An Act to Simplify Conveyances in the Creation of Pre-trial Procedures for the Supreme Court of Nova Scotia,” its work on the *Statute of Frauds*, the rule against perpetuities, modernization of the administration of estates, land title registration, landlord and tenant law, the *Companies Act*, creation of a family court, vendor and purchaser legislation, personal properties securities legislation, family maintenance law and dower. Many of these

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78. Ibid.


topics would continue to be the subject of further study by succeeding law reform commissions in Nova Scotia.\textsuperscript{82}

Law reform was also being carried out on particular topics by special committees or subgroups of the Barristers’ Society, such as regional or country bar associations, but the Society also saw the need for a more broadly-based law reform body. At the Society’s annual meeting in 1965, suggestions were made for the formation of a law reform committee, “composed of lawyers, sociologists and others who are interested in the public weal to form such a committee, and to make suggestions to the Attorney General’s department.”\textsuperscript{83} Later that year Council passed a resolution calling for permanent machinery which would ensure: “continuous review of existing legislation; the promotion of revisions to existing legislation; and the promotion of new laws as required.”\textsuperscript{84} The resolution just happened to coincide with the enactment or creation of the UK Law Reform Commission in 1965, which was followed one year later with the creation of the Ontario Law Reform Commission.

III. The first Law Reform Advisory Commission 1969–1981

1. \textit{Bill-43 and the reasons for it}

On 25 February 1969 the Honourable R.A. Donahoe introduced for first reading Bill-43 titled “An Act to provide for a Law Reform Advisory Commission.”\textsuperscript{85} Three days later on second reading Mr. Donohoe told the House of Assembly:

> I do not propose to make any long address, relative to the principle of it. I’m sure that Honourable members who have had an opportunity to peruse it will know exactly what it is intended to do. And on the introduction of it, I did advise the house that this Bill is put forward in order to provide material and matter for consideration in this most important region of law reform.\textsuperscript{86}

But beyond telling the House that Bill-43 had something to do with the important subject of law reform, Mr. Donohoe had nothing to say about the reasons for the Bill, what it was supposed to accomplish or how this would be done. Admittedly the Bill was relatively short, comprised of only ten sections, but the topic certainly was important enough to warrant more

\textsuperscript{82} The case for the Law Reform Commission of Nova Scotia, \textit{supra} note 77; and \textit{Perpetuities}, \textit{supra} note 80.
\textsuperscript{83} \textit{Ibid} at 3, citing Council Minutes of 2 July 1965.
\textsuperscript{84} \textit{Ibid} at 4, citing Council Minutes of 4 December 1965.
\textsuperscript{86} “Bill 43, Law Reform Commission,” 2nd Reading, \textit{ibid} at 1098-1099 (Hon RA Donohoe).
of an explanation than was given by the Honourable Minister. On the other hand, the fact that there is no record of any kind of debate by the House members on second reading or in committee might suggest that there was no need for further elaboration by the minister. Perhaps the perceived need for a law reform commission was so obvious to the House that no explanation of its raison d’etre was required, a less charitable explanation might be that no one really cared. Whatever the correct interpretation of the event might be, there appears to have been no debate in the House on second reading and the Bill was referred to the Law Amendments Committee and returned to the House apparently without comment.

However, there were external forces at work in Canada and in the United Kingdom in the years leading up to 1969 that might have influenced the government to introduce legislation to create a law reform commission. In 1964–1965 the United Kingdom government had created the United Kingdom Law Reform Commission7 and, at roughly the same time, Ontario created its own Law Reform Commission.8 closer to home, as we have seen, the Nova Scotia Barristers’ Society expressed its concern for the need for some kind of law reform machinery with the passage of a Bar Council resolution in 1965 calling for a law reform commission that would help keep the laws of the province under continuous review.9 In addition, there was a more general world view in the 1960s reflecting a growing recognition in many countries that the whole body of the law was potentially in need of reform and that this could best be accomplished by a standing body of appropriate professional experts to consider reform of the law on a continuing basis.90 According to this view, society appeared to be losing faith in the other traditional methods for bringing about legal change. The legislatures were busy, the executive dominated by the need to satisfy the political agenda of the party in power, and judges who were bound by precedent and the literal rule of interpretation as well as the belief that it was not up to them to carry out the investigative research involved in the gathering of social data of the kind required for law reform. The law was seen as not keeping up with rapid changes in technology and in social values. There was an optimistic belief that state-sponsored

87. Supra note 19.
89. See above, the text accompanying note 77.
90. Sawer, supra note 28.
activities could cure social problems\(^91\) and that the human intellect could devise means to bring the external world fully under control.\(^92\)

Of all the factors that might have influenced the Nova Scotia government to introduce Bill-43, the passage of a Nova Scotia Bar Council resolution was probably the most important. It was the only factor mentioned by the Minister on second reading of the Bill when he explained that Bill-43 was being put forward by the government at the request of the Nova Scotia Barristers’ Society.\(^93\) As law reform measures go, Bill-43 presented to the Nova Scotia legislators a cautious approach. It did not seem to create a loose cannon that might invade and usurp the traditional legislative prerogatives of the House of Assembly. The Commission in its title was clearly described as advisory and the mandate given to the proposed commission was clearly limited and controlled by the office of the Attorney General.

Bill-43 became law on 3 April 1969 when the statute entitled “An Act to Provide for a Law Reform Advisory Commission” received Royal Assent.\(^94\) The Commission, composed of ten commissioners, did not, however, become operational until 1972.\(^95\) A member of the public reading this statute for the first time could easily be forgiven for getting the impression that the new Commission was very much under the control of the Attorney General. Certainly there were parts of the statute that conveyed this impression. For example, the Commission’s mandate, found in section 4 of the statute, required the Commission to undertake a review of any statutory enactment the Attorney General might request and “to recommend the repeal, revision or amendment of an enactment or any part thereof so reviewed.” The statute further provided that if the Attorney General requested, the Commission was obliged to consider any matter that was not already covered by statutory law and if the Commission determined that legislation was required, to recommend legal reform or change in the form of legislation.\(^96\) The result of this provision was that if a particular situation or set of circumstances, not then regulated by statute or regulation, appeared to be causing problems in society, the Commission was authorized, if the Attorney General requested, to investigate and

\(^{91}\) Hanford, supra note 3 at 506-507 quoting Judge Hal Jackson, “Law Reform from the Outside looking Back” (Paper delivered to the 1987 Annual Conference of Society of London Lawyers) [unpublished].

\(^{92}\) RA Macdonald, supra note 3.

\(^{93}\) Supra note 86.

\(^{94}\) Supra note 1.

\(^{95}\) Commissioners were appointed for two years, ibid, s 2(4). For a list of the first Commissioners and the first Secretary and Executive Officer, see Appendix 16.

\(^{96}\) Supra note 1, ss 4(b), 5.
propose a solution in the form of a draft statute. The Commission was also given authority to initiate research into any area of the law the Commission considered to be in need of reform, but only with the approval of the Attorney General. The statute made it clear that the term “law” includes the statute law, common law, judicial decisions, or any procedure under the statute or other law.\textsuperscript{97}

In addition to the ten commissioners, the Commission’s administrative staff was to be composed of a person serving as secretary and executive officer of the Commission whose duties involved dealing with administrative matters, and supervising any research as well as any other services that might be required. The statute stipulated that this position was to be filled by Legislative Counsel or a person in the public service appointed by Cabinet.\textsuperscript{98} There was also the possibility that the Attorney General could or would appoint an assistant secretary of the Commission from the public service.\textsuperscript{99} The Commission was authorized to appoint other staff members as research personnel with the approval of the Attorney General. The fact that the chief administrative officer of the Commission and the person in charge of supervising commission research was also Legislative Counsel, had the benefit of ensuring a close working connection between the Commission and the Department of the Attorney General, but it also meant loss of central control over its activities.

The Attorney General’s department also controlled the Commission budget which meant that the Commission did not have to solicit for funds from other external donors, but it also meant that the government controlled the purse strings. There was a provision in the statute for the creation of a separate “law reform fund” into which could be deposited any sum of money contributed as a grant or a gift.\textsuperscript{100} As far as it is known, no funds were ever accumulated in this account.

There were other non-statutory factors that tied the Commission closely to the Department of Justice. For example, the Commission’s offices were located on the same floor and in the same building as the Department of Justice. The Commission used the Department’s library and secretarial staff while members of the Legislative Counsel’s office carried out invaluable research on commission projects for the Commission.\textsuperscript{101} All very efficient and beneficial to the Commission, but also lending support to the public

\textsuperscript{97} Ibid.
\textsuperscript{98} Ibid, \textsuperscript{s} 3.
\textsuperscript{99} Ibid, \textsuperscript{s} 3(2).
\textsuperscript{100} Ibid, \textsuperscript{s} 9(2).
perception that the Nova Scotia Law Reform Advisory Commission was not far from being a mere unit of the Department of Justice.

The issue of publication of Commission reports recommending changes in Nova Scotia law was a point of contention throughout the life of the Commission and provided additional evidence of the lack of control the Commission had with regard to its own activities and operations. The Commission was required to submit annual reports to the Attorney General outlining the activities of the Commission during a given year.\(^{102}\) The Commission was also required to submit, in the form of final reports, their research, conclusions and recommendations for individual reform projects.\(^{103}\) The Attorney General was not obligated by the statute to publish these reports, nor was the Commission specifically authorized to publish them. As one commentator observed:

> It is vital to good law reform that proposed changes should be given the fullest possible consideration before they are implemented and this will be achieved most effectively by the Commission publicizing its findings and inviting comments from interested persons before it reports to the Attorney General with its recommendations.\(^{104}\)

These observations appear to be directed primarily at non-final or discussion papers, but they are equally applicable to final reports of the Commission.

The Law Reform Advisory Commission began operations on 25 January 1972 with the appointment of the first ten commissioners, all of whom were part-time appointments. The secretary and executive officer’s functions were carried out by Legislative Counsel who, by necessity, also had to be part time. In its 1973 Annual Report, the then executive director and secretary, is described by the Commission’s chairman as being “Secretary and de facto research director, administrative manager and liaison officer.”\(^{105}\) The Chair of the Commission, the Hon. Mr. Justice A. Gordon Cooper, was also only able to devote part of his time to Commission operations. The Commission had no full-time professional employees.\(^{106}\) In the first year of operations, the Commission received a number of suggestions for projects that originated with the Legislative Committee of the Barristers’ Society or came from Legislative Counsel

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\(^{102}\) Supra note 1, s 8(1).

\(^{103}\) Ibid, s 8(2).

\(^{104}\) L. Skene, supra note 101 at 213.


\(^{106}\) Ibid.
himself. All suggested topics were vetted first by the executive director and, if deemed suitable, would be recommended to the Commission for their approval and sent to the Attorney General with a positive recommendation for Commission action. If he approved of the suggestions they would be sent back to the Commission as a request from his office for action. One legal commentator has suggested that, on its face, the Act does not permit the Commission to initiate projects, even with the Attorney General’s approval.\(^{107}\) Whether legally authorized or not, the Law Reform Advisory Commission began work on at least eight projects in its first year, three of which were implemented by legislation. All of the research required for these three studies or reports was provided by members of the Commission without external research assistance.

At the same time that it was actively working on eight projects, the Commission was also trying to determine its approach to the whole question of law reform.\(^{108}\) Recognizing that its statutory mandate required a planned approach to law reform, the Commission decided to adopt an approach that would involve studying fields or areas of law rather than merely dealing with specific amendments to statutes to correct anomalies in them.\(^{109}\) The Commission acknowledged that “the law should more accurately reflect current social ideas and ideals to meet the needs of the people of the Province in a world of changing social and economic conditions.”\(^{110}\) Whether their decisions to undertake the eight projects they worked on in 1972 were influenced or affected by the above mentioned “area approach” is not clear, but in September of 1972 the Commission decided to commission Professor Charles of the Faculty of Law at Dalhousie to prepare a study paper that would contain suggestions, based on his experience, that would be proper areas of study and investigation for the Commission.

In his paper, Professor Charles not only listed areas of law that other provincial law reform agencies had studied and subsequently published reports with recommendations for reform, but he also referred to thirty model acts prepared by the Uniform Law Conference over the years that had not yet been adopted by Nova Scotia. His paper also provided what was described as “a philosophy of law reform” which emphasized that the purpose of law reform was to improve the law and then described the different ways this could be done. Relevant considerations, such as

\(^{107}\) L. Skene, supra note 101 at 208.
\(^{109}\) Ibid at 5.
\(^{110}\) Ibid.
a broad or narrow approach, or concentrating on lawyers, law or social policy legislation, are also discussed in the paper.\textsuperscript{111} The Charles Report (1972) was delivered to the Commission in November 1972 and discussed by the Commission in December of that year without any consensus being reached as to the approach the Commission favoured. Whether the paper had any effect upon the choice of projects subsequently undertaken by the Commission is not clear, but the Commission did decide that it would not undertake a review of a particular section of the \textit{Fatal Injuries Act},\textsuperscript{112} a project that had been suggested by the Nova Scotia Barristers’ Society to the Attorney General and passed on to the Commission for investigation. In keeping with their stated “area approach” the Commission did not think it appropriate to merely correct anomalies.

In 1972 the Nova Scotia Barristers’ Society proposed to establish a Law Foundation to provide funding for the new Law Reform Advisory Commission. The proposal involved taking money from interest earned on lawyers’/clients’ trust accounts. In 1972 the Society approached the Commission with the suggestion that the Commission take their proposal and treat it as a law reform project. Quite properly, the Commission thought it was not appropriate for the Commission to promote such an initiative as a law reform project and suggested that the Barristers’ Society should take the lead in getting legislation passed.\textsuperscript{113} In 1973 the Society made an attempt to have its law foundation proposal enacted into legislation but was not successful. The reasons for rejection by the legislature are interesting: the scheme amounted to an unwarranted appropriation of clients’ funds; the Law Reform Advisory Commission had not proven itself and could not justify the appropriation of these funds for its purposes; and if the work of the Commission was regarded by the government as being so important then the government should directly bear the cost of the Advisory Commission’s work.\textsuperscript{114} (Although this was a Nova Scotia Barristers’ Society bill, one County Bar actually voted against it.) The Advisory Commission had only been in existence for two years, but it appears, it had not yet gained the confidence of the members of the House of Assembly.

\begin{footnotes}
\item[112] \textit{Fatal Injuries Act}, RSNS 1967, c 100.
\end{footnotes}
2. *The workplan—Doing law reform*
Besides having to agree on a general approach to law reform, the Advisory Commission had to develop a more specific method of actually doing law reform. The Commission addressed this issue in the second year of operation and came up with a process that involved three different stages. The first stage would consist of a research report called a study paper. This paper would be prepared by either commissioners or external researchers hired for the task. The study paper was expected to include an outline of the legal problems to be addressed, or in other words the defects in the existing legal provisions, as evidenced by economic and social data in statistical form, if available. The paper would also include reference to data from the reports of other law reform commissions or agencies. Study papers were usually intended for internal consumption only, but might also be circulated to interested parties for comment, in some circumstances.

The Commissioners having digested the study paper were expected to then reach preliminary or tentative views or conclusions as to its contents and agree on what changes might be recommended. Their views were expressed in a working paper which was intended for circulation to other interested parties for comment. This was the second stage. After receiving and considering any comments about the contents of the working paper, the Commission would then prepare, as the third stage of its workplan, a final report. This final report, expressing the conclusions and recommendations of the Commission would be then sent to the Attorney General’s office for consideration and possible action.

3. *Some ongoing problems*
During its ten year period of operation the Law Reform Advisory Commission was continually plagued by a lack of full-time personnel to carry out its reform mandate. By mid-1973, with a backlog of eight projects to be completed, the Commission was convinced that a full-time research officer was required, if the backlog was to be reduced. They pressed their case with the Attorney General and went the further step of stopping work on three projects and not beginning work on two others. In his Annual Report December 1973, Chair Justice Cooper also noted that law reform is a full-time job requiring a full-time chair and a full-time director of research. To emphasize his point, Chair Cooper asked not to be

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116. As the Commission explains in its 1973 Annual Report, *ibid* at 7, “Study Papers may or may not be circulated for comment prior to the Commission arriving at tentative conclusions.”
reappointed, citing pressure of judicial duties and his belief that the time had come to appoint a full-time chair.\textsuperscript{117}

The Nova Scotia government addressed Chair Cooper’s concerns and suggestions by appointing a full-time chair and full-time executive director/secretary effective 1 January 1974.\textsuperscript{118} Unfortunately, neither appointee could take up their duties on that date. As a result, the Commission had to operate without their services for six months, until June 1974. The effect upon Commission operations was significant.\textsuperscript{119} The Commission was only able to complete one project in 1974 and had eight others under study. Lack of critical personnel also forced the Commission to refuse a request from the Attorney General to conduct an assessment of legal aid services in the province.\textsuperscript{120}

During 1975–1976 the Advisory Commission was able to complete five projects, but the Attorney General’s office continued to request the Commission to undertake other new projects, with the result that at the end of 1976 the Commission still had eight projects under study.\textsuperscript{121} One of the projects completed during this period was an act to amend the Commission’s founding statute.\textsuperscript{122} The amendment proposed changes to the number of commissioners, an increase in the number of nonlawyers on the Commission, and three-year terms for seven of the commissioners in order to avoid any gaps in Commission operations. The Commission’s proposals, as put forward to the Attorney General, were accepted by the government and the necessary statutory amendments were made in 1976.\textsuperscript{123}

Lilias Toward was appointed Chair of the Commission in 1977 and by the end of that year reported that the Commission now had ten projects in progress.\textsuperscript{124} The backlog was obviously increasing. This was due in large measure to the fact that during 1977 members of the Commission had concentrated their efforts almost exclusively upon the subject matter of matrimonial support and the ownership of matrimonial property in a marriage, a project that was of particular interest to Chair Toward. To help counteract the increasing backlog and to speed up the research process, the

\textsuperscript{117} Ibid at 11.
\textsuperscript{119} Supra note 101 at 201.
\textsuperscript{120} Supra note 118 at 7-8.
\textsuperscript{121} Ibid at 3. The eight projects included: Matrimonial Support, Limitations of Actions, Small Claims Court, Companies Act, Probate Act, Occupiers Liability, Personal Property Security Legislation and Illegitimate Children.
\textsuperscript{122} Supra note 1.
\textsuperscript{123} Ibid.
Commission decided to create small committees to deal with individual projects. As the Chair explained, the committee members (commissioners) would not be expected to do basic research themselves. This work was to be done by the Commission’s full-time research officer assisted by a member of the Legislative Counsel’s office.  

In 1978 the Commission was able to report that it had completed four projects and that five were still under study. However, the Commission also mentioned that by agreement with the Attorney General, they had decided in October 1978 to hold in abeyance research work on three projects so that the Commission could concentrate on other projects considered to have greater urgency. At its June meeting in 1978 the Commission decided to ask the Attorney General to refer all topics dealing with family law to it. In addition to its normal workload, the Commission was also asked by the Nova Scotia representatives to the Uniform Law Conference to review and comment on several uniform acts before they were presented to the Nova Scotia government. Legislative Counsel assured the Commission that it was proper for the Commission to express its views, but the Commission wanted to make it clear that any views it expressed were entirely unofficial and did not represent the formal view of the Commission.

Lilias Toward’s term as Chair of the Nova Scotia Law Reform Advisory Commission ended on 31 October 1979. One month before this date, Chair Toward prepared a sixteen page report for the Attorney General to augment the usual annual report of the Commission. In her September Report, Toward stressed the necessity of having a full-time chair and suggested that “more research could be undertaken if the duties laid down in the Act for the Executive Director were made the responsibility of a full-time Chair.” As she pointed out “it is very difficult for [Legislative Counsel] to combine his duties [as such] with those of the Executive Director of the Commission. Just when the Commission should be most active, the House is in session with the result that the Legislative Counsel/Executive

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125. Ibid. The member was Bill Macdonald who had been rendering valuable assistance to the Commission since 1974.  
127. Ibid.  
130. Ibid at 16.
Director is hardly available even for consultation and cannot be expected to carry out administrative duties and supervision of research at such times.”  

Chair Toward therefore recommended that the Act be amended accordingly. She concluded her report by suggesting that “[i]f a team of well qualified research personnel were to be built up, Nova Scotia could have as effective a Law Reform Commission as any in Canada.” The implication of this comment is obviously that more full-time research staff were needed and that the Commission was not as effective as it might be.

Only one project was completed in 1978-79, four were in progress and three still in abeyance. No new projects were undertaken. The Annual Report for 1979 is completely factual and lacking any observations or recommendations. It would appear that Chair Toward elected to include any such remarks in her separate report, one that the Attorney General would not feel obliged to publish, or perhaps to ensure that the Annual Report for 1979 would be published in some form. During the two years when Toward was chair of the Commission, the Commission completed four projects—two in 1978 and one in 1979.

On 21 December 1979 Linden Smith was appointed chair of the Advisory Commission. Besides being the law partner of Harry How, the Attorney General, Smith held other official offices. At the first meeting of the Commission on March 1, 1980, Chair Smith proposed the adoption of a new procedure to be followed which he explained would help to expand the research part of the reform process. The new procedure would involve the Office of Legislative Counsel doing the research on projects and preparing draft acts for the Commission to review. Since some members of the Legislative Counsel’s office had been assisting the Commission for a number of years, the proposal must have envisaged even more members of the Legislative Counsel’s office being involved. The commissioners accepted the new proposal subject to several conditions. The first condition was that any draft proposals for change had to include alternatives and, secondly, that the draft clearly outline the principles upon which the recommended change or changes were based. Chair Smith

131. Ibid at 9.
132. Ibid at 16.
133. Supra note 126. There was no mention of any new projects being undertaken in this report or that for 1978.
agreed to the conditions and pointed out that external research assistants would be sought if that was necessary.\footnote{Ibid. “It was further pointed out that there may be outside contracting of research work if the need arises.”}

There was no annual report published for 1980, although a draft report had been prepared and circulated to commissioners.\footnote{Minutes of the Nova Scotia Law Reform Advisory Commission (23 January 1981) at 4, Halifax, Nova Scotia Archives (1996-055/001-05).} Information gathered from the Minutes indicates that the Commission had three new projects referred to it during 1980 for a total of nine projects under study.\footnote{New projects included: Securities Legislation, Uniform Rules of Evidence & Uniform Limitation of Actions.} Several of the new projects had their source in the Council of Maritime Premiers. The result of this new development was that the catchment area for law reform work expanded, thus adding to the workload of the Commission. The Commission was still receiving references from the Attorney General as late as January 1981, and was actively engaged in the discussion of a uniform evidence act when it ceased to function.\footnote{The last meeting of the Advisory Commission was held on 23 January 1981. Supra note 137 at 4. It was resolved that the Commission should meet again at the call of Chair. The call never came.} As of 23 January 1981 the Commission had twelve unfinished projects on its worklist.\footnote{See Appendix 8.} The newly instituted reform process had only been in operation for ten months, too short a period for it to have any recognized effect, as far as speeding up the reform process was concerned. A heavy workload and apparently insufficient research resources was one of the ongoing major problems that the Commission never quite overcame.

**Independence**

The Advisory Commission’s founding statute clearly conveyed the impression that the Commission was to operate under the close control of the Attorney General and appeared to allow the Commission to exercise little independent judgment in relation to its operation. The most direct and forceful discussion of Commission independence is contained in a personal report that Chair Toward sent to the Attorney General on the occasion of the completion of her term as Chair of the Commission in September 1979.\footnote{Supra note 129.} Toward was emphatic that the proper role of the Commission was to take a longer range, continuous review of the law and that this could not be achieved by the government or government departments. She emphasized that the Commission’s approach had to be unbiased and nonpolitical, with the ability to go beyond the field of practical politics at
least on some occasions. To fulfill this role, the Commission not only had to be independent in fact but, more importantly, it had to appear to be independent to the public. To be credible in the eyes of the public, she contended, the Commission must not appear to be simply producing what the government instructs it to produce. It must not appear to be merely an adjunct of the Attorney General’s office for which the government would be responsible. If the Commission had to await references to it by its political masters, she argued, it would become, in fact, no more than a standing Royal Commission with the added danger that the Attorney General might be tempted to refer topics to the Commission to defuse controversy and actually delay reform. Strong words indeed! Chair Toward did acknowledge that for the most part, the Attorney General had been very receptive to any suggestions made to him by the Commission (not surprising in light of the fact that the Legislative Counsel was the source of more than one reform project suggestion to the Commission and to the Attorney General). Toward did not, however, specifically call for section 4(2) to be amended and her annual report does not suggest this either.

It is a matter of record that during its ten years of operation the Commission refused to undertake eight reform projects requested by the Attorney General. Refusals were based on different grounds. One request was refused because it required specific amendments to a particular statute, while another was rejected because it was too large and potentially too time consuming. Several requests were refused because the Commission thought they involved important social policy issues rather than legal issues. The distinction was important because the Commission appears to have believed that the Legislature expected the

142. Ibid at 3.
143. Ibid at 4.
144. Ibid.
146. The Fatal Injuries Act.
147. Assessment of Legal Aid in N.S.
148. Interest on Client’s Trust Accounts & Minors Consent to Medical Treatment.
Commission to confine itself to reform projects that involved primarily legal issues. Other projects were rejected for unknown reasons.

In 1974, the Advisory Commission tried to formally establish its freedom to select its own topics by requesting in its annual report to the Attorney General that section 4 of its founding statute be amended to allow the Commission to select its own topics. The suggestion was not acted upon by the Attorney General and section 4 was not amended. Four years later, in 1978, at an internal meeting of the Commission, the issue of independence was raised once more. Interestingly enough, the commissioners expressed two different views regarding independence. One group of commissioners thought that the Commission was more intimately tied to the Attorney General than was necessary and that the Commission should be able to initiate its own projects, subject to approval by the Attorney General and to publish its own reports. Other commissioners, however, pointed out that most of the projects currently under study by the Commission had been initiated by the commissioners themselves and suggested that it might be best to test the existing system before recommending any changes, noting that the Attorney General had not yet disallowed any Commission initiated project.

However, the commissioners were in agreement that the Commission should be free to decide whether its reports should be published and made available to the public. They further decided that once a matter had been referred to the Commission they should be free to deal with the matter as the Commission saw fit. Sometime before the end of 1978, the Attorney General apparently met with the Commission. At this meeting the commissioners outlined their concerns and made suggestions as to how they would like to see the Commission operate. These concerns and suggestions were incorporated into a written memorandum and sent to the Attorney General.

In the single year of Commission operation following the end of Toward’s term as Chair and the publication of her 1979 Report, there is no evidence in the minutes or elsewhere of any action by the Attorney General to increase the independence of the Commission. In fact, as

151. Supra note 118 at 7.
153. The memo is unpublished, see ibid.
already noted, the new Chair Linden Smith had proposed a process which he explained was designed to speed up the research efforts of the Commission. Under this new process, the Legislative Counsel’s office would do most of the research and drafting of new projects and submit the results to the commissioners for comment. It is not clear how new projects were to be selected under this process. If the idea was to have the Legislative Counsel’s office select them, then this would seem to be a further reduction of the Commission’s actual independence by taking away their prior limited freedom to initiate projects, subject to approval. The question was moot, however, because the Commission ceased to operate in January 1981.

Publication of Commission reports
Section 8(1) of the Commission’s statute required the Commission to make an annual report to the Attorney General. The Commission did so for all the years of its operation except 1980 when a draft annual report was prepared but never published. A review of the Commission’s annual reports indicates that for the most part they follow a pattern of listing completed projects by title with a separate list of projects under study at the time, also listed by title. However, in its first year (1972) for each of the projects being worked on, the Commission’s Annual Report contained a short summary of the principles that formed the basis of the Commission’s recommendations and the conclusions reached in the relevant study papers. Thus anyone reading the Annual Report would have some idea of what was being proposed as changes to the law. In other annual reports the Commission provided a draft statute reflecting the proposed changes to be made, and in other cases the annual reports provided a short explanation for the project being undertaken or a short update on progress. The result is that annual reports did provide some information to the public about completed projects and proposed changes. These annual reports were published by the Attorney General, but how widely they were circulated is unknown.

However, the founding statute did not require the Attorney General to publish either interim or final reports of the Commission and the Commission itself appeared to think that it was not authorized to do so. As one experienced law reformer noted, the reports of the Advisory Commission “were not published unless the Attorney General decided to publish them.” This situation, he observed “… caused some tension

154. See above, the text accompanying note 135.
155. Supra note 8 at 249.
between the Commission and the Attorney General.” Evidence of this tension can be found in the concerns expressed by some commissioners at an internal meeting of the commissioners in 1978 that the Commission ought to be able to publish its own reports independently of the Attorney General so that the Commission’s position on reform issues would be known to the public. The reports referred to at this meeting appear to have been final reports rather than interim reports.

In her unpublished report to the Attorney General in 1979, Chair Toward expressed her personal view that any changes proposed by the Commission in the form of working papers, press releases, private commissions or public hearings, should be publicized so that the public could read them before the Commission’s final reports were prepared. The distinction between interim reports and final reports is important. As she explained, in the case of interim reports not only do they enlighten the public about concerns the Commission had with existing legal provisions, they also help to prepare them to react to the final reports or their reform proposals. Having the benefit of such views would also help the Commission to ascertain the reactions of those members of the public who would be affected by the proposed changes to the law. Such a process would also allow the public to participate in the reform process itself. Allowing the public and interested parties to voice any objections they might have to the proposed reforms at an early stage in the reform process might serve to diffuse objections to final recommendations that the government might decide to implement statutorily. However, Chair Toward also noted that prior to 1978 it was her impression that “…[t]he Attorney General was rather diffident about having the work of the Commission made public in case the Government might be subject to pressure from the public to take a particular course of action which they [the government] may or may not wish to follow.”

Some research reports, prepared either by members of the Commission or by external researchers on contract to the Commission, were circulated for public comment by the Commission. In these cases, the reports were treated either as study papers or working papers.

156. Ibid at 250.
157. See above, the text accompanying note 152 and following.
158. See supra note 129 at 10.
159. Ibid at 10-11.
160. Such as Judge Peter O’Hearn’s paper on the Abolition of the Grand Jury or Mrs Toward’s paper of “Matrimonial Support & Disposition of Matrimonial Property.
161. Such as Professor Peter Darby of the Dalhousie Law School Faculty.
162. Judge O’Hearn’s paper and Mrs Toward’s research report were released by the commission as “Working Papers” while Professor Darby’s paper on Mechanisms Liens was released for public comment as a “Study Paper.”
We should keep in mind that background research papers whether titled study papers or working papers can differ in what they contain. Whether prepared by Commission staff or external researchers, these reports can vary considerably in the extent of their coverage. Some will only outline the existing legal provisions in Nova Scotia and compare them with similar provisions in other jurisdictions, while outlining the problems that need to be addressed. Other reports will go further and discuss solutions that have been proposed in other jurisdictions, but without recommending any particular solution or change for Nova Scotia. The most thorough report will do all of the above and also recommend what the author considers to be the preferred solution. It is the latter kind of study paper or working paper that gives the reader the best idea of the kind of changes the Commission might adopt. But these are still just research papers that contain the views of knowledgeable people in the field. Until they are discussed, analyzed, and adopted or accepted by the Commission, they do not constitute evidence of what approach to reform the Commission will take. To publish such reports is not to announce the changes the Commission will necessarily finally propose to the government. They are not in the same category or of the same order as a report published by the Commission that reflects the Commission’s tentative views or conclusions, such as a discussion paper or a final report. The Nova Scotia Advisory Commission clearly wanted final reports publicized and were aware of the benefits of publishing preliminary reports of the Commission as well.

**Commissioner’s appointments**

Another problem was that commissioners were only appointed for two years and all terms expired at the same time. These two factors resulted in disruptions in the work pattern of the Commission and affected its long-range planning. It also encouraged the commissioners to postpone current or planned projects until the commencement of the new members’ terms and, most seriously, resulted in a complete shutdown of the Commission in 1974 for five months.

Amendments to the Commission statute in 1975–1976 provided for appointments not exceeding three years for the chair and seven commissioners, and appointments not exceeding two years for the other seven commissioners. If these appointments had been made, it would not

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163. See above, the text accompanying note 123.
164. A problem that was noted by L. Skene, supra note 101 at 204; and Lilias Toward in her Report supra note 129 at 9. There is no mention of this problem specifically in any of the Commission’s Annual Reports.
165. SNS 1976, c 37.
only have provided greater continuity of commissioners’ experience, but
would also have provided the overlapping necessary to avoid a hiatus in
Commission operations. Unfortunately, the legislative changes were never
implemented by the Attorney General, a fact that was mentioned by Chair
Toward in her Report of 17 September 1979.166
The 1975–1976 amendments also provided for an enlarged
Commission of 10 to 15 members, as well as permitting the appointment of
five nonlawyers.167 Following this legislative amendment the Commission
was enlarged to fifteen members, but nonlawyers were never appointed;
a fact that does not appear to have been a cause for concern for the
commissioners since there was no mention of this oversight in any annual
report or the unpublished report of Chair Toward in 1979. The fact that
the first panel of commissioners was composed of legally-trained persons
either judges, lawyers or legal academics, is understandable. First of all,
the initial pressure for the establishment of a law reform commission came
from members of the Bar and so it seemed reasonable to have the reform
of the law carried out by persons with legal training.168 Secondly, it was
not uncommon for law reformers to believe that lawyers were best suited
to find legal solutions to both legal and social problems in the community.
Nonlawyers, it was believed, would have greater difficulty understanding
legal concepts and considerably more difficulty devising legal solutions.
Their lack of understanding it was thought, would slow down the law
reform process. Typical of this approach and belief is the comment of a
former chair of the Ontario Law Reform Commission who declared in
1971:

If...the solution is to be found through control by law, then legal
methodology dictates that lawyers have the primary role in seeking
the means of achieving these solutions. This, to my mind, inevitably
leads one to the conclusion that the final decision-making rests with
the lawyers, and I think it is not helpful that their progress should be
impeded by the necessity of making lawyers of any laymen who are
participating at this stage.169

However, there were other reformers who took a different approach
and saw things differently. These commentators, or participants in the
process of law reform, saw the value of having nonlawyers on law reform
commissions or committees so that the technical expertise of lawyers

166. Supra note 129 at 7.
167. Supra note 165, s 2(5).
168. See Hurlburt, supra note 8 at 306.
169. A Leal, “Methods of Law Reform in Canada.” (Paper delivered at Cumberland Lodge, Windsor
Great Park, 24 April 1971) [unpublished]. Quoted in Hurlburt, supra note 8 at 307.
could be balanced by the critical outlook of those with different and more varied experiences of life.\textsuperscript{170} Nonlawyers would help to liberate lawyers from their conservatism and “preoccupation with the existing framework of the law.”\textsuperscript{171} Individuals holding such views thought that nonlawyers could provide legally-trained law reformers with a different view of what the law is for ordinary citizens and how it affects their needs. As one nonlawyer and commissioner of the succeeding Nova Scotia Law Reform Commission explained, his role was “to ask the obvious why? Or why not”? which he hoped would encourage other commissioners to articulate their assumptions.\textsuperscript{172}

The values that underlie the views held vis a vis the law and its purposes may not be the same as those not trained in the law. In the end, for commissioners it is a trade off between taking the extra time to try to explain often complicated legal concepts to nonlawyers and the offsetting benefits gained from having involved commissioners with perhaps a different world view and understanding of what the law is, and what it can or cannot do for society. One English member of the judiciary and former law reformer, somewhat tongue in cheek, remarked that “…law reform is much too serious a matter to be entrusted to lawyers.”\textsuperscript{173} He also suggested that “as the work of law reform develops, and the organization goes on, perhaps consideration might be given in some way to including in the [English law] Commission … laymen and laywomen in the work of law reform.”\textsuperscript{174}

4. Accomplishments of the first Commission

By the time the Law Reform Advisory Commission had ceased operations in January 1981 it had worked on thirty-six projects. Twenty-five of these had been referred directly to the Commission by the Attorney General while another eleven had been initiated by the Commission, recommended to the Attorney General and then referred back to the Commission.\textsuperscript{175} Of the thirty-six projects, the Commission completed seventeen but had also rejected requests to review eight projects.\textsuperscript{176} Not counting the project to

\textsuperscript{170} DR Harris, “Comment on the Right Honourable Sir Alexander Turner’s Address ‘changing the law’” (1970) 4 NZLR 45 at 47.
\textsuperscript{173} Lord Justice Wilberforce, UK, HL, Hansard, 5th ser, vol 264, 1172 at 1177 (1 April 1965) quoted in Hurlburt, supra note 8 at 307 n 3.
\textsuperscript{174} Ibid.
\textsuperscript{175} See Appendix 1, 2.
\textsuperscript{176} See Appendix 1.
amend the founding statute, this leaves twenty-eight projects actually worked on with a completion rate of 61 percent. The implementation rate however, was only 36 percent (ten out of twenty-eight)\textsuperscript{177} while the average time required to complete a project was 2.1 years.\textsuperscript{178}

As already noted,\textsuperscript{179} the Commission decided to adopt a planned approach whereby it would try to reform areas of law rather than narrow discrete problems. Adhering consistently to this approach was made more difficult by the fact that the Commission had to take on reform projects that were selected by the Attorney General. An examination of projects undertaken by the Commission suggests that 40 percent of them fell into the area of administration of justice.\textsuperscript{180} This would include reform projects that changed the institutional structure of the judiciary or its practices or procedures. A second area or category, that of both real and personal property law, involved nine projects or 30 percent of the total.\textsuperscript{181} Family law, involving six projects, accounted for 20 percent of the total projects, while corporate and commercial law involved five projects or 17 percent of the total.\textsuperscript{182} What might be described as private law, involving torts and contract law only accounted for 10 percent of the projects (3 out of 30). In spite of the fact that the Commission did not totally control its selection of projects, it was still able, for the most part, to carry out its planned approach of reforming areas of law rather than small, specific amendments.

If we examine the seventeen final reports produced by the Advisory Commission in terms of the type of statutory change recommended by the Commission, we find that seven projects (41 percent) involved the enactment of new legislation to cover areas of the law not then regulated by existing statutory provisions.\textsuperscript{183} These new enactments were deemed necessary in order to meet the evolving needs of Nova Scotia’s society and to cover gaps in the existing statutory coverage. Seven projects (41 percent) recommended that existing statutes be revised or abolished (as in the case of the Grand Jury) in order to modernize the statutory framework.\textsuperscript{184} Three projects (18 percent) involved what might be considered to be minor or moderate amendments, which was not surprising given the policy decision of the Commission not to undertake minor changes to eliminate anomalies.

\textsuperscript{177} See Appendix 4.
\textsuperscript{178} See Appendix 3, 5.
\textsuperscript{179} See above, the text accompanying note 108 and following.
\textsuperscript{180} See Appendix 6.
\textsuperscript{181} Ibid.
\textsuperscript{182} Ibid.
\textsuperscript{183} See Appendix 7.
\textsuperscript{184} Ibid.
The Story of Law Reform in Nova Scotia: A Perilous Enterprise

but it also demonstrates that the Commission was able to follow its preferred approach of area research as well.\(^{185}\)

In the first two years of the Commission’s operation much of the research work of the Commission was carried out by Graham Walker, Legislative Counsel, who drew heavily upon uniform model acts as the starting point for new Commission projects. Commissioners themselves carried out research on some projects. The history of the Nova Scotia’s Law Reform Advisory Commission clearly shows the absolutely critical role played by Legislative Counsel and the Legislative Counsel’s office in both the selection of Commission projects and the research and drafting that followed. In all, Legislative Counsel officials did the primary research in ten of the completed projects. Chair Toward in her 1979 Report stressed the need for the closest possible liaison between Legislative Counsel and the Commission.\(^{186}\) However, that very closeness detracted from the Commission’s independence and may help to explain her surprising recommendation about the removal of Legislative Counsel from Commission operations in her 1979 Report.\(^{187}\) When the Commission abruptly ceased operations in January of 1981 there were twelve unfinished projects.\(^{188}\) The Petty Trespass Act project\(^ {189}\) completed in 1979 was the last project completed by the government and the Matrimonial Property Act\(^ {190}\) was the last project implemented by the government in 1980. During the period November 1979 to January 1981 the Attorney General referred five new projects to the Commission.\(^ {191}\)

5. Why was the commission abandoned?
The last meeting of the Law Reform Advisory Commission was held on 23 January 1981. When the meeting adjourned the Chair advised that the Commission would “meet again at the call of the Chair.”\(^ {192}\) The call never came. The Commission as a potential operating entity continued to exist until 20 December 1981 when all commissioner appointments expired. But, as a matter of fact, the Commission, as an operational body, had ceased operations as of 23 January 1981. The Commission continued to exist as a legal entity until 1990 when the second (independent) Commission was

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185. Ibid.
186. Supra note 129 at 9.
187. Ibid at 9, 16.
188. See Appendix 8 for a list of the 12 unfinished projects.
191. These included: a Securities Act, a Trespass to Property Act, an Occupiers Liability Act, a Builders Lien Act and a conditional Sales Act.
192. Supra note 137.
created by statute and the statute that created the first commission was repealed.193

No reasons were given as to why commissioner appointments were not renewed and the Commission allowed to expire operationally. Six years after the event Hurlburt suggested that:

The reasons for its de facto demise appear to have been financial stringency, lack of common approach to law reform between the Commission and the Attorney General, and the feeling of the Attorney General that he could effect through his department whatever law reform is necessary without being faced with reports from an entity which he did not control.194

Financial stringency may have been an significant factor in the decision to terminate the Commission, but it was probably not the dominating factor. It is true that the budget of the Commission had grown from $75,000 in 1973195 to $114,000 in 1975196 and to $141,000 in 1981.197 In order to keep up with the volume of work the Commission did persistently ask for greater resources. Even with the assistance of staff from the office of the Legislative Counsel, including the Legislative Counsel himself, and the appointment in 1975 of a full-time research officer, there was still a need for more research assistance if the accumulated backlog of projects was to be reduced and the completion time of projects improved. The cost of the Commission was clearly increasing not decreasing, but this issue was never discussed by the government with the Commission or anyone else.

As to the lack of a common approach to law reform, it is not clear whether this was a reference by the author to law reform in terms of philosophy, selection of topics or the reform process itself. Since the Attorney General selected the majority of reform projects to be undertaken, and, even allowing for the fact that the Commission refused eight projects and suggested on their own initiative another half dozen, the Attorney General still had a veto over Commission selections as well as internal control of research supervision, via Legislative Counsel. It may be that the Attorney General did not approve of the significant emphasis placed upon family

194. Hurlburt, supra note 8 at 252.
195. This is mentioned by Graham Walker in the Minutes of the Meeting of Law Reform Commissions of the Atlantic Provinces and Canada (1 October 1973) at 2 Halifax, Nova Scotia Archives (1996-055/001-02).
law as an area of reform by the Commission, but the Commission was allowed to proceed with the project. Perhaps the differences in approach referred to may have been due to the Commission’s insistence on greater consultation with the public and interested parties, and the publication of their interim reports, as well as annual reports of the Commission.

As for the third possibility that the Attorney General might have thought it preferable to have law reform done in-house so to speak, there is some support for this supposition in remarks that were made in 1989 by the then Attorney General Harry How to a newspaper reporter in a telephone interview. Mr. How is reported to have said that “it was a cabinet decision and it was decided we weren’t spending money on policy matters that would be politically practical.”

The Honourable Harry How explained that the Cabinet had reassigned the Law Reform Advisory Commission’s duties to the Nova Scotia Policy Board, a body of bureaucrats drafting government policy, because, as he said in the interview, “the Policy Board reflected the political reality of the day.” He went on to say “it’s no good proposing laws to the government that in turn get squashed because they aren’t acceptable...you’ve got to realize when you get close to politics, what matters is what is possible to get through the legislature.”

The explanation is a bit surprising in light of the fact that the majority of reform projects were either selected by the Attorney General’s office or approved by that office. His comments may have been a veiled reference to the Commission’s low implementation rate of 36 percent or he may have been referring more specifically to the Commission’s emphasis on family law projects.

As to the matter of control, if Hurlburt is correct and the Attorney General was worried about controlling the Law Reform Advisory Commission, what was the basis for his concern? Clearly the authority to tell the Commission what projects to undertake, and to be able to veto those the Commission undertook on its own initiative, gave the Attorney General as much control as he needed. This fact, together with the influence that Legislative Counsel could exert as part of his functions as executive director of the Commission would seem to give the Attorney General all the control required. Perhaps it was not the actual degree of independence the Commission had which was the problem, but the spectre of greater independence constantly being requested by the Commission, and perhaps

198. Ibid.
199. Ibid.
200. Ibid.
201. The implementation rate usually refers to recommendations implemented into legislation. See above, section III(b).
achieved in the future, that bothered the Attorney General. Chair Toward’s sharp criticism of the Attorney General in her September 1979 Report and her suggestion that Legislative Counsel be removed as executive director may have been the last straw for the Attorney General.

As already noted, the Commission had twelve unfinished projects on its agenda when it ceased operations.\textsuperscript{202} Seven of these projects had been referred to the Commission after 1979.\textsuperscript{203} With only fourteen months between November 1979 and January 1981, and assuming an average completion rate of 2.2 years, there was not sufficient time to complete the new projects and the six projects carried over from earlier years. Twelve unfinished projects represented a non-completion rate of some 40 percent. Perhaps this was also a factor in the Attorney General’s decision.

As is the case with many political decisions, they are a result of a consideration and evaluation of several factors with no one factor being determinative. In the case of the decision to terminate the Law Reform Advisory Commission, financial stringency may have been an important factor, but it was certainly influenced by a growing tension between the Commission and the Attorney General, and the concern by the Attorney General that the Commission would continue to seek more independence.

6. An assessment of the Nova Scotia Law Reform Advisory Commission

In the eight and a half to nine years of operation, the Commission was asked to consider 36 different proposals for law reform, an average of 4.2 per year. For a Commission with part-time commissioners, little in the way of research staff for the first three years, a part-time executive director and part-time chair, it is not surprising that the Commission was unable to meet the demands placed upon it by the Attorney General. Even after the appointment of a full-time research officer in 1975 the Commission struggled to keep up with the workload. If the office of the Attorney General was not happy with the work of the Commission and its completion rate or implementation rate, it did not show it by reducing the number of project reviews being requested of the Commission. In 1980 the Commission received five new projects to review.\textsuperscript{204} Considering the resources it had to work with and the significant contribution it made to the improvement of the legal system generally, the Commission gave a credible performance within the limits imposed upon by its founding statute.

\textsuperscript{202} Ibid & Appendix 8.


\textsuperscript{204} Ibid.
IV. The second Law Reform Commission—The independent Commission

1. Bill-70, 1990

On 5 April 1990, after an interlude of almost ten years, the Honourable Tom McInnes, Attorney General for the Conservative Party then in power, introduced into the Nova Scotia House of Assembly Bill-70, entitled “An Act to Establish an Independent Law Reform Commission.” The Bill was given second reading on 17 June 1990 at which time Minister McInnes expressed regret that the province had not had a Law Reform Commission for almost a decade and emphasized how important it was for the government to “stay abreast of the law as it is created across the country.” He declared that in the proposed Bill the government had tried to create an independent group, at least as far as they were able, “to look at new laws and law reform.”

In his outline of the Bill on second reading, the Minister went on to point out several features that promoted independence. He noted that the Bill created a commission of not less than five and no more than seven commissioners, four of which would be legally trained, (two members of the Barristers’ Society, a Judge of the province, and a full-time member of the Faculty of Law at Dalhousie University), and one nonlegally trained person. The Society members were to be appointed by the Council of the Society rather than the government while the Judge and Faculty members would be appointed by the Cabinet, but only after consultation with the Chief Justice of Nova Scotia and the Chief Judge of the Court to which the Judge to be appointed was a member. The faculty member would only be appointed after consultation with the Dean of the Faculty of Law. A non-legally trained person would be appointed by Cabinet. McInnes emphasized that if the government decided to appoint seven commissioners instead of five, the extra two could also be non-legally trained persons, bringing the potential to three out of seven commissioners. The Honourable McInnes further explained that the commissioners would elect their own President rather than the Cabinet making the appointment. Furthermore, he explained that the annual reports prepared by the Commission would be tabled by the Attorney

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207. Ibid.
209. Supra note 206 at 4335.
General each year. This would, he explained, add to the independence of the Commission and “afford the Commission the opportunity to complain of tampering or underfunding or what have you.”

The Bill apparently anticipated that staff would consist of an Executive Director, appointed in accordance with the *Civil Service Act*, but by the Commission rather than the Attorney General. The Commission also had the freedom and authority to appoint whatever other staff was required to carry out the Commission’s mandate. The Commission also had control of its finances in the sense that it was given a notional fund of $300,000, initially made up of contributions from the Attorney General’s department of $150,000 and a matching grant from the Law Foundation of $150,000. These amounts were not specified in the Bill itself which only provided that the Commission had to maintain an account that would be under the control and management of the Commission and which was entitled The Law Reform Commission Fund. Into this account the Attorney General could pay, from time to time, whatever amounts his Department had managed to get appropriated from the Legislature, as well as other funds, such as those from the Law Foundation. The Commission had control over the funds once they were received but had no control over the amounts that the two primary donors might decide to provide. The notional starting budget of $300,000 was not guaranteed.

There was one provision in Bill-70 that gave the Minister some concern. Clause 8(1) outlined the duties of the Commission, which included receiving and considering proposals made to it by any person, initiating and carrying out the research necessary to accomplish its objective, publishing papers, studies or other documents prepared by the Commission, cooperating with other organizations and providing information, research and study results and recommendations to government departments if the Attorney General agreed. However, clause 2(b) of section 8 required the Commission to “undertake at the request of the Attorney General the examination of particular laws or branches of the law and make recommendations for their improvement, modernization and reform.” If enacted into law, this provision would certainly put some limits on the Commission’s independence. Minister McInnes admitted that the Barristers’ Society and others had suggested that the Attorney General should not have this type of control. Their concern was that because the Commission had such a

211. *Civil Service Act*, RSNS 1989 c 70.
212. *Supra* note 208, cl 10(1)(3).
214. *Supra* note 206 at 4335.
broad mandate and limited resources the Commission’s ability to pursue their own preferred reform projects might be compromised, particularly if an over-enthusiastic Attorney General gave them too many projects to handle.\textsuperscript{215} The Minister himself mused that he might “…remove that clause or word it in a different way so that it is discretionary, so [it] is at their discretion as to whether they take instruction.”\textsuperscript{216} However, he did concede that it was important for the Attorney General to have the opportunity to ask the Commission to review legislation for ideas that the government might want to pursue and have some assurance that the Commission would not just shove the request aside.\textsuperscript{217} Interestingly enough, several of the members of the House of Assembly also expressed the view that the Attorney General should have the authority to require the Commission to review potential legislative proposals sent to them. They did so on the basis that the Attorney General might have some important legislative proposal that he would like the Commission to review and that the Commission should give his request priority over other Commission work.\textsuperscript{218}

As a matter of fact, the concern expressed by some members of the House that the Commission had a very broad mandate, was certainly justified by the terms of Bill-70.

By comparison with the mandate of the Advisory Commission, that of the second Commission, as outlined in clause 4 of Bill-70, was much broader and gave a better idea of what law reform entailed. Whereas the first Commission was required to review any enactment (statute or regulation) that was requested by the Attorney General and to recommend changes, to consider, at the request of the Attorney General, any matter that might become the subject of an enactment, and to recommend new legislation, if required, and to inquire into and consider any matters relating to the reform of the law,\textsuperscript{219} clause 4 of Bill-70 described the object or purpose of the second Commission as follows:

\begin{quote}
[T]o review the law of the Province and any matter relating to law in the Province and to make recommendations for the improvement, modernization and reform, including, without limiting the generality of the foregoing, recommendations for
\begin{enumerate}
\item development of new approaches to, and new concepts of, law that serve the changing needs of society and of individual members of society;
\end{enumerate}
\end{quote}

\begin{itemize}
\item \textsuperscript{215} \textit{Ibid} at 4350 (Bernard Boudreau).
\item \textsuperscript{216} \textit{Ibid} at 4335 (Hon Thomas McInnes).
\item \textsuperscript{217} \textit{Ibid}.
\item \textsuperscript{218} \textit{Ibid} at 4341 (John MacEachern) & 4350 (Bernard Boudreau).
\item \textsuperscript{219} \textit{Supra} note 1, s 4.
\end{itemize}
(b) clarification and simplification of the law;
(c) removal of provisions of the law that are outdated;
(d) improvement of the administration of justice;
(e) review of judicial and quasi-judicial procedures.\(^\text{220}\)

This mandate has several features that are similar to mandates given to the English Law Reform Commission of 1965\(^\text{221}\) and the Canadian Federal Law Reform Commission.\(^\text{222}\) Besides being required to review the law of the province in any matter relating to it, which is a huge task in itself, the Commission is also required to recommend changes that will modernize and hopefully improve the existing law. In clauses 4(a) through 4(e) the Bill tries to clarify what improving, modernizing and reforming can encompass. Clause 4(b) and 4(c) are usually referred to by law reformers as legal housekeeping activities. Although very important to public perception of the law and its administration, they do not have the broad sweep of clause 4(d) or 4(e) or the very broad vision of clause 4(a). Clause 4(a), in particular, challenges the Commission to stretch its vision of what law is, or entails, to identify the changing needs of society, and to develop new concepts and approaches to law that will satisfy such needs. In other words, the Commission is given free reign to exercise its imagination and ingenuity in an effort to reform the law. It is no wonder then that some members of the legislature were concerned about the Commission’s ability to carry out its mandate in relation to whatever law reform initiatives it decided to undertake, let alone whatever additional requests the Attorney General might make for law reform projects.

Why did the Conservative government decide to create another law reform commission? There appeared to have been a number of factors at play. As frontline observers of legal defects in need of reform and practitioners forced to work with or around such defects, members of the Nova Scotia Bar would naturally have a continuing interest in the resurrection of a law reform commission. During the debate on Bill-70 opposition members took every opportunity to criticize the government for allowing the first Law Reform Advisory Commission to expire, and several members mentioned discussions they had with the government prior to the enactment of Bill-70 about the possibility of revising the dormant Commission. As one opposition critic put it, the House was operating very much in a void during the ten years without a Commission to help bring forth legislation that would innovate and “blaze new trails

\(^{220}\) Bill-70, supra note 208, cl 14.

\(^{221}\) Supra note 20.

\(^{222}\) Supra note 21.
The Story of Law Reform in Nova Scotia: A Perilous Enterprise

in the area of legislation.”223 By allowing the 1969 Commission to remain dormant the House was “missing a real opportunity to involve the people and institutions who could be a great benefit to this House.”224

A second factor involved the events leading up to the Marshall Inquiry that submitted its report in 1989.225 This important Report created awareness in Nova Scotia of the need to reform the administration of justice in the province. It suggested that the legal system was seen, at least by some segments of the population, as not responding adequately to the rapidly changing needs of society.

A third factor may have been the appearance in 1989 of an article in a local Halifax newspaper quoting the remarks of the Chair of the Federal Law Reform Commission, Allan Linden as saying that Nova Scotia needed pressure for reform because it was not one of the progressive provinces on law reform.226 The absence of a body to carry on systematic, continuous law reform activities involving broad consultation, and the need for such a body, seemed to be demonstrated by the great difficulties the government experienced trying to get a consensus on proposed legislation involving the Children’s Services Act.227 Conflicting views on important social policy issues fundamental to the Act, which prevented a consensus being achieved, was attributed to the failure of the government to conduct a broad consultation approach seeking the views of affected parties. This was the very kind of approach that a law reform body would have undertaken if there had been one. Bad publicity such as this probably added to the pressure on the government to reinstitute a commission.

Nineteen-ninety also saw the results of an important initiative to investigate the possible reform of the courts in Nova Scotia with the creation of the Nova Scotia Court Structure Taskforce appointed by the Attorney General.228 The Taskforce was given a broad mandate, which included investigating whether or not the County and Supreme Courts should be merged and whether a Unified Family Court should be created, as well as a Traffic Court. The Taskforce was also mandated to investigate procedures before the courts, enforcement of court orders, bylaws and small claims orders, as well as the development of judicial case management, automation of court administration, the role of masters, registrars and

223. Supra note 206 at 4349 (Bernard Boudreau).
224. Ibid.
226. Supra note 197 at A1.
227. Supra note 206 at 4346 (Alexa McDonough); Children’s Service Act, RSNS 1989, c 68, as it appeared on June 1989.
228. Supra note 44.
referees and the use of alternate dispute resolution techniques. This was clearly a broad reform initiative and the kind of project that might have been carried out by a body such as a law reform commission.\footnote{229. See, Terms of Reference of the Charles Report 1991, \textit{ibid} at 6-7.}

Finally, as the last factor pressuring the government to get back into the law reform business, a private members’ bill was introduced by a member of the opposition on 6 March 1990 that proposed amendments to the original \textit{1969 Law Reform Advisory Commission Act}.\footnote{230. Bill-24 \textit{An Act to amend Chapter 251 of the Revised Statues of 1989. The Law Reform Act}, 2nd Sess, 55th Parl, Nova Scotia, 1990, (Introduced by John DS MacEachern).} These amendments, if enacted, would have given more independence to the first Commission by allowing it to select its own reform projects without first seeking approval of the Attorney General.\footnote{231. \textit{Ibid}, cl 2.} The Bill also proposed creating the position of director of research of the Commission, a position that would be held by a member of the Dalhousie Law Faculty appointed by the Dean.\footnote{232. \textit{Ibid}, cls 3(3), 3(4).} By so doing, it was hoped that the director would enlist the help of law students as researchers for the Commission.\footnote{233. See \textit{ibid}, cl 3(5). Mr. MacEachern made a similar suggestion during debate on Bill-70. See \textit{supra} note 206 at 4340.}

Which of the above factors was the most influential in convincing the government to introduce Bill-70 to the House is unknown, but historically the bar had continuously advocated for the creation of a law reform commission to replace the first Commission.\footnote{234. See \textit{section 11(3) above.}}

The second “independent” Law Reform Commission commenced operations in February of 1991 with the appointment of the first commissioners.\footnote{235. The first Commissioners were Professor W.H. Charles (President) Justice J. Davidson, Dawna Ring (lawyer) Ron Culley (lawyer) & Beverly Johnson (non lawyer-social worker). \textit{First Annual Report of the Law Reform Commission of Nova Scotia 1991–1992} (Halifax) at 5.} The Commission had no institutional structure, other than a notional budget of $300,000, with which to begin its primary task of law reform, but that did not stop the commissioners from getting to work immediately. Within three days of their appointments commissioners had their first Commission meeting and within two weeks had convened a meeting with Legislative Counsel, the Chair of the 1969 Advisory Commission in 1980 when it ceased to operate, Linden Smith, and the then current Chair of the New Brunswick Law Reform Commission.\footnote{236. \textit{Ibid} at 3.}

The first three months of operation concentrated upon the building of the institutional infrastructure of the Commission, gathering background information relevant to the law reform process, trying to establish criteria

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\textit{The Dalhousie Law Journal}
for the selection of reform projects, and trying to develop their own philosophy or approach to law reform. Clearly, there was a lot of work to do. In the first fourteen months of operation the Commission met 34 times.

The Commission began its operations in offices quite physically removed from the Department of Justice offices in downtown Halifax. Operations commenced with one full-time and one part-time secretary/administrator. From February until July 1991 the Commission had no executive director and no legal research officer. With the appointment of its first legal research officer, the Commission was able to hold a weekend conference to consider the selection of projects. The Commission chose as its very first project the enforcement of maintenance orders. The Commission was aware of changes to the law that had taken place in other provinces and was concerned about the delays that existed under the present system in Nova Scotia as well, and the inconsistent way the Family Maintenance Act was currently being applied. The Commission was also aware of public concern with the problem of enforcement.

Within three weeks of choosing its first project, the Commission received a formal request from the Attorney General to consider the state of administrative law in the province and to provide specific input into new proposed administrative law procedures and practices that the government wanted to incorporate into legislation scheduled for the fall of 1991. This was a hugely important and broad project for a Commission who had yet to hire an executive director who would direct all of its research efforts. In fact, the Commission’s first executive director, Dr. Moira McConnell was not hired until January 1992 and then only on a part-time basis because of her law school commitments. Ms. McConnell assumed her full-time duties as Director on 1 July 1992. In the interim the Commission’s President, Professor Charles, took on these duties. Because of the breadth and complexity of the administrative law of reference, the Commission hired, on a contract basis, a second legal research officer.

In December 1991, the Commission decided to undertake a third project, (the second of its own choosing), in the area of domestic violence. The purpose of the project was ‘to examine how the legal system deals

237. Ibid at 3-5. See Appendix 9 for a list of factors the 2nd Commission considered during their discussions relating to both existing laws and proposed, future law.
239. Supra note 235 at 8.
240. 6 July 1991, ibid at 3.
241. Ibid at 4.
242. Ibid at 3-4.
with the issue of spousal assault.” The Commission noted that there was a growing interest at all levels of government in law reform and other initiatives in this area. One important question was whether any deficiencies in the legal approach to domestic abuse was a result of inadequate laws or rather, the way the law was currently being utilized to deal with the problems. An additional legal research officer was hired on contract to conduct the necessary research for this project. Thus, in the space of one year, the new Commission had developed its institutional underpinnings, hired staff, found physical accommodations from which to conduct its operations, selected two projects for reform and received a third project in the form of a government reference, a project that had the potential to be larger than the other two combined. The second Commission appeared to be off to a fast start. But in spite of the Commission’s best efforts there were members of the Nova Scotia Bar and Law Foundation who, by April 1992, thought that the Commission was doing nothing but dealing with administrative matters since no product had yet been produced by the Commission. Such concerns were expressed to the Executive Director. The fact that the Commission was without a full-time Executive Director until July 1992 and without a permanent full-time secretary, was either not considered to be a sufficient reason for the lack of any final reports or, alternatively, was not known to the critics.

2. How the Commission saw itself
Early annual reports of the Commission show that it did recognize that the Nova Scotia legislature had given it several important and distinctive characteristics, not necessarily shared by other law reform commissions in Canada and elsewhere. These characteristics have already been discussed, but it is important to realize that the commissioners themselves were very much aware of them, and particularly, the major hallmark or anchor of the Commission, “its statutorily guaranteed independence.”

This was a quality which the commissioners saw reflected in the following way and which bear repeating:

(a) a statutory requirement that the Commission include a non-legally trained Commissioner who would not bring to the table the traditional perspectives and approach of a legally trained person;

244. *Ibid*.
246. *Supra* note 235 at 1.
247. See Discussion of Bill-70 and its provisions in section IV(1) above.
248. *Ibid* and *supra* note 235 at 1.
the ability of the Commission to review the administration of justice as a whole and not merely the substance of statutes and regulations, in other words the Commission could review not only the substance of the law but, just as important, the way it was used or applied;

(c) the ability of the Commission to choose its own projects and, hire its own staff, including the Executive Director;

(d) the ability to manage its own budget once funds were allocated;

(e) the ability to select its own President.

Commission financing was to be shared equally by the government and the private sector to promote independence. These features were dictated by the founding statute and expressed the will of the legislature, but the Commission had also developed its own philosophy of law reform and its own law reform process.

During the first two years of its life the second Independent Commission tried to develop and articulate its philosophy of law reform and to indicate what were some of the underlying themes that would drive the reform process. One such important theme was the belief that both the public and government needed to be better informed “about the nature of law as a method of communication between society and elected representatives.” The concern seemed to be that if the law of the land did not reflect the needs and aspirations of society, as interpreted by its elected representatives, there would be an unwanted and unnecessary disconnect between the two groups. It was the Commission’s conviction that it was important to educate the public and government about the idea of law and its role in society, as well as the concept of law reform as a process and that this function was as important as reforming specific areas of the substantive law.

A second Commission theme involved the question of how success in law reform should be measured. This was important to the Commission because of its conviction that law should not be changed just for the sake of change. If for example, thorough background research revealed that the problem was not inadequate or defective legislative provisions but a failure to apply or administer those laws effectively, then as far as the Commission was concerned, the law should not be changed but rather its administration should be improved. If this was the perceived solution then the Commission would so recommend and would not...

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251. This issue was raised and discussed in the commission’s *Second Annual Report*, *Ibid.*
recommend changing the old law by statutory amendment. Similarly, if the Commission was convinced that legislative changes were necessary and should be recommended, but the evidence showed that the necessary human or physical resources could not be found to make the proposed legislative changes effective, then, in their view, legislation, however much it might be needed, would not be recommended. The Commission also acknowledged that proposed legislative reform, even if not capable of implementation, could still have some educational value in the sense of showing what should be done. Nevertheless, it was also the view that proposing stillborn legislation in these circumstances would constitute a disservice to the community.252

The third underlying theme or conviction of the Commission flowed from its desire to educate the public and the government about the nature or idea of the law and its important function in society. However, to do so required greater public discussion and interest in the work of government and the contribution that law reform can make to developing a society that better meets the needs of all people in the province.253 Expanding a public discussion would require broad consultation with the citizens of Nova Scotia who would or might be affected by the law being reviewed and changed.254

The Commission recognized the diverse societal natures of both Canada and Nova Scotia and considered that an important role for the Commission, as a law reform agency was, through its actions, to legitimize and give voice to the validity of pluralism in Nova Scotia’s society.255 It was the Commission’s belief that they had an obligation to actively seek the participation of all Nova Scotians in the reform process and they proposed doing this by “affirmative consultation.” Although involving many different aspects, one essential characteristic was “the recognition that the Law Reform Commission is not only a public service but is, through its very existence, part of the law reform culture and that the way in which it acts also causes changes.”256

Finally, the Commission was of the view that socio-economic development will not occur in the absence of equality. This belief is

252. Ibid.
253. Ibid at 3.
256. Ibid at 10.
reflected in the Commission’s acknowledged focus upon equality in its early project selection. 257

The Commission decided early on that it was very important to establish, as soon as possible, its identity and credibility with the public, government, Bar, and other reform agencies. 258 To do this, the Commission decided that an ambitious and diverse programme of research, involving what might be considered difficult or contentious areas of the law, would generate the sought after interest in the Commission and its reform work. The Commission thought that such undertakings in reform would have greater impact and service more needs in the community than developing one or two more modest straightforward projects. The initial hope was to produce one final report per year. 259

The Commission’s philosophy of public involvement in the reform process via broad discussion of its projects also produced a second strategic initiative. Copies of Commission reports were given wide distribution free of charge and summaries of reports were published in three languages, English, French and Mi’kmaq. Reports were written as much as possible in plain language to allow the public to participate in discussions in a reasonably informed manner. 260

A third stratagem involved a request to the government to increase the size of the commission to seven Commissioners with the hope that the additional two members would be appointed as representatives of minority groups and thus more fully ensure a perspective from people whose needs might differ significantly from the majority. 261

A final strategy focused upon the Commission’s commitment to close liaison and cooperation with other agencies engaged in law reform, particularly the Department of Justice and other departments of government. 262 Recognizing the fact that its independence meant much less direct interaction with the Department of Justice and the Legislative Counsel’s office than was the case with the Advisory Commission, the second Commission nevertheless saw the need to share information about reform research and initiatives with the government. The government

259. Ibid at 1-6.
261. Second Annual Report, supra note 249 at 3.
262. Ibid at 2-3. The executive director noted that the Commission had “focused on a cooperative and consultative approach to its research work. Where possible every effort is made to ensure that the research carried out is made available to other agencies in both governmental and nongovernmental sectors to avoid duplication and to assist where other agencies have a similar interest in a research topic but may not have the resources to do the necessary research.”
also saw benefits in a collaborative approach. This is reflected by the cooperation and coordination experienced in early projects between the government and the Commission. For example, the Administration of Justice Project required the collection of basic data from approximately 400 administrative tribunals. Besides providing additional research funds specifically for the project, the Nova Scotia government assisted with the collection of data by having the Commission’s request for completion of a questionnaire accompanied by a letter from the Premier himself requesting tribunal cooperation.\textsuperscript{263} Since this was a government reference perhaps such cooperation should not be too surprising.

In other instances, the Commission cooperated with other non-governmental agencies or equality and advocacy groups by suspending work on projects currently being researched by these groups.\textsuperscript{264} There were other occasions upon which the government and the Commission worked on similar projects with varying degrees of liaison and cooperation.\textsuperscript{265} In perhaps what was the clearest evidence of government/Commission cooperation, the Department of Justice and the Commission issued simultaneous joint press releases that provided details of their two different approaches to the problem of domestic violence, with the explanation that it was in the best interest of the public to show two different approaches and solutions to the same problem.\textsuperscript{266}

As an additional courtesy, the Commission regularly provided the Department of Justice, or other affected government departments, with advance copies of relevant discussion papers and final reports so that they would have time to react in an informed manner to immediate questions and inquiries.\textsuperscript{267}

The general work process\textsuperscript{268} adopted by the second commission involved five distinct stages as follows:

- **Stage one:** Project Selection;
- **Stage two:** Project design/feasibility study;
- **Stage three:** Research/advisory;
- **Stage four:** Discussion Paper/Consultation;
- **Stage five:** Final Reports/Recommendations.

\textsuperscript{263} Second Annual Report, supra note 249 at 19.
\textsuperscript{264} The Human Rights Project is an example of such an approach.
\textsuperscript{265} Such projects as Adult Guardianship, Electronic Information, Adoption Information, Civil Procedure rules, Court Structured Settlements and Contaminated Sites.
\textsuperscript{266} Second Annual Report, supra note 249 at 17.
\textsuperscript{267} Third Annual Report, supra note 258 at 15.
\textsuperscript{268} The general work process involving different stages of research is outlined in the Commission’s Second Annual Report, supra note 249 at 10-11.
Stage number one—Project Selection
Project selection theoretically presupposes some objective criteria that can be applied when making decisions about new reform projects. The second Commission did try to enumerate relevant factors that could apply to both existing laws and new proposed laws. But there is one other important factor in project selection, not necessarily the first to be considered, that involves areas of reform or specific projects undertaken by other law reform agencies. Experience has shown that similar areas of law in different common law jurisdictions tend to need updating and improvement as the years go by and societies evolve. Reform activities by other law reform agencies can either encourage a local reform agency to select a project or might confirm a decision already made for other reasons. The second Law Reform Commission in Nova Scotia, like the Advisory Commission, was well aware of the reform initiatives of other reform agencies and took guidance from their efforts.

Stage number two—Project design/feasibility study
In the second stage, staff engaged in preliminary research work to determine the size and cost of the project, whether it was useful and viable, and also considering its potential relation to other work in the community. To take an example, because there was concern within the Commission that the size and scope of the Administrative Law Project (ABC Project) would engage all of the Commission resources, the Commission asked a legal research officer to prepare a viability study that would determine the scope, timing of the project, and resources required. Although the ABC Project was a government reference, the Commission could theoretically have refused to take on the project if it decided that it could not meet government deadlines or it could not do so with resources available. During its first five years the Commission required feasibility studies for two other potential projects, which included Children and the Law (project not undertaken) and Enduring Powers of Attorney (project undertaken).

Stage number three—Research/advisory
If the decision is made to take on a project with or without a feasibility study being done, the third stage consists of a research brief being completed or prepared by a Liaison Committee comprised of one or more commissioners, the researcher assigned to the project and the executive

269. See Appendix 9.
270. See above, the text accompanying note 240.
271. First Annual Report, supra note 235 at Appendix C.
272. Ibid at Appendix E.
director. The research brief, in addition to providing basic research data about the project, also contains proposed recommendations for reform. Such recommendations are usually developed through specific consultations and advisory meetings among the Liaison Committee, affected people in the community and the government. The research brief is submitted to the commissioners but is not circulated to the public at this stage.

Stage number four—Draft discussion paper
This paper contains the initial positions or conclusions that the commissioners have reached on various issues, having taken into account the recommendations put forth in the research brief. The discussion paper is given broad public consultation and comments are invited. A copy of the discussion paper on each project is provided to affected government departments prior to general release. A summary of the paper is translated into French and Mi’kmaq languages and a period of several months is allowed for responses and comments to be received by the Commission. The Commission tries to arrange for media coverage of discussion papers to promote public discussion and meetings are arranged with interested groups to provide information as well.

Stage five—Final reports/recommendations
After public submissions and comments have been received and reviewed by the Commission, a final report with recommendations and draft legislation, if appropriate, is provided to the Minister of Justice and other affected ministers. The final report is also given wide public distribution and may include changes to proposed recommendations contained in the discussion paper, based on public reaction to the discussion paper recommendations.

Apart from terminology differences, the main distinction between the general work process of the Advisory Commission and the second Commission is the addition of an extra stage by the second Commission, that is, the project Design/Feasibility Stage Two.

274. Ibid.
3. Accomplishments or productivity of the Commission

During the 27 years between 1990 and 2017, the Second Commission produced 53 reports, composed of discussion papers, final reports and three other related reports.275 Twenty-five of the 53 reports were final reports.276

Of the 25 final reports, 2 recommended new legislation to cover previously unregulated areas of the law, eight recommended modernization by replacement of existing statutes with new legislation, seven recommended amendments to existing statutes, three recommended changes to common law rules, three recommended changes to administrative practice or procedures, and one recommended no action at all.277 Twelve of the final reports were implemented by the Nova Scotia government and brought about changes to the justice system in some way with an implementation rate of 48 percent. If projects recommending administrative action rather than legislative action are included, the success ratio increases to 56 percent.278 As the Commission emphasized in its annual reports, education of the general public and government officials regarding the law and law reform was considered to be of equal value and importance to the Commission.279 How well this goal was achieved is impossible to measure, but it did not appear to translate into public support for the Commission in 2015–16 when the government decided to withdraw Commission funding.

It took, on average, 2.9 years to complete a Commission reform project, 3.27 years for government references and 2.6 years for non-government projects.280 Six government references took between 1 and 3 years to complete281 while 4 of them took 4 to 6 years.282 Of the 15 non-government references, 10 took 1 to 3 years to complete and 5 more than 3 years but not more than 5 years.283 The longer time required to complete some projects can be partially attributed to withdrawal or reduction of funds by the government or the Law Foundation causing a temporary halt to

275. Twenty-Fourth Annual Report of the Law Reform Commission of Nova Scotia 2014–2015 (Halifax) at 4, which states that the Commission has published 51 project reports and papers. In August 2015 the Commission published its final Report on Powers of Attorney, bringing the total to 52. And in September 2017 a final report was published on the division of family property, bringing the total to 53.

276. See Appendix 10 for a list of completed projects.

277. See Appendix 11 for the projects involved.

278. These included projects dealing with: (1) Domestic Violence (training program developed), (2) Administrative Law Reform (training program for tribunal chairs and members developed), (3) Human Rights and (4) Seniors Only Housing (Commission recommended no legislative change).

279. See the text accompanying note 253, above.

280. See Appendix 12.

281. Ibid.

282. Ibid.

283. Ibid.
Commission work on some projects. In other cases, the broad consultation process adopted by the Commission was the cause. In still other cases, the complexity of the project under taken required more extensive research and thus more time to complete.

In total, the Commission worked on and reviewed 34 different projects, not all of which resulted in the production of a final report. While recognizing there is bound to be a certain amount of overlap in broadly described categories and that the categories themselves are subject to subjective delineation, it appears that family law was the area subjected to most review with twelve reform projects undertaken in this area. The second most reviewed area is best described as involving the administration of justice, with nine projects in this area. These projects covered issues involving the structure of legal institutions, as well as their procedures and administrative practices. The remaining eight projects dealt with private law—tort and contract, mortgages, electronic information, human rights and property.

Several of the projects endeavoured to provide additional legal protection to various vulnerable groups in Nova Scotia society and to address equality concerns. Although important social policies were also involved in many of these projects, none involved recommendations that would create radical changes in the social order.

The most prevalent reason or basis for recommending reform was to modernize outdated statutes whose provisions no longer were considered suitable to regulate particular areas of the law brought about by changes in technology, social values or changing circumstances. The need for reform was often brought to the attention of the Commission by the Bar or public groups who experienced daily problems dealing with outdated legal provisions. The need for change was often recognized by the Commission itself when it reviewed the reform projects of other law commissions. Fourteen of their reform projects were taken on in order to modernize areas of the law.

A second important motivating reason for reform was the need to make the administration of justice more effective and efficient. Access to justice issues promoted simpler, less costly legal processes and procedures, as exemplified in 10 reform projects. Several of these were large projects.

284. See Appendix 10 for a list of the 34 projects.
285. See Appendix 13.
286. Ibid.
287. See Appendix 14.
288. Ibid.
289. See Appendix 12.
taking 4, 5 or 6 years to complete and included the ABC Project.\(^{290}\) Other projects included reform of the *Juries Act*\(^{291}\) and the *Probate Act*,\(^{292}\) as well as an empirical review of the operations of the Small Claims Court. Other smaller but related projects involved interim payments of damages, vexatious litigants and court structured settlements.\(^{293}\)

Some reform projects were more concerned with the way the law was being administered, and therefore focussed their recommendations, not on reform of substantive law, but on the application or administration of that law by those charged to do so to make it more effective. Projects having this emphasis and recommendations included an enforcement of maintenance orders, domestic violence and human rights. Several reform projects addressed the need to provide additional new legal options for particular situations and constituencies, such as projects on living wills and mortgage remedies. Still other projects were needed to correct a specific common law anomaly, such as a problem with the *Tortfeasor’s Act*,\(^{294}\) and the rule against perpetuities. The need to clarify the law was often only one factor in many projects, but was the main reason for reform in the project dealing with minors consent to medical treatment.

4. Three perennial concerns of the Commission

Almost a decade after it began its operations, the Executive Director of the Nova Scotia Commission, John Briggs, noted in his 11th Annual Report (31 March 2002) that the Commission faced three distinct but interrelated challenges going forward.\(^{295}\) They were the need to: establish stable, long term funding; have the Commission seen by the public and government as a credible agency for reform, producing reports and recommendations for reform that were not only of high quality but relevant to the solution of persisting legal deficiencies that affected all Nova Scotians; and, finally to develop broader and deeper public support for its work, as well as support from the judiciary, the Bar, the government and the academic community.

Funding was not a new concern for the Commission. As far back as November 1992 the then Executive Director, Moira McConnell, had expressed concern to the commissioners about the ability of the Law Foundation to continue to match the government’s financial contribution to the Commission in the light of lower Foundation revenues caused by

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\(^{290}\) Ibid; Also see the text accompanying notes 5, 240, 270, above.


\(^{293}\) See Appendix 14.

\(^{294}\) *Tortfeasor’s Act*, RSNS 1989 c 471.

falling interest rates. In her second Annual Report 1992–1993, McConnell states that the Commission would be unable to take on any new projects, unless they were government references and accompanied by financial assistance.\textsuperscript{296} This situation led the Commission to consider possible alternate funding sources in the form of direct payments from individual government departments for research work done by the Commission to support specific departmental reform initiatives.\textsuperscript{297} Fortunately, the Law Foundation was able to match the government’s contribution of $150,000 in the fiscal year 1993–1994. However, that proved to be the highwater mark of the Law Foundation funding because for the next 4 years, the Foundation’s contribution consistently diminished until it reached zero in 1997–1998.\textsuperscript{298}

By 1994–1995 general Commission revenues had decreased by 20 percent with more decreases expected in 1995-96. In her 4th Annual Report Executive Director McConnell writes that “[t]he funding position of the Commission has been tenuous since its inception and remains so from year to year as its two funding sources, the Department of Justice and The Law Foundation, have each had to reduce their budgets.”\textsuperscript{299} As indicated above, in 1997–1998 the Law Foundation was unable to supply any funds to the Commission and the Commission was able to continue operating only because the government increased its contribution from $150,000 to $200,000 and the Commission, luckily, had a surplus of $50,000 in its budget due to a staff reduction. The Commission’s total budget for 1997–1998 was therefore $250,000 as opposed to its initial starting budget of $300,000.\textsuperscript{300} By 1998–1999 the Commission was running a deficit of $17,000.\textsuperscript{301}

The Law Foundation did manage to increase its funding contribution to $100,000 in the fiscal year 2000–2001, but in April 2000 the government notified the Commission that it would be unable to provide any funds for the fiscal year 2001–2002.\textsuperscript{302} It was against this backdrop that Executive Director John Briggs noted the need for stable funding and the Commission

\textsuperscript{296} Second Annual Report, supra note 249 at 7.
\textsuperscript{297} Memorandum from Dr ML McConnell, Executive Director, to the Law Reform Commissioners (23 November 1992) [unpublished, archived at the Law Reform Commission Office].
\textsuperscript{298} See Appendix 15.
\textsuperscript{299} Fourth Annual Report, supra note 255 at 7.
decided not to plan for any new projects.303 Faced with what might be the end of its operations, the Commission decided to concentrate its efforts on finishing those projects already underway.

The Commission was fortunate that the Law Foundation eventually agreed to provide funding in the amount of $250,000 per year for three years from 2001 to 2004.304 In return for this financial bailout, the Law Foundation required the Commission to prepare a report for the Foundation respecting the Commission’s mission, governance, staffing arrangements, and operations. The Commission used the report as an opportunity to engage in a self examination of the Commission and its operations. The Report titled “A Continuing Need for Law Reform: The Case for the Law Reform Commission of Nova Scotia,” was published in January 2001 and given wide circulation in Nova Scotia.305

The Report evaluated the position occupied in the legal and legislative landscape by the Commission in Nova Scotia and reviewed the experience of other law reform bodies in Canada, as well as in a number of jurisdictions throughout the world. The Report also addressed such questions as whether there was a need for a law reform commission in Nova Scotia, what had been its achievements, and what, if anything, should be changed about the Commission. The Report concluded that funding remained a consistent, continuing problem and weakness and the key to the Commission’s future viability depended upon the government recognizing the clear benefits of a permanent, full time and independent law reform body, and providing it with sufficient and regular financial support. The Report also indicated that most features relating to the current Commission had served Nova Scotians well and were not in need of change and that the Commission performed an essential public service that was not and could not be provided by any other entity. It concluded that the need for a permanent institution to carry out law reform in Nova Scotia was more compelling than ever.306

In February 2003, the Commission received a letter from the Law Foundation advising that it would not be able to sustain its pledged funding of $250,000 due to the continuing decline of interest rates.307 Without government support, any significant reduction below $250,000, in the

304. Eleventh Annual Report, supra note 7 at 7, 4.
305. Supra note 77.
306. Ibid, and also see the text accompanying note 77 above and following.
Commission’s view, would mean the probable end of the Commission. As it was stated in the Commission’s 12th Annual Report 2002–2003:

It is clearly apparent that without a return of provincial government funding support, the Law Reform Commission of Nova Scotia will have to cease its operations by the fiscal year ending March 3, 2004.308

The Report then went on to critically observe:

It is ironic that at a time when Canada’s federal Government is supporting law reform initiatives in various parts of the world, and while Commonwealth law Ministers are being urged by the Commonwealth Secretariat to support independent law reform agencies, we in Nova Scotia face the real prospect of losing our own Law Reform Commission.309

Ultimately, the government of Nova Scotia agreed to restore partial funding for the Commission in the amount of $125,000, each year, for 2 years covering the period 2004–2006, on condition that the Commission devote most of its resources over this time period to “participation in a collaborative review and revision of the Nova Scotia Rules of Civil Procedure”310 (the Rules Project). The Law Foundation agreed to match the government’s contribution for two years as well.311 In addition the Commission requested supplemental funding of $34,500 to cover special expenses related to the Rules Project.312

The Rules Project turned out to be a lifesaver for the Nova Scotia Commission, but it did mean that the Commission had little time to devote to other reform projects. As the 14th Annual Report lamented “the fiscal year just ended (31 March 2005) was unique in that for the first time the focus of the Law Reform Commission was not on examining of the laws of the Province with a view to recommending changes in the law but rather a review of the Civil Procedure Rules that guide the workings of the Nova Scotia Courts.”313 However, the Commission was still able to start a project on vexatious litigants in 2005.314 This project resulted directly from

308. Ibid at 16.
309. Ibid.
314. Ibid at 7.
the research work done by the Commissioners on the Rules Project and was recommended by the judiciary as an urgent project. At about the same time, the Commission started another project of collaborative research with Saint Mary’s University, Halifax, examining the operations of the Small Claims Court.315

The Nova Scotia Commission was not the only Commission struggling to remain financially afloat. Other reform agencies in Canada continued to be vulnerable to the competing claims put forth by other worthy claimants for limited public funds. Although the international situation continued to demonstrate the need for law reform as a necessary support for the maintenance of the rule of law, the same need was not always seen or appreciated to the same extent in Canada.

Law foundation funding reached its peak in 2008 when the Foundation contributed $167,728.00 to the second Commission, but after that time funding decreased continually until it reached its lowest point in 2015–2016 at $96,070.00.316 In spite of efforts by the Commission to reduce costs by moving the Commission to cheaper premises in 2014317 and reducing publication costs, the Commission began to run deficits, $4,285.00 in the fiscal period 2013–2014318 and $9,400.00 in the period 2014–2015.319

Finally, on 8 June 2015, the Commission was notified by the government that funding would cease entirely by 31 March 2016.320 Given the inability of the Law Foundation to come to the rescue a second time, the government decision seemed to spell the end of the Commission. The problem of financial instability was a real one for the Commission from its beginning to its end and appears to have been the main reason for its eventual demise.

As to the issue of relevance, in 1993, the then Executive Director of the Second Commission, Moira McConnell, articulated to the commissioners concerns that had been expressed to her by members of the Nova Scotia Bar and the Law Foundation that the Commission needed to be seen as a useful working group that carried out projects quickly, so that results

315. Ibid at 7.
316. See Appendix 15.
319. Twenty-Fourth Annual Report, supra note 275 at 8.
320. Supra note 5.
were relevant and of interest.\textsuperscript{321} Coming after only two full years of its operation, such concerns might seem a little premature, but they were taken seriously by the Commission. Usefulness and relevance in this context appeared to relate to the timely production of Commission reports. Relevancy was tied to timing rather than to the type of projects selected. As McConnell explained to the Commission, it had to find a balance between thoroughly researching projects and producing the results expeditiously. She emphasized that the Commission could not run the risk of being perceived as an “academic resource agency.”\textsuperscript{322} As we have already noted, the Commission had originally hoped to produce one report per year but was unable to meet this goal.\textsuperscript{323} By taking on projects involving more difficult social issues and engaging the public more actively in the reform/consultation process, the Commission inevitably increased the length of time required to produce a final report. In the first 5 years of the Second Commission, on average, a final report took 2 years and 3 months to complete compared with 2 years and six months to 3 years in the succeeding years.\textsuperscript{324}

But usefulness as a goal had another meaning for the Commission. It seems to have considered education of government and the public about the nature of law and the reform process as a useful initiative on its part, and one it wanted to pursue. This subjective view of the Commission’s usefulness by the Commission itself was also supported by more objective evidence in the form of use of the Commission’s reports by academics, lawyers, judges and the public, even in cases where the reports did not bring about legislative change. Comments made by Nova Scotia legislators in the House lauding the work of the Commission added to the objective evidence of usefulness.\textsuperscript{325} But would these expressions of approval translate into public or government support for Commission funding, in times of government financial constraint, requiring hard decisions by the government?

About a decade later, the then Executive Director, John Briggs echoed similar concerns that the Commission must be, and must be seen to be

\textsuperscript{321} The issue was originally raised in a Commission meeting on 24 April 1992 by Commissioners Culley and Ring (Bar representatives) supra note 245 and discussed in more detail by the then Executive Director in a special memo to the Commission dated 2 November 1993 [unpublished, archived at the Law Reform Commission Office].

\textsuperscript{322} Ibid.

\textsuperscript{323} Supra note 249.

\textsuperscript{324} See Appendix 12.

\textsuperscript{325} As John Briggs noted in the Commission’s Eleventh Annual Report, supra note 7 at 3 and as detailed in Appendix G of the Commission’s Special Report on “The Case For the Law Reform Commission of Nova Scotia, December 2001.” Supra note 77.
“helpful” and to demonstrate its “usefulness.” In using these terms Mr. Briggs appears to have meant that the Commission should undertake reform projects that were relevant to the needs of the government, and particularly to the public, in that they addressed social needs and cured legal defects in a timely manner. The Commission did see evidence that the public accepted the Commission as a public resource and, in this sense was relevant, and the fact that the public was submitting an increasing number of suggestions for reform projects.

If public support is taken to include public participation in the law reform process by responding to Commission discussion paper proposals, attending discussion groups, viewing the Commission’s website or contacting the Commission for legal information or advice, it would seem that the second Commission had generated such support. But, if public support also means actually lobbying or pressuring the government to reinstate funding at times when it is withdrawn, or to provide public testimonials as to the importance and value of the Commission as an agency of law reform, we find little evidence of this in the history of the second Commission. Admittedly, the public had not been called upon to express its support for the Commission during the several funding crises already chronicled, and we therefore have no way of knowing what support might have been demonstrated had it been requested. With regard to the last and fatal funding crisis in 2016, the Commission did solicit and receive the support of the Bench, Bar, Academia and related agencies, such as the Nova Scotia and Dal Legal Aid Societies, in the form of expressions of support directed to the government, in hopes that the government decision would be changed. The public, however, were never asked directly to show their support. There were no editorials in newspapers, there was no social media blitz and there were no public demonstrations outside the legislature objecting to the funding cut. It is not clear how many members of the public even knew that the funding had been withdrawn, and even less clear what their reaction might have been.

5. Significant events in the life of the second Commission

In addition to the perennial problems of funding, public perception and public support, just discussed, there were several important events that had a significant impact upon the second Commission and its operations. The first of these was publication of the Donald Marshall Inquiry Report in 1989.

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This report highlighted deficiencies in the Nova Scotia criminal justice system, in particular. It was against this backdrop that the second Law Reform Commission was created in 1990. One question to consider is what direct impact did the Marshall Inquiry have on the approach to law reform taken by the Commission and in particular on its project selection and operations? Commission Minutes show a decided difference of opinion as to whether the Commission should specifically examine the recommendations of the Marshall Inquiry, presumably to carry out any needed reforms, or whether the Commission should only keep the Marshall recommendations in mind when working on future projects, particularly in relation to issues of access or inclusion or both to the justice system.\footnote{Supra note 245 at 17-21.} The issue was not directly resolved or put to a vote but the Marshall recommendations by themselves were never the focus of later Commission research or inquiry. The Commission did agree that it would be appropriate for the Commission to request another community member for the Commission be appointed, preferably an Aboriginal person.\footnote{Memorandum from ML McConnell, Executive Director, to the Law Reform Commissioners (20 August 1992) [unpublished, archived at the Law Reform Commission Office].}

As a result of a meeting of the Commission held in 20 August 1992 it was decided that a summer student be employed to do research in relation to human rights in Nova Scotia and $1,500.00 was allocated to cover the cost.\footnote{Ibid.} The Federal Government also contributed $9,000.00 to assist with research costs. But the project proved hard to define and the Human Rights Commission\footnote{The Nova Scotia Human Rights Commission was created by the Human Rights Act, RSNS 1989, c 214, s 22.} did not seem to think any changes were needed to the Act.\footnote{Minutes of the Law Reform Commission of Nova Scotia (8 December 1995) at 8 [unpublished, archived at the Law Reform Commission Office].} Investigation and research into the project soon revealed that the issues identified appeared to be more involved with resources and implementation of the Act rather than legislative reform of the Act. In addition, many of the issues had been covered fairly thoroughly in the ABC Project.\footnote{Ibid. Also see supra note 240.} As a result, the Commission decided that a specific project on issues raised by the Human Rights Act would not be appropriate and that specific comment could be made in the ABC Project, which was not yet completed, on the issue of the need for expeditious resolution of violations and claims under the Act.\footnote{Fifth Annual Report, supra note 257 at 34.} That appeared to be the end of the matter. However, we should keep in mind that the Human Rights Act...
Project was not the only one that had been initiated but not completed by the Commission. There were four others, including minors consent to health care 1999, adoption information (a Government Reference put on hold in 2001 when government funding stopped), structured settlements (government legislative changes pre-empted issue of Commission final report) and, finally, electronic information law reform.

Not long after the Commission was created in 1990, and started actual operations in 1992, interest rates in Nova Scotia experienced a sharp and dramatic decline. The consequences were felt by the Law Foundation which saw its revenues decrease sharply and, as a result, its ability to fund operations like the Nova Scotia Law Reform Commission. For example, the original arrangement was to have the Law Foundation match the government contribution of 50 percent of a notional budget of $300,000, if the Foundation had sufficient funds to do so. During the first 10 years of the second Commission’s operation, the Foundation was only able to provide, on average, 31.6 percent of the Commission’s budget. It is therefore even more remarkable that the Law Foundation was able to fund the Commission to the tune of $250,000.00 per year for three years during the period 2001–2004. Between 2005 and 2015 the Law Foundation was able to maintain its funding at the rate of 43 percent of the government’s contributions. In the final year of government funding, 2015, the Law Foundation was able to supply 34 percent of the government contribution or, in other words, $96,070.00.336

Over the entire 26 years of Commission operation, the Law Foundation was only able to fund the Commission at a rate of 33 percent rather than the hoped for 50 percent.337 Obviously, such a shortfall in Commission revenues made operations much more difficult.

A third significant event, also involving funding, occurred in April of 2000 when the government announced that the Commission would no longer receive funding beginning 31 March 2001. As a result of this unexpected action the Commission was forced to think about alternatives to its way of operating and to explore new models of operation which would, hopefully, address the recurring problem of funding law reform in Nova Scotia.338 One useful by-product of the government decision to

336. See Appendix 15.
337. See Twelfth Annual report (2002–2003), supra note 307 at 15 where this ratio was first noted and in 2016 by then President D. Jamieson in an internal Commission document prepared as a response to media questions—April 6 [unpublished].
338. See the text accompanying note 296 and following. Also see the Minutes of the Law Reform Commission of Nova Scotia (20 September 2001) [unpublished, archived at the Law Reform Commission Office].
stop funding was the preparation of a document by the Commission titled “The Case for the Law Reform Commission of Nova Scotia.” It also prompted the Foundation to step in with funding at the rate of $250,000.00 for three years (until 2004).

The possibility of some kind of collaboration with a university, as part of the exercise by the Commission to explore alternate ways of conducting law reform was initially raised by the Commission in the process of preparing its document entitled “The Case for the Law Reform Commission” in December of 2001. Some kind of partnership with either Dalhousie Law School or Saint Mary’s University was discussed in the document. The purpose of such a partnership was to reduce costs and demonstrate to the Law Foundation and government that the Commission was exploring initiatives to do this. It was estimated that if the Commission could transfer its operations to a university site, savings of approximately $20,000.00 or more could be achieved. Partnership with Dalhousie Law School appeared to be problematic because of the lack of space and other considerations, so it was decided to focus the possibility of law reform collaboration with Saint Mary’s.

Discussions began in December of 2001 with meetings between the Commission’s Executive Director and Saint Mary’s officials and continued until March 2003 when a formal Memorandum of Understanding was signed. It was declared, among other things, that “Saint Mary’s believes in the importance of law reform to all Nova Scotians and wishes to assist the Law Reform Commission with its work.” However, Saint Mary’s officials warned that space was a problem. There was one other factor critical to the development of a successful partnership, whether with Saint Mary’s or Dalhousie, and that was the ability of the Commission to produce evidence of financial viability; some assurance that the Commission had the necessary core funding to continue operations.

The President of Saint Mary’s met with the Attorney General in early January 2004. He stressed the importance of the joint venture in

339. Supra note 77.
341. Supra note 77.
342. One Commissioner estimated savings of between $20,000 and $40,000, see Minutes of the Law Reform Commission of Nova Scotia (25 October 2002) at 4-5 [unpublished, archived at the Law Reform Commission Office].
345. Ibid.
law reform with the Commission as well as the importance of funding for the Commission by the government.\textsuperscript{347} The fact that Saint Mary’s had well-recognized courses in criminology and sociology meant that valuable staff resources were available to engage in and support inter-disciplinary work on law reform projects. In the fall of 2005 a Joint Research Project, involving an examination and assessment of the Nova Scotia Small Claims court, was initiated. Saint Mary’s faculty provided the social science expertise required for the project but investigative work revealed that there was “shockingly little empirical socio-legal research being conducted in Canada on the civil Justice system.”\textsuperscript{348}

Discussions with Saint Mary’s regarding the availability of space on campus took place between 2005 and 2009 but the problem was never resolved and the Commission did not relocate to Saint Mary’s.

The decision to seek a partnership with a university was driven by the need to reduce rental costs as well as a desire to show the Commission’s two crucial funding agencies, the government and the Law Foundation, that the Commission was trying to reduce the costs of law reform by trying other methods of operation. Both the universities and Commission hoped that such an arrangement would raise their public profile. The Commission also believed that such collaboration would demonstrate the benefits to be gained by engaging in more extensive interdisciplinary work. The attempted partnership did produce a Final Report on the Small Claims Court in March 2009. It also resulted in the appointment of John McMullan, Professor of Sociology and Criminology at Saint Mary’s, to the Law Reform Commission and the appointment of William Lawrence, the Commission’s Legal Research Officer, as a part-time teacher at Saint Mary’s in the Faculty of Business and Business Law.\textsuperscript{349} The arrangement was probably looked upon with favour by the Commission’s two major donors, but it did not save the Commission any money. Nevertheless, government funding and Law Foundation funding was restored in whole or in part anyway.

The Law Foundation’s three year rescue grant was scheduled to end on 31 March 2004 with no guarantee of further funding after that date. In the Commission’s 12th Annual Report (April 2002–31 March 2003) the Commission warned “It is clearly apparent that without a return of provincial government funding support, the Law Reform Commission of

\textsuperscript{349} Supra note 307 at 16.
Nova Scotia will have to cease its operations by the fiscal year beginning 31 March 2004. Coincidentally, however, the Civil Procedure Rules of the province were in need of an overhaul, the last revision having taken place 30 years before.

In 2002 the Nova Scotia Barristers’ Society and the judiciary jointly suggested that the Commission consider a revision of the Civil Procedure Rules as a Commission Project (the Rules Project) and discussions began between the Commission, the Barristers’ Society and members of the judiciary. At the same time the Commission was considering another bigger and more wide-sweeping project described as Access to Justice. This broad umbrella project was intended to contain within it more specific topics such as a simplified procedure for courts, contingency fees, structured settlements, and the problem of self-represented litigants. The Commission favoured their broader Access to Justice Project over the Rules Project, since it was more like the normal projects that the Commission usually undertook, and there seemed to be more of a role for the Commission to play in such a larger project. The Deputy Minister of Justice for Nova Scotia was reported as being receptive to the idea and suggested that a proposal be submitted before the end of 2002.

The Commission had already been looking for a project or projects that would help it to extend its existence beyond 1 April 2004 when the Law Foundation Rescue Grant ended. Originally, the Commission envisaged a proposal for a project that would combine both the revision of the rules as well as an access to justice component. It was thought that if the Commission could carve out for itself a helpful role, it would gain increased support from the Bar as well as the judiciary, and possibly raise its public profile as well. However, the judiciary made it clear that their priority was with the Rules Project and the role they saw for the Commission was that as project administrator or secretariat rather than providing research support.

As a compromise, the Commission decided to submit a proposal before the end of December 2002 for a Rules Project only, one that described the

353. Ibid, at 1.
354. Ibid.
355. Ibid at 6.
Commission’s role as primarily administrative rather than research, but which also suggested that the Commission staff could provide substantive research support as well. Not all commissioners were happy with the decision, however, even though the Commission had also decided to continue planning for a separate Access to Justice Project and to seek funding for such a project.\footnote{356. Minutes of the Law Reform Commission of Nova Scotia (10 December 2002) [unpublished, archived at the Law Reform Commission Office].}

At a meeting of the Commission on 19 June 2003 the Executive Director advised the commissioners that no money would be forthcoming from the government for a Rules Project.\footnote{357. Minutes of the Law Reform Commission of Nova Scotia (19 June 2003) at 1 [unpublished, archived at the Law Reform Commission Office].} On the other hand, the good news was that the Law Foundation had agreed to provide $125,000.00 for Commission operations from 1 April 2004–31 March 2005, if the Commission could obtain $150,000.00 in funding from some other source. The Commission therefore subsequently made an application to the government for more funding in the amount of $125,000.00, slightly lower than the normal annual funding of $150,000.00, but matching what the Law Foundation had offered.\footnote{358. Minutes of the Law Reform Commission of Nova Scotia (3 September 2003) at 1 [unpublished, archived at the Law Reform Commission Office].} In October 2003, the Deputy Minister of Justice advised the Commission that the Department had $200,000.00 available, but only for the current fiscal year ending in 31 March 2004. Moreover, the money was only available on condition that the Commission devote all of its resources for two years to a rewriting of the Civil Procedure Rules. There was also the possibility of an additional $50,000.00, making a total of $250,000.00 over two years. The Commission’s role would be that of secretariat with some research support to be provided.\footnote{359. Minutes of the Law Reform Commission of Nova Scotia (21 October 2003) [unpublished, archived at the Law Reform Commission Office].}

We can speculate about the reason or reasons for the Department of Justice’s decision to make the project funds available, even with conditions. No doubt the judiciary, who were in favour of the Project, probably exercised a little gentle persuasion and the fact that the Law Foundation had offered to provide $125,000.00 for at least one extra year also helped. There may have also been a genuine desire on the part of some senior Justice Department staff to assist the Commission to keep it operational.

There were a number of serious issues the Commission had to consider that flowed from this new arrangement. On the positive side, the two year project would allow the Commission to continue operating after 31 March 2004 and perhaps encourage the Justice Department to provide more long-
range core funding. Insofar as the revision of the Civil Procedure Rules could be characterized as part of an Access to Justice Program, Saint Mary’s University might see the Commission’s involvement as a positive factor supporting the proposed move of the Commission to Saint Mary’s.

There were other factors at work on the negative side, however. First of all the $250,000.00 offered by the government was less than the Commission had budgeted for the project. Also of considerable concern was the lack of clarity about the Commission’s role, and the fact that the Rules Project was a very different project than the Commission had undertaken in the past. The condition imposed by the government that the Commission devote almost all of its time to the Rules Project meant that there would be little additional time for the Commission to work on other projects. The Commission might become both, in fact, and in public perception, merely a research or administrative arm of the Project and would continue to exist in name only as a Law Reform Commission. At the beginning it was not clear who would lead the project and whether the Commission would provide any research report at all or would only act as a secretariat.  

At a Commission meeting on 18 November 2003 it was decided by the Commission to agree in principle to the government’s funding offer and that a meeting would be sought with the Supreme Court of Nova Scotia to obtain a Memorandum of Understanding which would clarify the Commission’s role.  

In January of 2004 the Commission was invited to participate in an all day “Chartering or planning session” along with members of the Nova Scotia Supreme Court and Court of Appeal, the practicing Bar and Department of Justice representatives.  

In March of 2004 the Commission began to receive materials from the “Chartering Session” which provided for the development of a Steering Committee and the creation of eight other working committees who would concentrate on revising different parts of the Rules.  

By July of 2004 the Commission staff was fully engaged with the Rules Project. It had been expected by all parties that the research support component of the Rules Project carried out by the Commission would be finished by April
2005, at which point drafting of the rules would begin. As it turned out, the drafting stage did not start until November 2005 with completion not expected until February 2006. Contrary to initial expectations, the Commission continued to receive requests from the drafters for research reports relating to the drafting exercise until the end of 2007. The Judges approved the Rules in the spring of 2008, at which time the Commission staff was still engaged in support work for the Project. A two-year project had developed into one that lasted six years from the proposal stage and four years from the time that work started on the Project.

In spite of devoting most of its time to the Rules Project from 2004 to 2008, the Commission was still able to complete several other projects, including a final report on Privity of Contract, a background paper on Court Structured Settlements, and a project on Vexatious Litigants. The government also sent the Commission a Reference on Grand Parent-Grand Child: Access. The fact that the Commission was able to meet significant research and administrative demands placed upon it by virtue of its involvement in the Rules Project, speaks volumes about the dedication and perseverance of Commission staff, particularly Bill Lawrence, who shouldered the bulk of the research demands.

Without a doubt, the Rules Project, coming as it did just before the Law Foundation grant expired in 2004, saved the Commission from extinction. It allowed the Law Foundation to match the government funding and, although it was basically project funding, it supported the Commission financially until core funding by the government could be restored. The price paid by the Commission was reduced project output for about four years.

The Commission’s second major funding crisis was precipitated on 8 June 2015 by the arrival of the government notice warning that Commission funding would be completely cut off as of 31 March 2016. As soon as the notice was received, the President of the Commission, Darlene Jamieson, arranged meetings with the Deputy Minister of Justice and the Minister of Justice to discuss the decision and to try to get it reversed. A

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365. Ibid.
letter was sent to the Premier on 24 September 2015 from the Commission asking for a meeting but the request was not granted. Instead, the Minister of Justice responded on 15 December 2015 advising there would be no change in the decision.

Between 15 December 2015 and February 2016, the Commission asked for and received letters of support from many legal organizations, all of which indicated their opposition to the government’s decision and urged the reinstatement of funding. Agencies involved included the Nova Scotia Barristers’ Society, the Canadian Bar Association, the Schulich School of Law, Dalhousie, Dalhousie Legal Aid Service, the Alberta Law Reform Commission Institute and the Federation of Law Reform Agencies. In an unprecedented move, 17 Nova Scotia law firms sent a joint letter to the premier praising the accomplishments of the Commission and urging the premier to recognize its importance to law reform and to reverse his decision. On 23 February the Commission sent a follow-up letter to the premier again asking for a meeting. On 2 March, the minister of justice responded saying the decision would not be reviewed.

On 31 March 2016 the Commission sent a letter to individual MLA’s asking for their support by urging reversal of the government decision. In April the president of the Commission met with leaders of the two opposition parties, the New Democratic Party and the Conservative Party and their justice critics. On 16 May 2016 in the House of Assembly, the leader of the NDP, Ms. Marian Mancini, noted that the premier had not responded to the hundreds of lawyers represented by the letter sent to the premier by the 17 law firms. She asked the premier if he would like to do so before the House. The premier responded by explaining that the Premier’s Office frequently sends matter to individual ministers for a response. In this case the appropriate minister was the justice minister who had replied on behalf of the premier.

The premier also noted that the government had given the Commission a year’s notice of their intention to discontinue funding and that they had provided the Commission in-kind office space. He further explained that it was the government’s hope that the commission “would be able to find some funding to continue to do their work” and “that perhaps those 17 Nova Scotian law firms, who have taken the time to write to tell how important it is, will contribute financially to make sure they (the Commission) have the

370. Ibid (The Premier).
371. Ibid.
resources they need...."372 In response, the Honourable Mancini pointed out that it would be inappropriate for the Law Reform Commission to seek private funding and that she had made this point on several occasions.373

The premier disagreed with this contention and insisted that it would not be inappropriate for law firms to contribute (financially) to the Commission, that the government would be happy to be a partner with the Bar by continuing to provide and offer office space free of charge to the Commission.374 When questioned by the media sometime later, outside the House, the Executive Director of the Commission, Angus Gibbon, explained that such a contribution would not be appropriate and could affect the independence of the Commission.375

As a result of the loss of two-thirds of its budget, the Commission lost the services of its Executive Director, as well as its chief legal research officer, and was forced to operate with a part-time researcher and part-time finance officer. The Commission continued, nevertheless, to work after 31 March 2016 on two projects that were in progress, The Matrimonial Property Act Project and The Intestate Succession Act Project.376 The Law Foundation provided the Commission with funding of $85,000.00 for the fiscal year 2016–2017,377 and $72,000.00 for the fiscal year 2017–2018,378 funds which permitted the Commission to continue limited operations with part-time employees.

On 16 November 2016 a meeting of stakeholders representing the Commission, the Schulich School of Law, the Department of Justice, the Judiciary, the Barristers’ Society and the Law Foundation was convened to explore the possibility of carrying on law reform activities using a different institutional structure. The meeting agreed that the venture was worth pursuing and further meetings were planned. As of November 2017 the second Law Reform Commission continues to exist as a legal entity, operating at a very reduced level, with a very reduced budget, with part-time personnel and in offices provided by the government free of charge, kept alive by the generosity of the Law Foundation.

372. Ibid.
373. Ibid at 9471, (Marian Mancini).
374. Ibid.
375. As reported in “The South Coast Today,” Timothy Gillespie, “‘Get your funding elsewhere,’ Premier says to Law Reform Commission” South Coast Today (17 May 2016), online: <www.southcoasttoday.ca>.
12. *Why is stable funding for law reform commissions not sustainable in Nova Scotia?*

We have described law reform in Nova Scotia as a precarious enterprise and posed what we described as the overarching question, whether continuous law reform, as carried out by a law reform commission, is a sustainable activity in Nova Scotia. We further elaborated by asking, if it is not sustainable, what are the reasons or factors that make it so? Funding, or rather lack of it, was not a major problem for the first Law Reform Advisory Commission in Nova Scotia. Funding was never reduced or withdrawn completely and was not the reason for the first Commission ceasing to operate. As we have already chronicled, the Chair of the Commission, Linden Smith, in January 1981, did not call any further meetings of the Commission and the appointments of the then commissioners simply expired and replacements were not appointed.\(^{379}\) The second Commission, a decade later had a different experience. The later Commission lasted two and a half times as long as the first, but had the government component of its funding withdrawn completely twice during that period (2001 and 2016). Similarly, Law Foundation funding, the other major component of the Commission’s fund, was withdrawn entirely once and was at risk of being withdrawn several times during the 26 years. No government has been prepared to guarantee long term funding, but without stable, consistent funding law reform commissions are destined to suffer the uncertainty that goes with year to year financial handouts.

*General factors affecting funding*

Theoretically, there can be a number of general factors, both positive and negative, that might have an effect upon funding and funding decisions. William Hurlburt has suggested that there are some factors that tend to protect law reform commissions from institutional oblivion.\(^ {380}\) But, as he points out, they provide only modest advantages and any protection given would not be effective against a minister or government that was “indifferent or even hostile to a law reform or a law reform commission…”\(^ {381}\) However modest these advantages might be, they are worth noting. First is the fact that a budget for a Commission usually appears as a line item in the Department of Justice budget year after year and, as a result, may be taken for granted and included as an habitual item, unless the Department is called upon to reduce its own budget. If this

\(^{379}\) See Section III(7) above.

\(^{380}\) Hurlburt, *supra* note 8 at 486.

\(^{381}\) *Ibid.*
occurs at a time of financial stringency, each item in the budget will be subject to close scrutiny and justification will be required for its continued presence. But unless the triggering event occurs, the possibility is that the status quo will not be disrupted and the funding item will continue to appear in the budget.

Secondly, having a law reform commission to carry out needed reform activities relieves the pressure on governments and government departments to do all the reform work themselves. There may also be some political advantage to the government appearing to be interested in law reform by funding a law reform commission. Thirdly, there might well be a political price to be paid for dissolving a law reform commission, and it could be a high one, but this is not likely in Canada.

A fourth factor is that financial crunches experienced by every government come and go like the tides. Less severe financial constraints are more likely to occur more frequently than the more severe ones and may not result in draconian measures being taken by the government. There is always the hope and the possibility that an improvement in government fortunes will permit a reinstatement of funding and that lack of government funding will not be permanent.

A final positive factor, not specifically enumerated by Hurlburt, is the fact that hopefully there will always be a group of supporters of law reform outside the political arena who will continue to support funding for law reform and law reform commissions. The ultimate question, however, is whether all or any of these factors can have a sufficient impact on government funding decisions to protect law commissions from a government decision to withdraw or severely curtail funding. Experience in Nova Scotia clearly tells us they cannot.

Factors that discourage funding

Although financial constraint is often the reason given by governments for withdrawing funding, there are other factors that may play an equally important role in the government decision. For example, it may be that the government does not fully appreciate the important role played by law reformers in the maintenance of the rule of law. Legally trained persons would understand the connection but nonlawyers may not. Officials in the Department of Justice will appreciate the fact that continuous law reform is an essential prerequisite to the maintenance of the rule of law, but it is questionable whether non-lawyer members of the Cabinet would see the importance of this concept. As Hurlburt has observed “A Cabinet is not likely to be devoted to law reform. It is not likely to consider law reform
to be something which should be given a high priority.” It is not, in their view, an essential service.\footnote{Ibid at 368.}

Perhaps politicians do not think in terms of the rule of law at all. They may be under the illusion that law reform, however it is done and by whom, can be suspended for a period of time without doing irreparable harm to society. It is difficult to point to any specific effect that might flow from either a shut down of a law reform commission or a drastic reduction in its operations. Any negative effect will probably not be noticed. Some laws will continue to produce unjust or undesirable results, but such consequences will not usually be attributed to lack of sufficient law reform or to a degrading of the rule of law. A deteriorating rule of law is unlike a rusting bridge, and it is hardly as visible, but the longer term consequences can be just as harmful.

Governments sometimes reach the conclusion that law reform can be done “in house” just as effectively, at lower cost, and with the government in complete control of the timetable and results. This may have been a factor with the first Commission’s demise. When such a decision is made, it usually signals some degree of dissatisfaction with the work of a law reform commission. In more specific terms, it might mean dissatisfaction with the thoroughness of the research work done by the Commission or with the identification of the legal deficiencies or the recommended solutions. Final reports may be considered not persuasive enough or lacking in insight or innovative solutions.

Disagreement with the type of projects selected by the Commission can also be an underlying, but not necessarily expressed, source of dissatisfaction. Apart from government references, the Commission may have selected reform projects that the funders do not think address the most pressing social needs. They may also be considered to be too technical or narrow, too dull or uninteresting and with little public appeal. Conversely they may be considered to be too ambitious, controversial or “avant garde,” as was the case with the Federal Law Commission’s approach to law reform. In rare cases, there might be an ideological conflict with the minister or cabinet. Law commissions make considerable efforts to solicit and generate public suggestions about perceived shortcomings in the legal system that need to be corrected. The second Commission, particularly, made a point of expanding public outreach consultation. But choices still have to be made by the Commission as to the project to be undertaken, hopefully on the basis of well-thought-out criteria.
Governments, in particular, are very time sensitive, particularly with respect to government references. They have a legislative agenda to follow and political pressure to contend with. Given the consultation processes that law reform commissions use, as well as their extensive research work to ensure a quality product, short range, quick solutions are usually not possible for a Commission unless the project has a very narrow compass. As a result, governments are usually unhappy with the length of time it takes for reform projects to be completed.

A low implementation rate for a Commission is not usually of concern to a government unless it results from the government accepting Commission recommendations for reform only to have them rejected by the legislature. In such circumstances the government might be embarrassed, even though they have approved the recommendations of the Commission. Government will obviously be concerned if this happens very frequently. Other donors, such as the Law Foundation, may be more concerned about a low success rate because it raises the question whether they are getting good value for monies provided to the Commission.

A practical consideration in a government decision to terminate, is that it is easier for a government to cut small programs like a law reform commission than to cut a departmental budget that is largely committed to personnel salaries. For example, the Department of Justice would find it easier to cut the Commission’s budget rather than cut its staff by one or two positions. Concern for the rule of law could easily be overridden by more immediate concerns within the Department.

A final factor that is always in the background is the issue of control. Although a Commission does not make binding decisions having the effect of law when it publishes its final reports, the fact that it is pointing out deficiencies in the legal system that require fixing puts pressure on the government to take some action. In some cases, due to lack of resources, the government may not be able to take action immediately no matter how much it approves of the recommended reforms. In other situations the recommended reforms may not be welcomed at all by the government. From a government perspective this can be an annoying by-product of law reform which a government can avoid or diminish by exercising more control over the Commission or getting rid of it.

Ultimately, however, no matter what influence these various factors, both supportive and nonsupportive, may have on government decisions, the government will make a political calculation on the public reaction to its decision.
Specific factors
The foregoing are common or generic factors that could apply in any jurisdiction in Canada to any law reform commission. But there may also be additional specific or special factors created by local conditions or circumstances that also may affect government-funding decisions. The question is, were any of these generic or special non-fiscal factors at work in Nova Scotia when decisions were made to let the first Commission expire and to severely restrict funding for the second?

V. Possible reasons for the demise of the first Law Reform Commission and government withdrawal of funding for the second
William Hurlburt offered his view that the first Nova Scotia Commission was “...the victim of ministerial indifference, ministerial desire for control, government parsimony, and, perhaps, official dislike.” He further suggested that the government was also concerned that the Commission might somehow “usurp the functions of the political process by engaging in the formulation of social policy” and that this concern was “at the root of the parsimonious attitude of Nova Scotia to its Law Reform Advisory Commission....” On this point the author may have been referring to the restrictive legislative mandate of the first Advisory Commission rather than its actual activities. As previously noted, the first Advisory Commission did exercise a certain amount of de-facto independence by initiating selection of some of its projects. There was obviously a desire for government control, as exercised through Legislative Counsel, and the Attorney General was probably stung by the sharp criticism of the Commission’s lack of independence by a strong Chair like Lilias Tower. This may have developed into a personal dislike as well. Her emphasis upon reform in the family law area may, as well, not have been appreciated by the government of a conservative male-dominated society.

As for the second Commission, the fact that the government sent seven references to the Commission between 2010 and 2015 suggests that the government still had confidence in the Commission and was satisfied with the work it was doing. This, in spite of the fact that the Commission was not always able to meet a government imposed deadline, as in the case of the Adoption Information Act. The fact that the premier and the Attorney General were both nonlawyers may have had an impact upon

383. Ibid at 485.
384. Ibid at 262.
385. See Appendix 12.
386. Adoption Information Act, SNS 1996, c 3.
their appreciation of the vital importance of law reform and the essential role played by law reform commissions in that essential service.

Hurlburt was of the view that “[i]n the long run, the greatest threat to law reform commissions, as it is to the implementation of any one law reform proposal, is indifference to law reform.”387 Indifference on the part of legislators, government officials and the public clearly contributes to the difficulties law commissions have in their quest for stable funding or any funding at all. Lawyers, on the other hand, are not as indifferent, as the history of law reform in Nova Scotia demonstrates. Their clear support for the second Law Reform Commission was demonstrated by the common letter of support sent to the premier by 17 Nova Scotia law firms, an action never before taken.

As for the public, they were not made aware until the last moment of the government action and so it is difficult to gauge what level of support they might have expressed for the Commission had they known. Experience has shown the Department of Justice to have been both cooperative, for the most part, and supportive of the Commission and, despite government withdrawal of funds, the Department of Justice provides the Commission with free government space. But there are two other government entities, the Cabinet and Treasury Board that also play an important part in the allocation of public funds. What their view of law reform or law reform commissions was, or is, cannot be known, but the final decision may have been in their hands rather than in the hands of the Department of Justice.

Of the many factors that might have had some influence upon the Nova Scotia government’s decision to terminate funding for the Commission there are three factors, I suggest, that had the greatest impact upon that decision. The first factor was the lack of understanding and appreciation, by both government officials and members of the general public, of the important role that law plays in our society and the equally important functions of law reform commissions. This deficiency means that any government action to reduce funding will not result in a negative backlash—the political risk of which will have been calculated by the government of Nova Scotia and which was probably estimated to be small. This makes it easier for a government, in times of financial constraint, to cut funding to small, discrete programmes like law reform and law reform commissions, even if this means the end of such programmes.

The second factor of special significance is a lingering concern on the part of the Nova Scotia government for the lack of control that invariably results from the creation of an independent law reform commission. With

387. Hurlburt, supra note 8 at 487.
such a commission, not only does the government not control all projects undertaken by the commission, but it also cannot control the legal and non-legal solutions to problems proposed by the independent commission. In the case of government references, the government does control topic selection, but not the solutions proposed by the Commission. There is a certain loss of credibility, and perhaps embarrassment as well, that is suffered by the government when it does not agree with the solution or solutions recommended by a Law Reform Commission and it chooses not to act upon them. This is particularly problematic if the reform project involves significant social policy issues. Not only might some segments of the population be disappointed if the proposed changes are not made but some legislators might, as well, be concerned that the Commission is impinging upon the political arena and usurping their function.

The third and equally important factor is the government’s belief that its own departments, including the Department of Justice, can perform all the necessary reform work “in-house,” under controlled conditions, within required timelines and at a lower cost. It is perfectly reasonable to think that government departments, or the policy unit of the Justice Department, can handle day to day housekeeping problems that emerge, involving technical drafting, or implementation problems. They can also probably deal with reform issues that involve some degree of social policy requiring a certain amount of public consultation. But if the reforms required involve serious social policy decisions that require wide-spread public consultation and the gathering of empirical data, both legal and social, the process of law reform becomes much more complex and lengthy and usually well beyond the normal capabilities of government departments. If such complex reform projects are undertaken by the government as “in-house” projects, there is a real risk that policy choices will be made on the basis of insufficient and incomplete data.

An example occurred in October 2017 with the Nova Scotia government’s attempt to replace the 300-year-old Incompetent Persons Act. Twenty-two years earlier the second Law Reform Commission recommended the repeal of this act because it did not respond to twenty-first century social needs in Nova Scotia nor did it reflect contemporary social values. Although the Commission’s final report and recommendations were published in 1995, successive governments failed to act on those

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recommendations until the Incompetent Persons Act was declared unconstitutional by the Nova Scotia Supreme court in 2016. The Supreme Court gave the government until December 2017 to introduce a new Act. Because the government had ceased to fund the Law Reform Commission as of 31 March 2016 it was forced to do the reform work itself. Bill-16 entitled “Adult Capacity and Decision Making Act to Respect Autonomy of Adults in Decision-making” was introduced in October 2017. The Bill was severely criticized both at Law Amendments Committee hearings and publicly because the consultation process began too late, was rushed and did not allow for adequate canvassing of the public or the expression of views. As a result, it was argued, Bill-16 still did not respond adequately to current social needs or reflect contemporary social values.

Although other factors may also have had some influence on the government’s decision in 2015 to terminate funding, the above three factors, I suggest, were the most influential and had the greatest impact. Scarcity of funds was, no doubt, the triggering event that led to the ultimate decision and certainly was a significant factor in its own right. By withdrawing Commission funding, the government assumed responsibility for law reform in Nova Scotia. We can only assume that by so doing it realized that it might have to undertake some reform projects that would require extensive research, as well as difficult policy choices and some lengthy consultations. The government decision to carry out all of its required law reform “in house” means that either the government thought that its own personnel could do just as good a job as a law reform Commission or that the results might not be quite as good but still acceptable given the lower costs. Either way, the government regained control of the process. It is also possible that the government would be content to see some other reform agency, not funded by government, such as a re-constituted law reform commission/institute, also engage in law reform. Such a non-government funded reform agency could engage in a variety of law reform projects and pass on the results and recommendations to the government for review and

390. Webb (Litigation guardian of) v Webb, 2016 NSSC 180, R016 CarswellNS 596.
392. 1st reading, Nova Scotia, House of Assembly, Hansard, 63rd Parl, 1st Sess, No 9 (2 October 2017) at 641 (Hon Mark Furey).
393. Sheila Wildeman, Professor of the Schulich School of Law, Dalhousie University, in her presentation to the Law Amendments Committee as reported in Keith Doucette, “Law needs Change: advocates” The Chronicle Herald (12 October 2017) A1.
assessment but without the same degree of public expectation that they would be acted upon by the government.

Conclusion

Reference has already been made to the importance of the rule of law and the need for the government and the public to recognize and understand how important this concept is to a democratic society. However, we should also note that one important element of the rule of law is the assurance of equality of treatment for all persons by the law, both in reference to their rights, but also their responsibilities. Law provides a legal structure by its rules, procedures, and institutions that facilitates the creation and development of social ordering and the creation of social institutions. If we viewed society as a tall building, law would occupy the four or five underground floors we seldom see, but which provide support for the rest of the building above, and all the activities of society that are carried on there. Basement law allows the rest of the building to function effectively and safely. If the basement is allowed to deteriorate, the rest of the building is put at risk. Viewed in this way, the importance of law and a well-maintained law is clear. But politicians and the public do not see the basement very often and, as a result, they do not fully understand or appreciate the critical role that law plays in our society, or how important it is for a society to have laws that reflect and support necessary social policies.

Perhaps those involved in law reform have not done enough to produce the necessary understanding that is needed. But perhaps we are not the only ones who are responsible for creating that understanding. Perhaps the Justice Department has a role to play. But until governments in particular come to understand the importance of the legal basement, funding for law

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395. See Section I(1).
397. See Jones, “The Rule of Law and the Welfare State” (1958) 58:2 Colum L Rev 143 at 149-150 who suggested a re-statement of Dicey’s second element might read, “all members of society, private persons and government officials alike, must be equally responsible before the law.” The Law Reform commission stressed the need for equality of rights as one of the basic aspects or themes of its reform philosophy. See section IV(6) above.
398. Hurlburt, supra note 8 at 9-13 has observed that laws affect everyone in society, often profoundly. The law as a whole should regulate human behavior and provide a framework for human activity in ways which are suitable to the society in which it operates. Gall, supra note 12 at 13 has suggested that “the law should be regarded as the core matter which those persons and institutions in any legal system utilize in order to effect an ongoing process in regulating the affairs and conduct of persons in society.”
reform and law reform agencies and Commissions will remain sporadic and uncertain and the whole enterprise will remain perilous.

But even if there was universal agreement about the importance of law in our society and the need to keep it polished and well maintained, we are still left with the question of the appropriate mechanism to do this. Some governments take the view that law reform can be done most effectively “in house” rather than by external law reform commissions. Governments taking this view or position are not likely to consider law reform commissions as essential for the maintenance of the law and its institutions. Perhaps the answer is that law reform is big enough and important enough to allow both governments and commissions to each play their part. Perhaps government departments, and particularly Justice, could concentrate upon reforms that are narrow in scope and do not require extensive research and public consultation, projects that can be completed in a short frame and would fit within a legislative timetable. Law reform commissions would then concentrate their efforts upon more controversial, complex reform projects requiring extensive public consultation and comparative research. The division of labour would not be sharp, clear or exclusive, but would provide a working plan for the two reform agencies. In times of adequate government revenues the Nova Scotia government might be prepared to fund both “in house” and “out of house” (law reform commission/institute) but when money is tight and fiscal restraint is the overriding government concern, it is not prepared to do so and cost becomes the deciding factor.

Some interesting parallels can be drawn between the experience of the law reform commissions in Nova Scotia and the reform experience in Manitoba. The first Manitoba Law Reform Commission was created in 1970 and became operational in 1971. It operated for 26 years until 1987 when the government notified the Commission that its commissioners would not be reappointed and that they would be replaced by senior civil servants with a savings of $250,000.00 per year as a result. The ultimate intention of the government apparently was to wind down the Commission. However, the significant backlash from the legal profession, the Faculty of Law and members of the public and media, as well as an impending election, caused the government to reverse its decision. A new statute was passed in 1990 entitled The Law Reform Commission Act which included provisions intended to protect the Commission from similar government action in the future. However, the good times only lasted for seven years and in 1997 the government once more announced its intention

399. SM 1989-90, c 25.
to shut down the Commission and to repeal the *Law Reform Commission Act*. The government was very clear about its reasons for doing so and explained that it wanted to put more money into community involvement and public safety. Once again, there were protests and the government changed its position. It allowed the Commission to continue its existence but with government funding that was reduced by 75 percent. This drastic reduction in funding meant that the Commission’s full-time staff had to be let go with the result that any research work or writing of draft reports had to be outsourced to external consultants retained on contract. As of 2015, the Manitoba Commission’s budget stood at $205,000.00 with the Department of Justice contributing $85,000.00 plus free office space and accounting services. The Law Foundation provided $120,000.00.  

If we compare the Nova Scotia Law Reform Commission with that of Manitoba we find that there are some striking similarities. Both served provinces that have relatively small populations and both Commissions operated with modest budgets. Both were threatened with government withdrawal of funds or nonreplacement of Commissioners on more than one occasion. The Manitoba Commission is still operating but on a much reduced budget and with reduced output. The question is does the Manitoba experience provide a useful or accurate indicator of what might happen to the existing Nova Scotia Commission? Although there are similarities in experience, there is one significant difference. In Manitoba there was a significant backlash and pushback by both the general public and the media while in Nova Scotia the only negative reaction to the government decision came from the local Bar. Therefore, the Nova Scotia government did not, and does not, have to contend with adverse public reaction, so there is little political pressure involving potential loss of votes to encourage the Nova Scotia government to reverse its latest decision. However, it might be encouraged to help in some other way.

VI. Postscript

The suggestion that the Nova Scotia government, despite its earlier decision to withdraw funding from the Law Reform Commission, might be willing to help support independent law reform in other ways, seems to have become a reality. After two years of discussion and negotiation a proposal to maintain some degree or level of independent law reform in Nova Scotia appears to have been developed.

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400. For an account of the experience of the Manitoba Law Reform Commission with government funding see Hurlburt, *supra* note 4 at 230-232.
Since November 2016 a group of interested stakeholders have been working on a proposal to replace the existing Commission with a more broadly based organization that would monitor the administration of justice in Nova Scotia with particular emphasis upon necessary reform of the substantive laws as well as access to justice issues. It has seemed generally agreed that the new organization will be described as an “institute,” but there currently is no definite title.

The new Institute would be housed at Dalhousie University in the Faculty of Law and would be funded by grants from the Nova Scotia Department of Justice, The Nova Scotia Law Foundation and hopefully the Federal Government. Administrative support, in the form of personnel time, would be supplied by the Law School and the Nova Scotia Barristers’ Society.\(^{401}\)

One might well ask what prompted the Nova Scotia government to resume funding independent law reform. Several possible reasons come to mind. After two years of discussions, the government may have gained a better understanding of the value and importance of independent law reform. The benefits to government departments in their efforts to keep Nova Scotia law up to date may have become more evident. Perhaps the proposed new organizational structure of an Institute involving a number of different stakeholders each with their own contribution, financial and otherwise, was more appealing, particularly if it resulted in a smaller government financial contribution. Or perhaps it was the fact that the new Institute would concern itself, not only with the reform of substantive Nova Scotia law, but would also focus upon the timely problems of accessing that law. Access problems appear to generate more public attention and concern than reform of existing laws. From a public relations point of view, government money used to seek solutions to access issues may be seen as a better investment than money spent only on more general law reform. Perhaps the government’s change of heart can be attributed to a combination of these reasons.

Whatever were the controlling reason or reasons for the government’s decision to fund the new institute, when and if it begins anticipated operation in 2018, it will have to face a number of important issues. First will be the need to achieve a workable balance, in terms of time and resources, between access to justice issues and traditional substantive law reform projects. It has been suggested that law reform agencies are access to

justice agencies because law reform encompasses not only substantive law but legal process reform as well. The Nova Scotia Commission has, in past annual reports, observed that access to justice is an issue of increasing concern and has specifically referred to individual commission projects that either have a specific access to justice component within them or which impact the general issue of access to justice in some way. The Commission has not, however, in the past, specifically indicated that access to justice was a major theme or thrust of the Commission’s work. The term “access to justice” is a term that can be used to encompass a wide variety of situations and problems. Interpreted too broadly it can be easily trivialized.

A second important issue concerns the expectations that the new institute may generate. Will there be expectations that both the Access to Justice and substantive law reform projects will involve a broader and deeper look at social justice issues? Such issues usually require broad public consultation, extensive gathering of social and legal data as well as multi-discipline research. Critics of historic law reform agencies have long argued for such an expansion, but not only is such an extension time consuming, but not only is such an extension time consuming, it is also expensive, which leads to the third and final concern to be addressed here, that of funding.

In its last full year of operation the Nova Scotia Law Reform Commission worked with a budget of $288,894. The initial proposal for an Institute made to stakeholders suggested a budget of between $310,000 and $340,000. The budgets for two other provincial law reform institutes, namely the Alberta Law Institute and the British Columbia Law Institute / Canadian Centre for Elder Law, have budgets of $1,555,000 and

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402. Former Supreme Court of Canada Justice Tom Cromwell (addressing a meeting of Law Reform Commissions in Halifax, 3 October 2015) at 4 [unpublished].
405. No mention was made of access to justice as a commission focus when the commission reviewed its work in 2011 over the previous twenty years. See Twentieth Annual Report of the Law Reform Commission of Nova Scotia 2010–2011 (Halifax) at 11-12. In the commission’s final report on Vexatious Litigants—April 2006, the commission drew a needed distinction between the concept of access to justice in general and the right that all citizens have to access the court system (except for vexatious litigants). See pages 2, 15, 16 and 20.
406. As cautioned by Tom Cromwell, supra note 402.
407. Supra note 29.
408. See Appendix 15.
409. An outline of the proposed funding is contained in the initial proposal to stakeholders. See supra note 401.
The budget for the proposed Institute has not yet been finalized but it would be totally unrealistic to think that it would be anywhere near the budgets of two larger and wealthier provinces. Whether the finalized budget will be close to the proposed range of $310,000–$340,000 remains to be seen. Even a budget of $340,000 might still prove insufficient to effectively achieve the institute’s twin purposes.

Guaranteed long term funding for law reform commissions or institutes is probably not attainable, but funding adequate to allow them to successfully complete their missions should be. In 1997 Professor Hurlburt likened the Manitoba experience to a modern-day “Perils of Pauline” adventure, with the Commission at the last moment being “rescued from actually falling from the cliff, but insecurely suspended from it and with limited room for action.” 411 Let us hope that the Nova Scotia experience will be different.

Concluding observations

Twenty eight years after its legal birth (1990), and one year after its more recent near practical demise, the second Nova Scotia Law Reform Commission is about to take on a new life, in a new form, with a new mandate. In light of this, two observations seem appropriate: First, the Commission might be viewed as having completed the ultimate law reform project, namely reforming itself (although not entirely voluntarily). Secondly, it is worth noting that, after an absence of many years, organized, independent law reform will once more be carried on in the Faculty of Law at Dalhousie. Dean Read would have been pleased.

410. Email from Angus Gibbon, Executive Director of the Law Reform Commission of Nova Scotia Commission (31 October 2016) [unpublished]—the budget amounts were allocated for the period 2015–2016.

411. Supra note 4 at 231.
List of Appendices

2. Source of the Projects—Who Requested Them as Reform Projects?
3. List of Completed Projects
4. Implementation of Reports
5. Duration of Projects—Time Required to Complete
6. Areas of Law Reformed
7. Type of Reform Solutions Proposed by 17 Final Reports
8. Unfinished Projects
9. Criteria Used by the 2nd “Independent” Commission for Project Selection
10. List of Final Reports—2nd Commission
11. Type of Reform Recommended
12. Length of Projects—Time to Complete
   (a) Government References
   (b) Non-Government References
13. Areas of Law Reformed
14. Reasons for Reform
15. Funding Contribution History
16. Members of the First Panel of Commissioners of the 1st Law Reform Advisory Commission
## Appendix #1


2. The Dower & Courtesy Act – (26 September 1972)
3. Limitation of Actions Act – (26 September 1972)
4. Amendments to the Fatal Injuries Act – (26 September 1972) (Rejected by Commission)
5. Probate Legislation – (26 September 1972)
7. Creation of the Office of the Public Trustee – (26 September 1972)
8. Reciprocal Enforcement of Foreign Judgments – (26 September 1972)
9. Interest on Clients’ Trust Accounts – (6 November 1972) (Rejected by Commission)
10. Regulations Act – (6 November 1972)
12. Torrens Land Registry System – (9 July 1973) (Rejected by Commission)
13. Trustee Act and Real Property – (9 July 1973) (Rejected by Commission)
15. Small Claims Court – (18 September 1974)
17. Collections Act – (18 September 1974)
18. Assessment of Legal Aid in NS – (27 November 1974) (Rejected by Commission)
19. Change of Name Act – (27 November 1974)
20. Age of Consent to Medical Treatment – (27 November 1974)
22. Frustrated Contracts Act – (April 4, 1975)
23. Occupiers Liability Act – (April 4, 1975)
24. Companies Act – (10 May 1975)
27. Petty Trespass Act – (14 January 1977)
29. Privacy as a Tort – (4 December 1978)
31. Practical Procedures re Magisterial Inquiries, Medical Examiners & Coroners (1978) – Rejected
32. Protection of Property Act / Trespass to Property Act (December 1980)
34. Securities Legislation (1980)
35. Evidence Act (Uniform) (December 1978)
Appendix #2
Source of the Projects: Who Requested Them as Reform Projects?

(a) Projects Requested by the AG
1. Builders Lien Act
2. Dower & Courtesy
3. Limitation of Actions
4. Fatal Injuries Act
5. Abolition of the Grand Jury
6. Creation of the Office of the Public Trustee
7. Reciprocal Enforcement of Judgments
8. Interest on Clients’ Trust Accounts
9. Torrens Land Registry System
10. Trustee Act and Real Property
11. Collections Act
12. Small Claims Act
13. Change of Name Act
14. Registry Act
15. Companies Act
16. Juries Act
17. Assessment of Provincial Legal Aid
18. Petty Trespass Act
19. Protection of Property Act
20. Builders Lien Act (2nd Project)
21. Securities Legislation
22. Conditional Sales Act
23. Status of Overholding Tenants Act
24. Practices, Procedures Re Magisterial Inquiries, Coroners Inquiries
25. Age of Consent for Medical Treatment

(b) Projects Requested by The Commission
1. Regulations Act
2. Probate Legislation
3. Matrimonial Property Act
4. Intestate Succession
5. Amendments to the Law Reform Advisory Act
6. Occupiers Liability Act
7. Illegitimate Children
8. Frustrated Contracts
9. Privacy as a Tort
10. Uniform Evidence Act
11. Personal Property Security Legislation
### Appendix #3
List of Completed Projects

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<thead>
<tr>
<th>Title</th>
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<tbody>
<tr>
<td>1. Reciprocal Enforcement of Judgments Act (1972–1973)</td>
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<td>4. Regulations Act (1972–1973)</td>
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<td>9. Amendment to the Law Reform Advisory Act (1975–1976)</td>
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<td>15. Probate Act (1972–1979)</td>
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Appendix #4
Implementation of Reports

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<td>Illegitimate Children (1977)</td>
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<td>10</td>
<td>Married Women’s Property Act</td>
<td>C. 9 SNS 1980</td>
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Appendix #5
Duration of Projects
(Time Required to Complete)

(a) Less Than One Year
Intestate Succession Act (6 months)

(b) One Year Projects
(1) Reciprocal Enforcement of Judgments
(2) Public Trustee Act
(3) Regulations Act
(4) Change of Name Act
(5) Registry Act
(6) Frustrated Contracts Act
(7) Protection of Property Act
(8) Builders Lien

(c) Two Year Projects
(1) Abolition of the Grand Jury
(2) Juries Act
(3) Petty Trespass Act

(d) Three Year Projects – 0

(e) Four Year Projects – 1 – Builders Lien

(f) Five Year Projects
Builders Lien Act – 2 Projects

(g) Six Year Projects
Dower Courtesy—Marriage
Matrimonial Property Act – 6 years – 2 projects

(h) Seven Year Project
Probate Act
Appendix #6
Areas of Law Reformed

I. Administration of Justice (12)
   (a) Reciprocal Enforcement of Foreign Judgments
   (b) Regulations Act
   (c) Limitation of Actions
   (d) Grand Jury Abolition
   (e) Probate Legislation—Procedure
   (f) Office of the Public Trustee
   (g) Collections Act
   (h) Juries Act
   (i) Legal Aid Assessment
   (j) Uniform Evidence Act
   (k) Small Claims Court
   (l) Practices / Procedures re Magisterial Inquiries, Medical Examiners and Coroners

II. Property Law—Real & Personal (9)
   (a) Personal Property Security
   (b) Torrens Land Registry System
   (c) Trustee Act and Real Property
   (d) Registry Act
   (e) Occupiers Liability Act
   (f) Petty Trespass Act
   (g) Protection of Property Act
   (h) Overholding Tenants
   (i) Conditional Sales Act

III. Family Law (6)
   (a) Dower and Courtesy
   (b) Change of Name Act
   (c) Age of Consent to Medical Treatment
   (d) Matrimonial Property Act
   (e) Intestate Succession
   (f) Illegitimate Children

IV. Commercial / Corporate Law (5)
   (a) Personal Property Security Legislation
   (b) Conditional Sales Act
   (c) Collections Act
   (d) Companies Act
   (e) Securities Legislation

V. Private Law / Tort & Contract (3)
   (a) Frustrated Contracts
   (b) Privacy as a Tort
   (c) Fatal Injuries Act
VI. Other / Misc (3)
   (a) Mechanics Lien / Builders Lien
   (b) Interest on Clients’ Trust Accounts
   (c) Amendments to Law Reform Advisory Act

Note: Two Reform Projects appear listed in more than one category or area—Collections Act, Area I & IV and Personal Securities Legislation, Areas II & IV
Appendix #7
Type of Reform Solutions Proposed
By 17 Final Reports

I. New Legislation—New Statute
(1) Reciprocal Enforcement of Foreign Judgments
(2) Public Trustee Act
(3) Intestate Succession Act
(4) Frustrated Contracts Act
(5) Marriage Partnership Act
(6) Petty Trespass Act
(7) Protection of Property Act

II. Amendments to Existing Statute
(1) Law Reform Advisory Act
(2) Registry Act
(3) Dower & Courtesy Act

III. Replace or Abolish An Existing Act
(1) Regulations Act
(2) Abolition of the Grand Jury
(3) Mechanics / Builders Lien Act
(4) Change of Name Act
(5) Juries Act
(6) Probate Act
(7) Builders Lien Act
Appendix #8
Unfinished Projects

(1) Limitation of Actions (1972)?
(2) Personal Property Security (1973)
(3) Companies Act (1975)
(4) Illegitimate Children (1975)
(5) Small Claims Act (1974)
(6) Age of Consent to Medical Treatment (1978)
(7) Securities Act (1980)
(8) Occupiers Liability (2nd time) (1980)
(9) Privacy as a Tort (1981)
(10) Conditional Sales Act (1981)
(11) Evidence Act (1981)
(12) Collections Act
Appendix #9
Criteria Used by the 2nd “Independent” Commission for Project Selection

- Are there biases in the law or in the application of this law based upon race?
- If the laws are criminal or quasi-criminal in nature are the recommendations of the Marshall Commission being considered?
- Does the law respect the right to freedom of religion?
- Is the law biased against non-Christian faiths or “non-believers”?
- Do these laws specifically refer to marital status?
- Are these laws applied differently to de facto relationships?
- Are there gender biases or does the law discriminate on the basis of sex?
- Is the language gender neutral?
- Are there biases in the present law or its application based upon an individual’s sexual orientation?
- Does this law apply differently to same-sex relationships?
- Are the mentally and physically challenged affected by these laws?
- Does this law affect First Nations persons differently?
- Does provincial law apply at all in light of the federal Indian Act?
- How will the law be dealt with in Native courts (e.g., such as the pilot project for the Mi’kmaq-based court for Indian Brook Community).
- Are ethnic minorities treated differently by these laws?
- Does the law respect an individual’s ethnic or national background?
- Are language rights affected?
- Are the interests of all age groups being considered?
- Is there adequate protection for the rights of children?
- Does the law respect the rights of the aged?
- Are there economic considerations / does this law treat people differently as a “class”?
- Are there discriminations against individuals on social assistance or the homeless?
- How does this law affect people who are incarcerated or institutionalized?
- Does the law infringe upon an individual’s freedom of association or freedom of expression?
Appendix #10
List of Final Reports: 2nd Commission
34 Formal Projects Undertaken By The Commission
25 Final Reports + 1 Report in Progress +
7 Projects Without final Reports + One Background Paper and
Three “Other Related Reports”

(25) Final Reports 2nd Commission

<table>
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<td>(2) Reform of The Jury System</td>
<td>1994</td>
</tr>
<tr>
<td>(3) Domestic Violence</td>
<td>1995</td>
</tr>
<tr>
<td>(4) Status of Child Born Outside Marriage</td>
<td>1995</td>
</tr>
<tr>
<td>(5) Adult Guardianship / Advance Health Care Directives</td>
<td>1995</td>
</tr>
<tr>
<td>(6) Administrative Justice System (ABC Report)</td>
<td>1997</td>
</tr>
<tr>
<td>(7) Matrimonial Property Act</td>
<td>1997</td>
</tr>
<tr>
<td>(8) Mortgage Foreclosure &amp; Sale</td>
<td>1998</td>
</tr>
<tr>
<td>(9) Probate</td>
<td>1999</td>
</tr>
<tr>
<td>(10) Enduring Powers of Attorney</td>
<td>1999</td>
</tr>
<tr>
<td>(11) Interim Payment of Damages</td>
<td>2001</td>
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<tr>
<td>(12) Mental Health Provisions of the Hospital Act</td>
<td>2002</td>
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<tr>
<td>(14) Builders Liens</td>
<td>2003</td>
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<tr>
<td>(15) Wills Act</td>
<td>2003</td>
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<tr>
<td>(16) Privity of Contract (Third Party Rights)</td>
<td>2004</td>
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<tr>
<td>(17) Vexious Litigants</td>
<td>2006</td>
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<tr>
<td>(18) Grandparent-Grandchild Access</td>
<td>2007</td>
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<td>(19) Contaminated Sites in N.S.</td>
<td>2009</td>
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<tr>
<td>(20) The Rule Against Perpetuities</td>
<td>2010</td>
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<tr>
<td>(21) Human Rights Act: Seniors Only Housing</td>
<td>2011</td>
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<tr>
<td>(22) Builders Lien</td>
<td>2013</td>
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<tr>
<td>(23) Enforcement of Civil Judgments</td>
<td>2014</td>
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<tr>
<td>(24) Powers of Attorney</td>
<td>2015</td>
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<tr>
<td>(25) Division of Family Property</td>
<td>2017</td>
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</table>

1 Project—In Progress

(1) Intestate Succession
### 7 Projects—No Final Report

(1) Human Rights
(2) Electronic Information
(3) Minors Consent to Medical Treatment
(4) Disclosure of Adoption Information
(5) Court Structured Settlements (Background Paper)
(6) Small Claims Court
(7) Civil Procedure Rule 79:08

### Other Related Reports

| (1) Evaluation of the Nova Scotia Small Claims Court (Final Report) | 2009 |
| (3) A Collection of More Than 8 Specific Individual Research Papers Prepared by Commission Staff for the Steering Committee of the Judicial Rules Project | 2004 |
Appendix #11
Type of Reform Recommended

I. New Statutes Recommended
(1) Enforcement of Maintenance Obligations (1994)*
(2) Adult Guardianship—Personal Directives Act (2008)*

II. Replace Old Statute with a New One
(1) Juries Act (1998)*
(2) Matrimonial Property Act (1997)
(3) Mortgage Foreclosure & Sale (1998)
(4) Probate Act (2000)*
(6) Builders Liens Act (2004)*
(8) Division of Family Property (2017)

III. Amend Existing Statutes
(1) Status of Child Born Outside Marriage (1999)*
   Amendments to Interstate Succession Act
(2) Interim Payment of Damages (2001)
(3) Mental Health Provisions of the Hospitals Act (2002)*
(4) Wills Act (2006)*
(5) Vexatious Litigants / Litigation
   Amendments to Judicature Act (2009)*
(6) Builders Lien Act (2013)*
(7) Enforcement of Civil Judgments (2014)
   Amendments to Maintenance & Custody Act*

IV. Change the Common Law Rule
(3) Abolition of the Rule Against Perpetuities (2010)*

V. Other Actions
(1) Domestic Violence—Admin Reforms Recommended Training
   Program Initiated (1995)
(2) Administrative Justice System (ABC) (1997)
   Government Training Program established for Administrative
   Tribunal Members
(3) New Regulations re Contaminated Sites (2013)
   Enacted under Environment Act
(4) No Action recommended—Human Rights Act (2011)
   Seniors Only Housing

* Indicates recommendations accepted by the government and legislation/
  regulations enacted—12/25 (48%)
### Appendix #12

**Length of Projects—Time to Complete**

<table>
<thead>
<tr>
<th>Title</th>
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<tr>
<td>(2) Reform of The Jury System</td>
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<tr>
<td>(July 1992 – June 1994)</td>
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<tr>
<td>(3) Domestic Violence</td>
<td>3 years / 2 months</td>
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<tr>
<td>(December 1991 – February 1995)</td>
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<tr>
<td>(4) Status of Child</td>
<td>2 years / 8 months</td>
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<tr>
<td>(July 1992 – November 1995)</td>
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</tr>
<tr>
<td>(5) Adult Guardianship</td>
<td>3 years / 5 months</td>
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<tr>
<td>(July 1992 – November 1995)</td>
<td></td>
</tr>
<tr>
<td>(6) Administration of Justice (ABC)</td>
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<tr>
<td>(July 1991 – January 1997)</td>
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<tr>
<td>(7) Matrimonial Property</td>
<td>1 year / 9 months</td>
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<td>(July 1995 – September 1997)</td>
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<tr>
<td>(8) Mortgage Foreclosure &amp; Sale</td>
<td>3 years / 6 months</td>
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<td>(July 1995 – September 1998)</td>
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<tr>
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<td>(10) Enduring Powers of Attorney</td>
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<td>(17) Vexatious Litigants / Litigation</td>
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### The Story of Law Reform in Nova Scotia: A Perilous Enterprise

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**Average length of time to complete a project 2.9 years**
## Appendix #12(a)
### Government References

#### Time to Complete

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<td>(4) Grandparents Access (January 2006 – May 2007)</td>
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**Average time to complete 2.5 years**
## Appendix #12(b)

### Non-Government References

### Time to Complete

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<td>(6) Matrimonial Property</td>
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<tr>
<td>(7) Mortgage Foreclosure &amp; Sale</td>
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<tr>
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<td>(13) Privity of Contract</td>
<td>1 year</td>
</tr>
<tr>
<td>(July 2003 – July 2004)</td>
<td></td>
</tr>
<tr>
<td>(14) Vexatious Litigants</td>
<td>2 years</td>
</tr>
<tr>
<td>(May 2004 – April 2006)</td>
<td></td>
</tr>
<tr>
<td>(15) Division of Family Property</td>
<td>5 years / 6 months</td>
</tr>
<tr>
<td>(January 2003 – November 2003)</td>
<td></td>
</tr>
</tbody>
</table>

**Average time to complete projects 2.6 years**
Appendix #13
Areas of Law Reformed

I. Family Law—12 Projects
   (1) Enforcement of Maintenance Orders
   (2) Domestic Violence
   (3) Status of the Child
   (4) Adult Guardianship
   (5) Living Wills
   (6) Division of Family Property
   (7) Enduring Powers of Attorney
   (8) Minors Consent to Medical Treatment
   (9) Wills Act
   (10) Intestate Succession
   (11) Mental Health Provisions of the Hospital Act
   (12) Grandparents Access to Grandchildren

II. Administration of Justice—9 Projects
   (1) Administrative Law Reform
   (2) Enforcement of Maintenance Orders
   (3) Domestic Violence
   (4) Juries Act
   (5) Probate Act
   (6) Vexatious Litigants
   (7) Small Claims Court
   (8) Civil Procedure Rules
   (9) Interim Payment of Damages

III. Other Areas—8 Projects
     (1) Human Rights
     (2) Electronic Information
     (3) Mortgage Remedies
     (4) Mechanics Liens
     (5) Privity of Contract
     (6) Rule Against Perpetuities
     (7) Seniors Only Housing
     (8) Contaminated Sites (Regulations)
Appendix #14
Reasons for Reform

I. To Make Administration of Justice More Effective & Efficient—10 Projects
   (1) ABC Report—Administrative Tribunals
   (2) Juries Act
   (3) Reform of the Probate Act
   (4) Interim Payment of Damages
   (5) Court Structured Settlements
   (6) Civil Procedure Rules Reform
   (7) Vexatious Litigants
   (8) Small Claims Court
   (9) Enforcement of Civil Judgments
   (10) Civil Procedure Rules

II. To Modernize Outdated Statutes—14 Projects
    (1) Probate Act
    (2) Mental Health Provisions of the Hospital Act
    (3) Abolition of Rule Against Perpetuities
    (4) Builders Lien Act
    (5) Powers of Attorney Act
    (6) Status of the Child
    (7) Adult Guardianship
    (8) Electronic Information
    (9) Intestate Succession
    (10) Division of Family Property
    (11) Adoption Information
    (12) Contaminated Sites Regulations
    (13) Seniors Only Housing
    (14) Civil Procedure rules

III. Administrative Enforcement or Application of Statutory Provisions Need Reform
     (1) Enforcement of Maintenance Orders
     (2) Domestic Violence
     (3) Human Rights

IV. Need to Amend or Abolish & Current Common Law Rule—3 Projects
    (1) Abolition of the Rule Against Perpetuities
    (2) Tortfeasors Act
    (3) Third Party Rights Under Contract—Privity of Contract

V. Need to Clarify the Law or Provide Additional Remedies or Options—3 Projects
   (1) Living Wills
   (2) Mortgage Remedies
   (3) Minors Consent to Medical Procedures
### Funding Contribution History

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Expenses</th>
<th>Total Revenues</th>
<th>NS Gov’t (% of total Revenue)</th>
<th>LF Contribution (% of total Revenue)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991–1992 (14 months)</td>
<td>$194,409</td>
<td>$293,289</td>
<td>68%</td>
<td>30%</td>
</tr>
<tr>
<td>1992–1993</td>
<td>$290,133</td>
<td>$253,797</td>
<td>59%</td>
<td>39%</td>
</tr>
<tr>
<td>1993–1994</td>
<td>$293,488</td>
<td>$318,577</td>
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<td>47%</td>
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<td>1994–1995</td>
<td>$283,482</td>
<td>$232,520</td>
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<td>32%</td>
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<tr>
<td>1995–1996</td>
<td>$273,661</td>
<td>$256,027</td>
<td>59%</td>
<td>39%</td>
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<tr>
<td>1996–1997</td>
<td>$238,327</td>
<td>$278,058</td>
<td>54%</td>
<td>45%</td>
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<tr>
<td>1997–1998</td>
<td>$206,857</td>
<td>$203,037</td>
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<tr>
<td>1998–1999</td>
<td>$221,264</td>
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<td>1999–2000</td>
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<td>2002–2003</td>
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<td>$250,323</td>
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<td>99%</td>
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<td>2005–2006</td>
<td>$288,066</td>
<td>$279,192</td>
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<td>45%</td>
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<td>2006–2007</td>
<td>$279,718.41</td>
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<td>2007–2008</td>
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<td>2009–2010</td>
<td>$338,563</td>
<td>$353,009</td>
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<td>48%</td>
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<td>2010–2011</td>
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<td>$334,576</td>
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<tr>
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<td>$329,024</td>
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<td>2012–2013</td>
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<td>$292,144</td>
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<td>2013–2014</td>
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<td>63%</td>
<td>37%</td>
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<tr>
<td>2014–2015</td>
<td>$302,244</td>
<td>$292,842</td>
<td>63%</td>
<td>37%</td>
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<tr>
<td>2015–2016</td>
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<td>$288,894</td>
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<td>34%</td>
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<td>2016–2017</td>
<td>$155,335</td>
<td>$85,214</td>
<td>0%</td>
<td>100%</td>
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</tbody>
</table>
NOTES:

1. The Commission’s fiscal year runs from April 1st to March 31st. The Commission began operations in February 1991. It received amounts of $50,000 from the NS Governmentt, and $50,000 from the LF to cover the months of February and March 1991. These amounts were followed by grants of $150,000 and $37,000 respectively, to finance the 1991–1992 fiscal year.

2. $150,000 was granted by the NS Department of Justice, and $9,300 was received from the Office of the Executive Counsel. In every other year, the NS Department of Justice provided all of the Commission’s NS government funding. Not separately identified in the table is a $7,000 grant in 1993-94 from the federal Department of Justice. This was the only occasion on which the commission received a grant other than from the NS Governmentt or the LF.

3. The government of Nova Scotia contributed funds to the Commission for 22 of the 26 years between 1991 and 2017 in the amount of $3,706,268.00 for a yearly average of $168,466.00.

   The Law Foundation of Nova Scotia contributed funds to the Commission for 25 of the 26 years between 1991 and 2017 in the amount of $3,234,655.00, for a yearly average of $129,326.00.

   The average yearly budget contribution provided by the Nova Scotia Government and the Law Foundation amounted to $266,958.00, approximately 10 percent below the notional budget of $300,000.00 as originally planned.
Appendix #16
Members of the First Panel of Commissioners
of the 1st Law Reform Advisory Commission

(1) Hon. Chief Justice Gordon Cooper (Chair)
(2) Hon. Justice Gordon Hart
(3) Arthur Moreira, Q.C.
(4) Lorne O. Clarke, Q.C.
(5) Lilias Toward
(6) R. MacLeod Rogers, Q.C.
(7) F. Murray Fraser
(8) L.J. Hayes
(9) Peter G. Green
(10) J. Gerald Godsoe
(11) Graham D. Walker, Secretary and Executive Officer (Legislative Counsel)