DISCUSSION PAPER

MATRIMONIAL PROPERTY IN NOVA SCOTIA
SUGGESTIONS FOR A NEW FAMILY LAW ACT

Law Reform Commission of Nova Scotia
April 1996

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WHAT DO YOU THINK?

The Law Reform Commission is very interested in knowing what you think about the issues raised in the *Discussion Paper*: *Matrimonial Property in Nova Scotia: Suggestions for a New Family Law Act.*

We have attempted, as much as possible, to describe the law and the problems with the present system in a way that can be understood by people who are not lawyers and who are not familiar with the legal system. Your criticism and comments will assist us in preparing a Final Report to the Minister of Justice on how the *Matrimonial Property Act* in Nova Scotia can be reformed.

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

If you would like to comment on our suggestions you may:

- Fax a letter to the Commission at (902) 423-0222
- Send an e-mail to lawrefns@fox.nstn.ca
- Telephone the Commission at (902) 423-2633
- Write to the Commission at the address below

In order for us to fully consider what you think about these issues before we prepare our Final Report, please contact us by August 1st, 1996. You may write to us at the following address:

Family Property Project
Law Reform Commission of Nova Scotia
2nd Floor, 1484 Carlton Street
Halifax, Nova Scotia
B3H 3B7

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

The Commissioners are:

William Charles, Q.C., Co-President
Dawn Russell, Co-President
Ronald Culley, Q.C.
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The Commission offices are located at 1484 Carlton Street, Halifax, Nova Scotia, B3H 3B7. The telephone number is (902) 423-2633; the fax number is (902) 423-0222 and the e-mail address is lawrefns@fox.nstn.ca. The Commission's research is also accessible through the Chebucto Community Net at http://www.chebucto.ns.ca/Law/LRC/LRC-home.html or under Nova Scotia Government and Politics, Legislation in Nova Scotia.

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TABLE OF CONTENTS

PAGE

MATRIMONIAL PROPERTY IN NOVA SCOTIA
SUGGESTIONS FOR A NEW FAMILY LAW ACT

SUMMARY

In the summer of 1995 the Law Reform Commission of Nova Scotia started a project to consider reforms to the law dealing with the economic consequences of the ending of marriage or marriage-like relationships. One of the main laws in Nova Scotia dealing with this issue is the *Matrimonial Property Act.* The *Matrimonial Property Act* had been passed in 1980 as part of a general reform movement across Canada responding to an increase in the divorce rate (once divorce became easier to obtain) and the perceived unfairness under the earlier system of property division on the ending of a marriage. The *Matrimonial Property Act* has not been altered since 1980. The only change which has occurred in this area is a change to the *Pension Benefits Act* which deals with the division of pensions on marriage breakdown, a matter which was unclear under the *Matrimonial Property Act*. Many changes in society and in the law since 1980 suggest that reform is needed to ensure that the law in Nova Scotia better meets current needs. Sixteen years of judicial interpretation, reforms adopted in other provinces and territories, the adoption of the *Canadian Charter of Rights and Freedoms*, and changing social attitudes and practices regarding family life, all suggest that a reconsideration of the fundamental aspects of family property division is needed.

Some of the more important changes considered by the Commission include: the fact that divorce is increasingly prevalent as are second and third family units; the social acceptance of cohabitation relationships as a family form; the increasing number of children born outside marriage; and the increasing recognition of same sex cohabiting couples both socially and legally. Changes in provincial human rights law, the recognition by the Supreme Court of Canada of a right to be free from discrimination on the basis of sexual orientation and marital status under the *Canadian Charter of Rights and Freedoms,* and recent court cases which have upheld challenges to the definition of "spouse" in various contexts, including family law, were also considered. The Commission also notes changing ideas, reflected in court decisions, about what is "fair" in the division of assets on the termination of marriage and marriage-like relationships.

There are other laws in Nova Scotia, such as the *Family Maintenance Act,* which also deal to some extent with the financial consequences of terminating spousal or spousal-type relationships. The Commission recognizes that some reform to the *Family Maintenance Act* will be necessary if the changes suggested in this *Discussion Paper* are accepted. However, the Commission felt that these changes need separate study as that *Act* covers a broader range of parent and child responsibilities.

The Commission also notes that for reasons relating to constitutional authority, couples resident on Aboriginal reserves have a unique situation which needs to be addressed in that

the *Matrimonial Property Act* does not apply to real property situated on a reserve. The Commission suggests that the Provincial Minister of Justice should request that the Federal Government consider the law governing this situation and carry out reform necessary to respond to the problem that this legal structure creates for some people in Nova Scotia.

The *Matrimonial Property Act* changed the existing law in 1980 in two important ways:

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

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

The *Matrimonial Property Act* does not apply to cohabitation relationships, but only to people who are legally married, although the maintenance obligations in the *Family Maintenance Act* do apply to some cohabitation relationships and to legally married couples. The *Pension Benefits Act* also applies to cohabitation relationships after three years. Court cases have established that cohabiting couples may have a right to a share in each other's property provided they can prove a contribution in money or labour to that property, but they have no statutory rights to property division and no equal rights to possession of the matrimonial home. This situation creates uncertainty and inconsistency in the law's treatment of cohabitation relationships. Moreover, recent court decisions under the *Canadian Charter of Rights and Freedoms* have found that it is contrary to equality rights to discriminate on the basis of marital status and sexual orientation.

The Commission feels that there are a number of areas in which reform is needed and suggests that a new law, the *Family Law Act*, should be passed. This new law would contain many of the same provisions and ideas now found in the *Matrimonial Property Act* but would better reflect current legal and social understandings about the nature of the family and family property. The new law would also clarify existing uncertainties in relation to the ways in which pensions are divided.

In deciding whether change is required, the Commission considered the initial purposes of the *Matrimonial Property Act*. The *Act* tries to encourage and strengthen the role of the family in society in three main ways: by recognizing that child-care, household management and financial support are joint responsibilities of the spouses, and that there is a joint contribution by the spouses, financial and otherwise, that entitles each spouse equally to the matrimonial assets; by providing for the orderly and equitable settlement of the affairs of the spouses on marriage termination; and by providing for mutual obligations in family relationships, including the responsibility of parents for their children.

The Commission feels that in principle these objectives or values are still relevant today. However, changes in society mean that the way in which these values are achieved and interpreted needs to be more reflective of today's needs and legal requirements.

This *Discussion Paper* considers a number of significant issues such as, the form of the family which should be governed by this law; and whether the family in Nova Scotia is best understood and dealt with as an economic partnership (as is the case in many other provinces), or as a distinct social arrangement which partly reflects the idea of an economic partnership and partly reflects the idea that family relationships have some unique characteristics.

After research and consultation in various parts of the province the Commission has developed the following preliminary suggestions upon which it invites public comment. Once the Commission has received and considered public commentary, a Final Report will be prepared and presented to the Government of Nova Scotia. The Commission's suggestions include:

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

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

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

- The *Matrimonial Property Act* should be replaced by a new *Family Law Act* which should reflect the following values:

    - affirm the role of families as fundamental units of society;

    - recognize a diversity of family forms;

    - provide fairly for the equitable sharing by parents of responsibility for their children;

    - recognize contributions to the family unit which should result in an equal division of family property; and

    - provide for an orderly and equitable settlement of the affairs of couples on the ending of a relationship.

- The *Family Law Act* should be available to married couples and to opposite sex and same sex couples in cohabitation relationships.

- The *Family Law Act* should automatically apply to:

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

- All couples should be allowed to "opt out" of the *Family Law Act* in a domestic contract subject to the existing powers of the court to review domestic contracts. Domestic contracts should also, in some cases, be set aside by the court if the two people did not obtain independent legal advice.

- Matrimonial assets should be called family assets or family property. The Commission is considering two models for the division of family property: the "economic partnership model" which divides the increase in value of assets obtained during the relationship; and the existing approach under the *Matrimonial Property Act* (the "integrated model") which shares assets brought into the relationship by each of the spouses as well as those acquired thereafter. Under either model the presumption of a 50/50 sharing of family property would be retained; however the way in which the assets are dealt with and the range of assets included differs. The Commission is unresolved as to which of the two models is better suited to Nova Scotia and seeks comment on this issue.

- The new *Family Law Act* should include a provision allowing judges to make an unequal division of assets in specified cases. If an integrated model is used as the basis for the *Family Law Act* the provision should be more easily available, particularly to deal with short relationships.

- The Commission has considered what assets should be available for division and suggests that:

    - the existing exemptions of personal effects, property exempted under domestic contract, and property acquired after separation should be maintained in a new law;

    - the Commission calls for comment on the issue of whether gifts and inheritances should remain, in principle, excluded from division;

    - the exempt status of business assets should be ended. For practical reasons the Commission suggests that, irrespective of the model adopted for the division of assets, business assets should be divided on the basis of economic value rather than property rights. However, the Commission invites comment on this issue.

- the Commission calls for comment on whether personal injury settlements, and accident and disability insurance benefits should remain exempt property under a new *Family Law Act*.

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

- The term "matrimonial home" should be replaced by "family residence" in a new *Family Law Act* and leasehold premises should be included within the definition of "family residence".

- The Commission refers to the recommendation in its Final Report *From Rhetoric to Reality Ending Domestic Violence in Nova Scotia* that domestic violence be taken into account as a basis for granting orders for exclusive possession of the family residence and notes that there is some concern about whether the adoption of this approach might reinstate fault as an element in property division and soften the criminal aspect of domestic violence. The Commission seeks public comment on this concern. If exclusive possession orders are granted where domestic violence is a factor, the Commission invites comment on whether there should be additional legal penalties, beyond the existing zero tolerance approach to domestic violence incidents and contempt proceedings for breaches of the exclusive possession order.

- The existing options for the division of pensions should continue to be available but should all be located in the new *Family Law Act* and pensions should be divided only in accordance with that *Act*. The Commission recognizes the special nature of the pension as a form of property and the public interest in the continued viability of pension plan funding. The Commission suggests that pension division at the parties' option should be available either as a cash buy out (or roll over to another fund) or alternatively as a separate pension on the member's retirement. The amount of the pension division should relate to the length of time the two people lived together as a couple but any division of pension benefit should not leave the member spouse with less than 50% of the full pension benefit.

- The new *Family Law Act* should deal more clearly with the interaction of a surviving spouse's application for the division of family assets, and other spousal inheritance rights.

LE PATRIMOINE FAMILIAL EN NOUVELLE-ÉCOSSE
SUGGESTIONS POUR UNE NOUVELLE LOI SUR LA FAMILLE

SOMMAIRE[1]

A l'été 1995, la Commission de réforme du droit de la Nouvelle-Écosse amorçait un projet visant la réforme du droit relatif aux conséquences économiques de la rupture des liens du mariage ou des relations similaires à celle du mariage. La *Loi sur le patrimoine familial (Matrimonial Property Act)* constitue le texte législatif principal traitant de cette question. La *Loi sur le patrimoine familial (Matrimonial Property Act)* fut adoptée en 1980 dans le cadre d'un mouvement de réforme canadien réagissant à la hausse du taux de divorces (le divorce étant devenu plus facile à obtenir) et à l'opinion générale à l'effet que sous l'ancien régime le partage du patrimoine familial lors d'une rupture se faisait de façon inéquitable. Peace and JusticeLa *Loi sur le patrimoine familial (Matrimonial Property Act)* n'a pas été amendée depuis 1980. Seule *la Loi sur les prestations de retraite (Pension Benefits Act*) fut amendée. Cette loi traite du partage des pensions lors de la rupture des liens du mariage, question qui demeurait obscure dans la *Loi sur le patrimoine familial (Matrimonial Property Act)*. De nombreux changements dans la société et le système juridique depuis 1980 militent en faveur d'une réforme afin d'assurer que les lois de la Nouvelle-Écosse répondent mieux aux besoins actuels. Seize années d'interprétation par les tribunaux, de réformes menées dans d'autres provinces, l'adoption de la *Charte canadienne des droits et libertés* et l'évolution des pratiques et comportements sociaux dans le domaine de la famille, militent en faveur d'un nouvel examen des aspects fondamentaux en matière du partage du patrimoine familial.

La Commission a considéré les changements les plus importants tels la fréquence accrue des divorces, l'existence de noyaux familiaux secondaires et tertiaires, l'acceptation par la société des conjoints de fait comme cellule familiale, l'augmentation du nombre d'enfants nés(ées) en dehors des liens du mariage, de même que le mouvement de reconnaissance des couples du même sexe par la société et le système juridique. D'autres éléments furent aussi pris en ligne de compte: les changements apportés aux lois provinciales sur les droits de la personne, la reconnaissance par la Cour Suprême du Canada du droit à l'égalité sur la base de l'orientation sexuelle et de l'état civil en vertu de la *Charte canadienne des droits et libertés*, de même que les récentes décisions judiciaires ayant accepté de nouvelles définitions du mot "conjoint" dans des domaines variés, incluant le droit de la famille. La Commission a aussi pris note de l'évolution des idées, laquelle se reflète dans les décisions judiciaires, quant à la notion "d'équité" dans le partage du patrimoine lors d'une rupture des liens du mariage ou d'une relation similaire.

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

La Nouvelle-Écosse possède d'autres lois, telle la *Loi sur les obligations alimentaires (Family Maintenance Act)*, traitant jusqu'à un certain point des conséquences financières de la rupture des relations conjugales. Selon la Commission une réforme de la *Loi sur les obligations alimentaires (Family Maintenance Act)* sera nécessaire dans l'éventualité où les changements prônés dans ce document de réflexion sont acceptés. Néanmoins, la Commission est d'avis que ces changements devront faire l'objet d'une étude distincte puisque cette loi traite d'un éventail plus grand d'obligations entre parents et enfants.

La Commission constate qu'en raison du partage des pouvoirs constitutionnels, les couples résidant sur des réserves autochtones font l'objet d'un régime puisque leurs biens immobiliers situés sur les réserves, ne sont pas soumis à la *Loi sur le patrimoine familial (Matrimonial Property Act)*. La Commission recommande que le Ministre de la Justice de la Nouvelle-Écosse requiert le gouvernement fédéral d'étudier le régime auquel cette situation est soumise et de le réformer le cas échéant afin de répondre aux problèmes crées par ce régime pour certains résidents de la Nouvelle-Écosse.

La *Loi sur le patrimoine familial (Matrimonial Property Act)* a modifié le droit existant en 1980 de deux façons importantes:

(1) en créant un "ensemble" de biens appartenant à chacun des conjoints, connu sous le nom de "patrimoine familial" pouvant être divisé, indépendamment du titre de propriété, en parts égales entre les conjoints lors de la rupture des liens du mariage, du divorce ou du décès de l'un des conjoints;

(2) en donnant à chaque conjoint un droit de propriété égal dans la résidence familiale, sans tenir compte du droit de propriété légal de l'un des conjoints, et en déclarant que la résidence familiale ne peut être vendue ou hypothéquée sans le consentement des deux conjoints.

La *Loi sur le patrimoine familial (Matrimonial Property Act)* ne s'applique pas aux conjoints de fait mais seulement aux personnes qui sont mariées légalement. Néanmoins, les obligations imposées par la *Loi sur les obligations alimentaires (Family Maintenance Act)* s'appliquent à certains conjoints de fait et aux couples mariés. La *Loi sur les prestations de retraite (Pension Benefits Act)* vise aussi les conjoints de fait ayant cohabité pendant au moins trois ans. Certaines décisions judiciaires ont conclu que quoique les conjoints de fait n'avaient aucun droit légal au partage du patrimoine familial, ils avaient quand même droit au partage de ce patrimoine à condition de pouvoir démontrer une contribution en argent ou en nature à ce patrimoine. Cela implique aussi que les conjoints de faits n'ont pas un droit légal de possession de la résidence familiale. En plus de l'incertitude et de la confusion caractérisant la façon dont le système juridique traite les conjoints de fait, des décisions judiciaires récentes rendues en vertu de la *Charte canadienne des droits et libertés* déclarent que la discrimination basée sur l'état civil et l'orientation sexuelle contrevient au droit à l'égalité.

La Commission est d'avis que de nombreuses questions devraient faire l'objet d'une réforme et recommande qu'une nouvelle loi, la *Loi sur la famille (Family Law Act)*, soit adoptée. Cette nouvelle loi devrait reprendre la plupart des dispositions et idées de la *Loi sur le patrimoine familial (Matrimonial Property Act)* mais devrait mieux refléter les valeurs légales et sociales actuelles concernant la famille et le patrimoine familial. Cette nouvelle loi devrait aussi clarifier les incertitudes actuelles en matière de partage des pensions.

Afin de décider si des changements étaient nécessaires, la Commission a examiné l'objectif premier de la *Loi sur le patrimoine familial (Matrimonial Property Act)*. Cette loi tente d'encourager et de promouvoir le rôle de la famille dans la société et ce, de trois façons: a) en reconnaissant que la responsabilité relative aux enfants, à la résidence familiale, et aux obligations financières doit être supportée par les deux conjoints, que les deux conjoints doivent contribuer conjointement, financièrement ou autrement, ce qui leur donne droit à une part égale du patrimoine familial; b) en prévoyant le règlement des affaires des conjoints de manière équitable lors de la rupture des liens du mariage; et c) en prévoyant les obligations mutuelles relatives à la famille, incluant les responsabilités des parents pour leurs enfants.

La Commission croit qu'en principe ces objectifs et valeurs sont encore pertinents aujourd'hui. Néanmoins, l'évolution de la société implique que la manière dont ces valeurs sont atteintes et interprétées doit mieux refléter les besoins et exigences légales actuels.

Ce *document de réflexion* examine bon nombre de questions dont les suivantes: quel type de cellule familiale cette loi doit-elle gouverner? La cellule familiale en Nouvelle-Écosse doit-elle être vue et traitée comme un partenariat économique (comme c'est le cas dans plusieurs autres provinces) ou plutôt comme une institution distincte dotée de caractéristiques reflétant en partie l'idée du partenariat économique et en partie l'idée que les relations familiales possèdent des caractéristiques uniques.

La Commission, après recherches et consultations dans divers coins de la province, a élaboré les recommandations préliminaires énumérées ci-dessous et invite le public à lui faire parvenir ses commentaires. Dès que la Commission aura reçu et examiné les commentaires du public, un *rapport final* sera rédigé et soumis au gouvernement de la Nouvelle-Écosse. La Commission fait les recommandations suivantes:

* La *Loi sur le patrimoine familial (Matrimonial Property Act)* doit faire l'objet d'une réforme.

* Une réforme au niveau fédéral doit être amorcée relativement à la rupture des liens unissant les couples résidant sur des réserves autochtones.

* Le Ministre de la Justice devrait considérer une réforme de la *Loi sur les obligations alimentaires (Family Maintenance Act)*.

* La *Loi sur le patrimoine familial (Matrimonial Property Act)* devrait être remplacée par la nouvelle *Loi sur la famille (Family Law Act)* laquelle devrait promouvoir les valeurs suivantes:

    * affirmation du rôle des familles comme cellules fondamentales de la société;

    * reconnaissance des divers types de famille;

    * partage équitable des responsabilités parentales;

    * reconnaissance des contributions à la cellule familiale résultant dans un partage égal du patrimoine familial;

    * l'adoption de dispositions prévoyant le règlement méthodique et équitable des affaires des couples en phase de rupture.

* La *Loi sur la famille (Family Law Act)* devrait s'appliquer tant aux couples mariés qu'aux conjoints de fait de sexes opposés et de même sexe.

* La *Loi sur la famille (Family Law Act)* devrait s'appliquer automatiquement:

    - aux personnes légalement mariées;
    - à toutes personnes reconnues dans leur communauté comme impliquées dans une relation intime ensemble à caractère suffisamment permanent; et
    - à toutes personnes ayant été impliquées dans une relation intime ensemble à caractère suffisamment permanent, si elles sont les parents d'un enfant ou ont assumé ce rôle.

* Tous les couples devraient avoir le droit de renoncer à l'application de la *Loi sur la famille (Family Law Act)* en signant un contrat à caractère familial sous réserve des pouvoirs de revision des tribunaux. Les contrats à caractère familial devraient pouvoir être annulés par les tribunaux si les deux parties n'ont pas obtenu une opinion juridique indépendante.

* Les biens conjugaux ("matrimonial assets") devraient être désignés comme biens familiaux ("family assets") ou patrimoine familial ("family property"). La Commission étudie deux modèles de partage du patrimoine familial, le modèle du partenariat économique en vertu duquel les biens acquis durant la relation font l'objet du partage et le modèle existant en vertu de la *Loi sur le patrimoine familial (Matrimonial Property Act)* (le modèle "intégral") qui inclut les biens que les conjoints possédaient avant le début de la relation. Dans les deux cas, une présomption de partage égal du patrimoine familial s'appliquerait, néanmoins, la façon dont les biens

seraient traités et l'éventail des biens inclus différeraient. La Commission n'a pas encore décidé lequel de ces deux modèles est le plus approprié pour le contexte Néo-Écossais et invite le public à exprimer son opinion sur cette question.

* La nouvelle *Loi sur la famille (Family Law Act)* devrait quand même contenir des dispositions permettant aux tribunaux d'ordonner un partage inégal du patrimoine familial dans certains cas spécifiques. Dans le cas où le modèle "intégral" est choisi comme modèle de base en vertu de la *Loi sur la famille (Family Law Act)*, ces dispositions revêtent une importance plus grande particulièrement en ce qui concerne les relations de courte durée.

* La Commission s'est penchée sur la question des biens qui devraient faire l'objet du partage et recommande que:

    * l'exemption relative aux effets personnels, aux biens exemptés en vertu de contrats à caractère familial, et aux biens acquis après la séparation, devrait être maintenue;

    * l'opinion du public devrait être obtenue relativement à l'exemption des dons et biens obtenus en héritage dans le partage du patrimoine familial;

    * l'exemption relative aux biens d'entreprise soit abolie. Pour des raisons pratiques, la Commission suggère que indépendamment du modèle retenu pour le partage des biens, les biens d'entreprise soit divisés sur la base de leur valeur économique plutôt que sur la base du droit de propriété. Néanmoins, la Commission invite le public à exprimer son opinion sur cette question;

    * l'opinion du public devrait être obtenue relativement au traitement des sommes reçues pour règlement de dossiers de responsabilité civile pour dommages corporels, et des bénéfices d'assurance responsabilité et d'assurance invalidité en vertu de la nouvelle *Loi sur la famille (Family Law Act)*;

    * une quantité raisonnable de biens personnels et de meubles nécessaire au support d'un enfant né de la relation soit exclue du partage en vertu de la loi.

* l'expression "résidence conjugale" ("matrimonial home") soit remplacée par "résidence familiale" ("family residence") dans la nouvelle *Loi sur la famille (Family Law Act)*, et que la résidence louée soit inclue dans la définition de "résidence familiale".

* La Commission réfère à sa recommandation faite dans le *Rapport sur la violence entre conjoints* à l'effet que la violence entre conjoints devrait être prise en ligne de compte dans la décision d'octroyer la possession exclusive de la résidence familiale. La

Commission reconnaît que cette approche est controversée puisqu'elle pourrait contribuer à rétablir la faute comme critère dans la décision de partager le patrimoine familial et amoindrir l'importance de la violence entre conjoints au niveau criminel. La Commission invite le public à exprimer son opinion sur cette question. Dans le cas où des jugements de possession exclusive de la résidence familiale sont rendus en tenant compte de l'élément de violence entre conjoints, la Commission invite le public à exprimer son opinion sur l'imposition de pénalités légales additionnelles au-delà de l'approche "tolérance zéro" pour les cas de violence entre conjoints, et sur le mécanisme d'outrage au tribunal dans le cas de contravention aux ordonnances de possession exclusive de la résidence familiale.

* Les modalités de partage des pensions existantes devraient continuer à être disponibles mais devraient être incluses et régies par la nouvelle *Loi sur la famille (Family Law Act)* et le partage des pensions devrait se faire en conformité avec cette loi. La Commission reconnaît le caractère spécial des pensions comme type de propriété de même que l'intérêt du public dans la viabilité des mécanismes de plans de retraite. La Commission suggère que le partage des pensions, selon le choix fait par les parties, devrait se faire soit par rachat en argent (ou par renouvellement dans un autre plan), soit par le biais d'une pension séparée lors de la prise de retraite par le bénéficiaire principal. Le montant à séparer à titre de pension devrait être proportionnel à la durée de vie commune des conjoints alors que le partage de ce montant ne devrait pas laisser le bénéficiaire principal avec moins de 50% du montant total des prestations.

* La nouvelle *Loi sur la famille (Family Law Act)* devrait régir plus clairement la situation du conjoint requérant le partage du patrimoine familial lors du décès de l'autre conjoint.

Tepqatkik Utmotoqnmuow Ula Nopa Sko'sia Ujit Piley Family Law Act[2]

SUMMARY

Nipkek 1995-ek, Law Reform Kmisn ujit Nopa Sko'sia poqjitoqɨpnn koqajataqnn ujit teplutaqn tan maliaptek ewle'juaqn tan wejiaq puna'ltimk aqq puni tqonasimk. Newte'jk teplutaqn ula Nopa Sko'sia tan maliaptɨk ula koquey na Matrimonial Property Act. Matrimonial Property Act na sapasikɨp 1980-ek kesk koquajaltimkek tan telkik Kanata mɨta atelkɨpnik puna'taqɨtijik (newt aji naqmasia'q punatekemk) aqq telaptasikek roqewin tan i'tlatasikɨp utma'taqn tan tuju kaqiaq malie'wuti. Ula Matrimonial Property Act mna'q tala'tasinuk weja'tikemk 1980-ek. Namsit tan teli kiwaska'tasik ula koquey na kiwaskatasikek Pension Benefits Act tan naskwatoq-l pension-l tan tuju maliewuti sioqiaq, ula koquey tan mu ulaptasinukɨp Matrimonial Property Act-iktuk. Pikuelk koquey piluasik mimajuinuiktuk aqq teplutaqniktuk wejatikemk 1980-ek, teluek nutaq koqaja'taqn klaman teplutaqn ula Nopa Skosia me aji ulatutew koquey. Newtiskaq jel asukuom tesipunqɨkewey ilsutaqɨtijik telutmi'tij, koqaja'taqn' tan uesua'tasikl sek province-l, uesua'tasikek Canadian Charter of Rights and Freedoms, aqq kesk piluatasik mimajuinu'k telita'sultijij aqq teleyatultitij, msit teluekl nuta'q iliankaptasin tan me teli naskuatɨmk utmo'taqn kjiksukewey.

Tanl me mekitetasikl kiwaska'tasikl kmisn ankitetkl wiaqiaq maw punatekmk aqq pikwelk nkutey tapuewe'l aqq si'stewel kjiksukewel, tan teli ulitetasik tekweyatimk, tan teli pmi ateli'tij mijuajijk weskijinueltijik keskmnaq malie'wuti aqq teli pmi ulite'tasik tekuweyati'tij jinmuk kisna e'pijik. Teli kiwasatasik province-ewel teplutaqn' ujit mimajuinue'l koqaja'taqn', Supreme Court of Canada tan teli nemitoq koqaja'taqn ujit lnua'ltimk ujit sexual orientation aqq malie'wuti ala Canadian charter of Rights and Freedoms-iktuk, aqq kejkawe'l Court-iktuk ilutasikl tan kelo'tasikl e'tmwekel ujit teli ankaptasik, "nikmaj" nkutey maw "family law-iktuk," maw ankitetasikɨpn. Kmisn na maw nemtoql kiwaskita'suaqn' wejita'ql court-iktuk, ujit tan koquey "tetpaqa'q" tan tuju nasquatɨmk utmo'taqn tan tuju kaqiaq malie'wuti aqq toqnasimk.

Eikl na ktɨkl teplutaqn' ula Nopa Skosia, nkutey nike' Family Maintenance Act, tan kwetmotmi'tij na'tukoqwey ujit suliewey amsela'sik elmiaq kaqiaq nikma'jewel. Mkisn nemitoql nuta'tal koqaja'taqnl ujit Family Maintenance Act elmiaq kiwaskataqn' uesku'tasikl ula Discussion Paper-iktuk usua'tasik, katu elta, Kmisn teltasikɨp ula kiwaskatqn' nutaql tepkisi ankaptasin mɨta na nekmewey Act uesuatoql aji milamu'kl unki'kuel aqq mijuajijue'l anko'taqn.

[2] Translation provided by Professors Murdena Marshall and Joseph B. Marshall, University College of Cape Breton, Sydney, Nova Scotia.

Kmisn elt nemitoq, ula ujit teliaql uijetmi'tij constitutional Authority, tequeyatultijik aqq uikultijik lnue'katik uesko'tmitij newtamu'k tan nuta'q ankaptasin mɨta Matrimonial Property Act mu kwetmo'tmukl. Kmisn teluek Provincial Minister of Justice nuta'q kwilutmn kɨplno'lal ankite'tmn teplutaqn tan to'amajo'tk ula aqq koquajatun tan ula problem tan kisitoq legal structure ujit eikik mimajuinu'k Nopa Skosia.

Matrimonial Property Act tapukl kiwaska'toqɨpnteplutaqniktuk 1980-ek:

(1) mawa'toqɨpn' utmo'taqn' "pool-iktuk" tan alsutkl newtejit uikma'j kisna ktɨk, teli nenasikl "matrimonial assets," tan kisi nasqa'ten, tan pasik telpukuik teplutaqniktuk, newt tesik mesnɨmi'tij uikma'jaq tan tuju sioqiaq malie'wuti, puna'tekemk kisna mpɨk newte'jit uikma'j;

(2) tan teli iknɨmuj e'tasai-iw uikma'j newte' tesɨk ulsutaqn ujit maliewutiewey wji'kwom, keskɨkmnaq ankaptasinuk tan wen alsutk teplutaqniktuk; aqq keskemnaq etui'skasinuk kisna emqatwi'kasinuk mu asitetmi'tik kitk uikajek.

Matrimonial Property Act na mu elianuk tequeyatimkiktuk, Katu pasik tanik teplutaqniktuk wji malie'wijik, tlia' ankotasimkewe'l Family maintenance Act-iktuk eliaql ujit eikl tequeyatimkl aqq uikmajaq wji maliewi'tij teplutaqniktuk. Pension benefits Act maw eliaq tequeyatimkiktuk newt kisi nesipunqɨk. Court-iktuk uejiaql kisutmi'tij utmo'taqnwel elmiaq kisi kinuateke'tij kisi ika'tunew suliewey kisna lukuaqn ujit utmo'taqn, katu mu ueskotmi'tik teplutaqney koquaja'taqn ujit teli nasqa'tasik utmotaqn. Ula na maw teluek neute' telikik koqaja'taqn uesko'tmitij ujit uskotmɨnew malie'wutiey uenji'kuom, mu na elianuk ujit tanik uikmajak tequeyatultijik. Ankuasik maw teli mu ketlewe'nuk aqq mu newte' telo'tasinuk Canadian Charter of Rights and Freedoms uejitasik na mu uijewasinuk newte' te'sik koqaja'taqn ujit lnua'ltimk maliewutiktuk aqq sexual orientation.

Kmisn telte'tkl me nuta'ql koqaja'tasin koquel aqq teluek, piley teplutaqn, Family Law Act, nutaq sapa'tasin. Ula piley teplutaqniktuk wiaq wikasital tanl teplutaqn aqq kisitetaqn' nike' etekl aqq mimajuinuewel nsutuoqn' ujit eujiaq kjiksukewel aqq utmotaqn'. Ula piley teplutaqn maw koquajatal mu ketlewe'nukl ujit tan teli nasqatasik pension-l.

Tan tuju kisutasikek kiwaskataqn nutaq, kmisn ankitetikɨpn' teluquek Matrimonial Property Act. Ula Act nesunemikw tan ueji ktmoqjenk aqq melkiknewa'toq kjiksu'kewey aqq suliewey mawi ankotmitij uikmajɨk, aqq tan tuju toqi ika'teketij uikmajɨk, suliewey aqq pilwey, tan newte' teli alsutmi'tij maliewimkewey utmo'taqn; kesk maliatek tetpaqa'q aqq newte' teli msnmi'tij utmo'taqn uikmajɨk elmiaq kaqiaq malie'wuti; aqq maliaptek tetuoqn kjiksukiktuk aqq maw teli ankuaiwa'tij unkikuk unijanua.

Kmisn telete'tk ula nikani wulutaqnn mej kiskuk kisi siawi wekasiten. pasɨk katu, tan teli milikiwaska'sik wsitqamu miamuj ula nikani wulutaqn aqq tan teli ewekasikl kiskuk mimajuinu'k wela'lukwi'titl tan tel nuta'tij aqq elt maw teplutaqne'l nuta'mkl.

Discussion Paper eykl ankatɨkl, staqa nike', talamu'kl jiksu'l wla teptulaqn nespi-ankatɨkl aqq maw etuk nestmumk tan koquewey jiksu Nopa Skosia, aqq ta'n teli ankaptmumk wenik lukwaqniktuk elt toqolukwajik (staqa piluwe'l province-l) kisna ki's ten kisi ela'matimk tan nespi miliaptɨk lukwaqniktuk elt toqolukwenl tan tetpaqi nemitasik ula toqalukwemk aqq elt tetpi ankatɨk jiksue'l mawi alsutaqnn aqq maw kisi nespi nemitasin tan te'sikɨkwey mimajuaqn tetapaqi kmian.

Ki's kisi mili pipanikesinuk aqq mawaknutmamk Province-iktuk kmisn wesua'toql aqq ksas nemitoq ewe'wasin ketlsɨk nike' pipanimulk. Ne'wt kmisn nsink aqq kisi ankaptɨk tan mimajuinu'k telete'mit'tij, Final Report lukwasitew aqq la'tuaten kaplno'l Nopa Skosia. Kmisn ula ksas nmitoq wiaqten:

* Matrimonial Property Act wjit Nopa Skosia nuta'q ilukasin.

* Tepias ten kaplno'lewey teplutaqn wjiaq Atua tan maliaji ta'nik lnu'k puna'ltultijik wikultijik lnue'kati'l.

* Tepias ilukwasik Family Maintenance Act ankatnin Minister of Justice.

* Piley Family Law Act tepias awanaqa wekasimk jel mu Matrimonial Property Act mɨta nekmewey wjie'wkl wulutaqnn:

    * nenkl milamu'kl jiksu'l aqq kisi mlkiknewa'tal tan telpukwik jiksu kiskuk;

    * mijua'ji'jk mej kisi wuli apoqnmuaten wjit tan teli anko'tasulti'tij aqq tan tli apankɨten;

    * nenem tan tli naskwa'ten mawi alsutaqn elmiaq puna'ltimk

    * kisi apoqnmuksinew menaqa meniajuinu'k puna'tijik koqaji-neskwa'sin mawi alsutaqn aqq maw tepiaq ankamuksinew tani'k wejiejik ula jiksui'ek

* Family Law Act tepias kisi apoqnmuan kitk tan tepqatmu'ktijik, kisna t'anik pasɨk tekweatultijik toqo kitk e'pijik kisna ji'nmuk

    - wenik toqapukwa'tasultijik

    - wenik wtank nenujik toqa'majik

    - wenik toqamajik toqo mijua'ji'jl ankwewa'titl staqa wnijanual.

* msɨt toqomatite'wk tepias asitelmuksinew tan tijiw tetpisa'titij nqatmnew Family Act tan wi'katikn toqnukwi'tij kisi ankatmnow tan ula wikatikn teliknaq teplutaqno'ko'm. Mu nmsmi'tik tetapuanmu'k ilumtimk tan ula teplutaqno'ko'm kisi asiskɨtew. Kmisn ajipjutoq me wen klusin ika'tasin Family Act-iktuk tan tlapukues ula wi'katikn tan toqomukwi'tij.

* oqopukua'timkewey mawi alsutaqn tepias tluwi'tasin jiksuey alsutaqnn. Kmisn ankatɨkl tapu'kl etekl wjit tan tlinaskwas'tuten mawi-alsutaqnn, sulieweyey mawi-alsutaqnn tan naskwatoql aqq nike' tan tela'tumkl ewekasimk Matrimonial Property Act ("integrated model") tan wiaqa'tasik wen koqoey pekisitoq aqq alsutkts keskmnaq tepqatmukek. Tlia loq tapu'kl tek telite'tk miamuj miawe'k maskwa'sik jiksu'k mawi alsutmi'tij, pasɨk na tan teli maliaptasik aqq tan telmilamu'k mawi alsutaqnn mu newt-eykl naskwa'tasinukl. Kmsin mu kisi ta'sik tan teken tapu'kl wula'sitew wjit Nopa Skosia aqq newto'j apoqnuksin.

* piley Family Law Act tepias asite'lman nujsutektlitkl kisi tlsuteken eykl koqoe'l ma kisi naskwatu'nl miawe'k. Tek na telamuk toqo asite'k Family Law Act, mej aji nqasa'si tan koqoewey telsutasik aqq maw kisi ankatasis tan wenik teli kpitoqma'tij.

* kmisn kisi ankatɨk tan koqoe'l kisi naskwa'ten aqq wulte's ula:

    * nike' etek tan ma ankatnmuk tan mimajuinu nuta'q tan teli maliamsij aqq tan koqowey mesnk kisi puna'teketek tepias nekmewe'l wiaqa wikasin piley tepulataqniktuk;

    * kmisn kwilutk apoqnmuksin tan tijiw wesku'tk iknmatimkewe'l kisna koqowey wen naqtmuj mu wiaqa'tasin tan tijiw nasko'tasimk;

    * tan wen weji pkwatoq mimajuaqm aqq tan koqoey ewaksij tepias nike' wiaqi wi'kasin. Tepaqi ankita'swaqniktuk kmisn ksas nemitoq tan nike' eyk pepsite'tekek tan tijiw naskwa'tatimk, mimujaqn wete'nin lukwaqniktuk tepias tli naskwatasin tan teli milesk mu tan teli mawi alsutmumk, pasɨk na, kmisn nuta'j ilumuksin;

    * mimajuinu apunkɨtus jile'k kisna tewatelut tepias mu wiaqi wikasin pasɨk tan tijiw ula apunkutuo'ti naqatsik wjit siawa'sin lukwaqn;

    * kmisn kwilutk apoqnmuksin tan tli maiaptɨtal wejukamimkl tan tijiw jilein toqo mu kisi lukewun, tan tla'tal piley Family Law Act;

    * wenji'komey wen wutmo'taqn aqq tan koqoe'l wen nuta'tl tan teli maliamuj wunijanual wenik tepias mnwikasin Act-iktuk.

* ula klusuaqn "tepqatkik wikuow" tepias tli wi'tasin "wikuow" toqo ten piley Family

Law Act aqq tan tet apunk-itmn tan telqatmn tepias nasimikasin tan tijiw koqaji wi'tmn "wikouw."

* kmisn wesku'tkl nikani-wula'taqnn etekl Domestic Violence Report-iktuk, emeki'taqn tepias kisi-wikasin tan tijiw telsutasik mu nespi naskwatasin tan koqoey etek wenjiko'miktuk aqq sespete'tk etuk ula tetpaqa'tekek aqq sespete'tk etuk ula tetpaqa'tekek kisna mu aqq etuk eteknuk me koqoey tan kisi nekmewey wtla'taqnitew koqoey o'plasik tan tijiw naskwa'tatemk aqq jiptuk ma tlnmitasinuk staqa emeko'taqn. Kmisn nutaq wenik apoqnmaknn tan tijiw ula wesku'tasik tek asite'lsuti tan mu koqoey miawe'k naskwasinuk tan tijiw kjitasik emeko'taqn eyk, kmisn kwilutk ilutaqn kulaman mej wen kisi melki sumaten tlia loq mu kaqataq elpa emeko'taqn aqq tan wen teli swiska'toq asite'lsuti koqoe'l tan ma kisi nask wa'tu'nl.

* tan etekl ki's mknikn' ujit tan teli nasquati-mk pension-l nutaq-l ne'kew i'kten katu nutaq-l i'kten piley Family Law Act-iktuk aqq pension-l nutaq-l tli nasqua'tasin nkutay tan teluek na nekemewey Act. Kmisn na nemitoq teli tepjike'k pension ujit tan teli utmo'taqnik aqq mimajiwinu'k teli jilaptmi'tij tan teli siawiaq pension-l aqq teli sulieweyik. Kmisn telutk tan pension-l tli nasquatuten, tan teli mknmi'tij tanik alsutmi'tij i'kti-tew kisi tua'telasin (kisna se'k lkitasitew) kisna me jel ap tepkisi pension-itew ujit elmiaq memb-l retire-ewij. Elmiaq kitasik tan tetuji nasqua'tasik pension wije'wtew tan nekmow teli kpiji tkunasi'tip katu tan teli naskua'tasik pension ma asite'tmuk naji anwatik n'katmuksin newte'jit aji tkele'jk aqq 50% mese'k.

* piley na Family Law Act nutaq maliaptmn tan tla'sitew koqoey elmiaq newte'jit kwilutk nasqua'tasin kjisu'kewel utmo'taqn aqq alsutan' tan tuju ktekl mplij.

I INTRODUCTION

1. The family property project

In the summer of 1995 the Law Reform Commission started a project to consider reforms to the law dealing with the economic consequences of the ending of marriages or marriage-like relationships. One of the main laws in Nova Scotia dealing with this issue is the *Matrimonial Property Act*.[1] While the *Matrimonial Property Act* was seen as very progressive when it was passed in 1980, there have been many changes in society and in the law since that time. These changes suggest that reform is needed to ensure that the law in Nova Scotia better meets current needs. Many of these changes have been made or are under consideration in other provinces, which suggests that the law in Nova Scotia should be reformed so that legal decisions regarding family law do not vary greatly from province to province. Sixteen years of interpretation of the *Matrimonial Property Act* by judges, as well as cases dealing with the effect of the *Canadian Charter of Rights and Freedoms*[2], all suggest that a reconsideration of the fundamental aspects of family property division is needed.

Some of the more important changes considered by the Commission relate to the increasing diversity of family forms.[3] With one in three marriages in Nova Scotia ending in divorce, second and third families and relationships based on unmarried cohabitation are becoming more prevalent. The current case law regarding ideas of fairness in the division of family assets also needs to be better reflected in the law. Finally, the Commission's interest in reform is consistent with recent proposals to restructure the delivery of family law services to the public. Although there are other laws in Nova Scotia that deal with the financial consequences of the ending of family relationships, such as the *Family Maintenance Act*,[4] the Commission has decided to focus specifically on the *Matrimonial Property Act.* The Commission's preliminary suggestions have been arrived at through research into the law in Nova Scotia and elsewhere as well as consultation in various parts of the Province. A Final

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

[2] Constitution Act, 1982.

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

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

Report to the Government of Nova Scotia will be prepared after the Commission has received public commentary on these preliminary suggestions.

2. Language

This *Discussion Paper* attempts to present legal information as clearly as possible so that people who do not have legal training can understand and provide comments on the Commission's suggestions for reform. There are still some situations where the language relates to specific legal, or in the case of pensions, technical concepts, and the words used will not be familiar to everyone. The following words in this *Discussion Paper* mean:

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

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

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

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

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

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

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

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

exclusive possession order under the *Matrimonial Property Act*, an order by which one

spouse can have the other spouse excluded from the matrimonial home for a defined period;

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

family property all property currently described as matrimonial assets;

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

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

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

leasehold interest where parties are tenants rather than owners;

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

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

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

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

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

personal property property other than land;

real property land;

same sex couple a form of intimate relationship where the parties are both male

	or both female; at present this form of relationship has little recognition in family law;
separate property	the principle which governed matrimonial property matters before the passing of the *Matrimonial Property Act*, which stated that each spouse could only claim property which was actually held in their name;
statute	law made by elected members of the legislature;
succession law	the laws that govern what happens to the property of a person who has died;
unequal division	under the *Matrimonial Property Act*, where a court decides that an equal division of matrimonial assets would be unfair or unconscionable, it may divide them on other than a 50-50 basis, or may divide non-matrimonial assets, or both; and
unmatured pension	a pension where no benefits have yet begun to be paid out.

II THE LAW IN NOVA SCOTIA

1. Background to the *Matrimonial Property Act*

The *Matrimonial Property Act* was adopted in Nova Scotia in 1980 as part of a general law reform movement in all the common law provinces[5] which attempted to address dissatisfaction with the existing law regarding division of property on the ending of marriage. Prior to these reforms the law had been based on a concept known as "separate property". This was a concept developed in the late nineteenth century which provided that upon marriage termination, whether by death or divorce, each spouse could retain only that property to which they could show legal title. In other words, there was no such thing as "family property" or "matrimonial assets". This meant that in Nova Scotia until 1980, all property owned by a married couple was considered to belong either to the wife exclusively or to the husband exclusively, unless they had *expressly* obtained legal title together as co-owners of the property. While the concept of separate property may, from the perspective of a 1990s understanding of family law, seem unfair or archaic, it was originally adopted in 1884 in response to discontent with the common law's approach to matrimonial property[6]. Prior to 1884 a husband was given full control over any property which his wife brought to the marriage or acquired during the marriage by any means. Separate property responded to the need of married women to be recognized as full legal persons distinct from their husbands. Changes in the law of matrimonial *property* did not, however, affect the right of a wife to seek *maintenance* (also called support, or alimony) from her husband after divorce or separation. Both before and after the adoption of the *Married Women's Property Act* in Nova Scotia in 1884, a husband remained under an obligation to support his wife, an obligation which was in principle lifelong.

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

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[5] In Quebec, family law is governed by the *Civil Code of Quebec.*

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

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

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

Rising divorce rates, increasing economic prosperity, and growing dissatisfaction with the traditional roles assigned to married women all led in the 1960s and 1970s to intense scrutiny of family law in general and of the law of matrimonial property in particular. This scrutiny was given particular momentum by the decision of the Supreme Court of Canada in *Murdoch* v. *Murdoch*.[9] In that case, an Alberta rancher sought during the course of a divorce proceeding to have her interest in land legally recognized. Although the land had been effectively acquired through the joint efforts of both her and her husband during a 25-year marriage, title to the land was held solely in her husband's name. The Supreme Court of Canada concluded that she had no legal right to any share of it on marriage breakdown. The injustice of this state of affairs led some provincial governments to move immediately to avoid the effects of this case by passing legislation to deal with this situation. For example, in Nova Scotia the *Matrimonial Property Act* passed in 1980 included a section stating that:

> *Where one spouse has contributed work, money or money's worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset of the other spouse, the contributing spouse may apply to the court and the court shall by order:*
>
> *(a) direct the other spouse to pay such an amount on such terms and conditions as the court orders to compensate the contributing spouse therefore; or*
>
> *(b) award a share of the interest of the other spouse in the business asset to the contributing spouse in accordance with the contribution,*
>
> *and the court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances.*

The *Murdoch* case was important in that it pointed to the need to rethink not just the law of matrimonial property, but also the law regarding support obligations within the family (family maintenance), and the law dealing with the rights of surviving spouses against the estates of their deceased spouses (the law of succession). There was also a need to ensure that the family law of the various provinces and territories was in harmony with the federal *Divorce Act* of 1968. The *Divorce Act*, in addition to making divorce somewhat easier to

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

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

obtain, also made it available on the same basis across Canada for the first time. Some provinces responded to the need for change by enacting omnibus family law reform legislation which covered both matrimonial property and family maintenance. Nova Scotia passed two acts, the *Family Maintenance Act* and the *Matrimonial Property Act* on the same day, June 5, 1980, and they came into effect on the same day, October 1, 1980.

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

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

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

The right to equal division is a *presumption* only, in that the *Act* also allows judges to make an unequal division in some cases, for example where the length of the marriage might indicate that an equal division would result in unfairness.[10] The right to equal division arises only at the *end* of a marriage. Before then, each spouse retains title to whatever property is in their name, and they may freely dispose of it without the consent of the other spouse. The only exceptions to this are the right to equal possession of the matrimonial home, and to veto any sale or mortgage of it. These rights arise at the moment of marriage and continue *during* the marriage.

Another important legal change relevant to matrimonial property, but not contained in the *Matrimonial Property Act,* occurred in 1987 when the *Pension Benefits Act*[11] was amended to provide for the division of pension benefits upon marital breakdown. The fact that pensions had not been specifically mentioned as matrimonial assets in the *Matrimonial Property Act* had led to some uncertainty as to whether they could even be considered as a matrimonial asset.[12] However, in 1990, the Supreme Court of Canada ruled that pensions are to be included as matrimonial assets under the law in Nova Scotia.[13] The amendments to the *Pension Benefits Act* allow the Supreme Court of Nova Scotia to award a maximum of half the pension benefit earned during marriage to the non-member spouse. This entitles the non-

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[10] S.13.

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

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

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

member spouse to a pension commencing on the date that the member spouse begins receiving a pension, or the member spouse's normal retirement date, whichever is earlier. While this amendment was helpful at the time, it has now created a situation where there are two different systems operating in Nova Scotia dealing with division of pensions on marriage breakdown, one under the *Matrimonial Property Act* and one under the *Pension Benefits Act*.

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

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

There is one exception to this general scheme which applies to the real property of some Aboriginal persons in Nova Scotia. Under the *Constitution Act, 1867* authority over "Indians and Lands reserved for the Indians" rests exclusively with the federal government and

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

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

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

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

provincial matrimonial property legislation has been held not to apply to interests in land situated within Aboriginal reserves. In two 1986 cases, the Supreme Court of Canada held that the B.C. courts had no constitutional authority under the provincial *Family Relations Act* to award a half-interest in a matrimonial home situated on reserve land to an otherwise eligible spouse,[18] nor to issue an interim order for exclusive possession of the matrimonial home accompanied by a restraining order against an abusive husband.[19]

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

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

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

[19] *Paul* v. *Paul*, [1986] 1 S.C.R. 306. For a critique of these cases, see M. Turpel, "Home/Land" (1991) 10 *Can. J. of Fam. Law* 17. The *Matrimonial Property Act* does apply, however, to spouses living on reserves with respect to any assets and debts they may have off the reserve.

[20] In *M*. v. *H.,* [1996] O.J. No. 365 (February 9, 1996), the Ontario Court of Justice, General Division decided that the support obligations imposed by the Ontario *Family Law Act* on opposite sex cohabitees had to be read as extending to same sex cohabitees, in accordance with s.15 of the *Charter.*

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

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

Supreme Court of Nova Scotia (January 1996) with province-wide authority over all family law matters.

2. The social context and purpose of family property law in Nova Scotia

(a) the social context

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

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

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

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

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

pronounced in Nova Scotia as in some parts of the country (for example, in Quebec out-of-marriage births topped births to married parents for the first time in 1993), the change has still been relatively dramatic.

Labour force participation by women has ceased to be related to an absence of children at home. About 66% of married women with children work outside the home, and the figure does not vary according to whether the children are preschoolers or not. With single and divorced mothers the age of the children does play a role in labour force participation, with mothers of younger children being less active in the labour force. Of mothers of children under six, about 44% of single mothers and 55% of divorced mothers work outside the home. When their children are over six, the participation rate rises to 60% (single women) and 72% (divorced women).

Another basic fact of family life in Nova Scotia is the association of family breakdown with poverty. Children who are born into a two-parent household where the marriage remains intact have approximately a 20% chance of living in poverty.[25] Children born into a household where the parents divorce, have a 73% chance of living in poverty.

(b) the purpose of family property law

The preamble to the *Matrimonial Property Act* states that it has four purposes:

- to strengthen the role of the family in society;
- to improve the position of children by clarifying issues of parental responsibility;
- to promote equality between the spouses;
- to provide for the orderly and equitable settlement of the affair of spouses upon marriage termination.

Since any reform must assess whether these objectives are still relevant to meet today's needs and also whether the existing law in fact has achieved these goals, it is useful to consider the values on which they rest.

(i) strengthening the role of the family in society

Encouraging and strengthening the role of the family in society has been a goal of state policy for centuries, based on the notion of the family as the building-block of society. Yet how to accomplish this "strengthening" has taken widely different forms over the years, and depends very much on which family forms are seen as socially desirable. Historically, the Judaeo-Christian tradition ensured that in Europe and North America the family based on

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

legal marriage was, until recently, the privileged form of the family. It was the sole beneficiary of "strengthening" measures, which took the form of economic benefits and privileges, along with added responsibilities for those in the married state.

The common law privileged married relationships over cohabitation relationships in a number of ways. Marriage contracts and separation agreements between spouses were encouraged, while cohabitation agreements were pronounced illegal as based on "illicit" exchanges (sexual favours) and therefore contrary to public policy. Husbands had an obligation to support and provide shelter for their wives, and wives were recognized as having the right as an agent to bind their husbands' credit. Widows had dower rights in their late husbands' property and, over time, growing claims to a share of his estate if he died without a will and, in cases of need, under the *Testators' Family Maintenance Act*.[26] Common law wives had none of these protections. Children born within a marriage had full succession rights and ultimately a statutory right to parental support,[27] while the child born outside marriage was *filius nullius* ("the child of no one") with no right to inherit from either parent at common law and no right to support except indirectly through "poor relief" legislation. [28]

The common law treatment of marriage was based on a male provider/female dependent model, even in those cases where women were not in fact dependent. Wives had no obligation to provide for their own support even if they had income exceeding that of their husbands. This assumption of economic vulnerability on the part of wives inspired various legal protections and benefits for them, but wives paid a high price: the surrender of control over their property and wages, and the threat of losing many of their protections for acts of sexual misconduct. Common law wives were at least spared these aspects of matrimonial law. Dower would be forfeited, for example, if the wife was living in adultery at the time of the husband's death. Clauses in separation agreements allowing the husband to terminate support payments if the wife did not remain *casta et sola* ("chaste and single") were in routine use until the 1970s, and maintenance payments under the Nova Scotia *Wives' and Children's Maintenance Act*[29] were liable to be forfeited in cases of wifely adultery until the *Act* was repealed in 1980. In addition to these doctrines, marriage as an institution was enforced through divorce law in Canada, which, prior to 1968, made divorce difficult to obtain.

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[26] R.S.N.S. 1989, c.465.

[27] See Law Reform Commission Final Report on the *Legal Status of the Child Born Outside of Marriage in Nova Scotia* (1995).

[28] Under the poor laws which used to operate in England and Nova Scotia, parishes were taxed to provide for their poor inhabitants. The parents of an illegitimate child could be forced by the parish "overseers of the poor" to provide for the child if they were able, even though the child itself could not sue its parents for support.

[29] S.N.S. 1965, C.57, now replaced by the *Family Maintenance Act.*

In short, the traditional economy of family law encouraged the development and maintenance of marriage-based families, both by providing certain protections for vulnerable members (conditional in the wife's case on sexual fidelity), and by making such families difficult to leave. All other intimate unions were discouraged by denying legal recognition, and refusing to extend protection to vulnerable members.

This historic gulf between the legal treatment of married couples and cohabitation relationships began to narrow, probably unintentionally, particularly after the adoption of separate property for spouses in 1884. As noted earlier, this concept gave to married spouses the formal autonomy and economic liberties which common law spouses had always possessed.[30] Legal and cohabiting spouses were both "strangers as to property", and each left their relationships with the property which each could identify as being his or hers. With regard to the matrimonial home, disputes were to be resolved solely by recourse to property law, without consideration of the welfare of either the non-titled spouse or any children. It did not matter under this system whether the home in question was occupied by a married couple or an unmarried one.

A further recognition of cohabitation relationships occurred with regard to the support obligation, only this time in the opposite direction. A benefit which had not historically been available to common law wives was extended to them in 1965 through a change to the *Wives' and Children's Maintenance Act.* At first available only to women who could show five years continuous cohabitation with the same man, the threshold was lowered to one year in 1970.[31]

These changes in the private law of the family were parallelled by changes to the definition of "spouse" in social welfare legislation such as the *Workers' Compensation Act*, beginning about 1970.[32] These amendments generally recognized common law spouses who could show from one to six years of cohabitation. By the eve of the passing of the *Matrimonial Property Act* in 1980, the legal positions of formally married and cohabiting spouses had grown significantly closer.

The *Matrimonial Property Act* and the *Family Maintenance Act* broke decisively with many of the older common law doctrines, mainly by imposing obligations and recognizing rights on a gender-neutral basis, and by eliminating the concept of fault (including sexual misconduct) as a significant factor to be considered in resolving marital disputes. The *Matrimonial Property Act* also broke with the post-1884 tradition of allowing property rights and legal title to prevail over family needs. Since 1980, the spouses' property rights have been altered

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[30] Common law wives were treated as separate legal persons and did not have to surrender control over their wages or property to their male partners.

[31] S.N.S. 1970-71, c.65, now replaced by the *Family Maintenance Act*.

[32] See S.N.S. 1970-71, c.66, which allowed a common law wife to claim benefits after six years of cohabitation or after one year if the parties had a child. S.N.S. 1992, c.35 reduced the period to one year in all cases and made the definition gender-neutral.

to take into account fairness both during a marriage (the matrimonial home provisions) and at its end (division of assets).

However, as the title of the *Matrimonial Property Act* suggests, "the family" which it aims to strengthen is that based on marriage, and not any other family relationship. In this respect, the *Matrimonial Property Act* had the curious effect of reversing the pre-1980 trend toward equality of legal treatment of married and cohabiting families. It heightened the distinctions between marital and non-marital families by making property division and certain rights in the matrimonial home available only to married spouses, leaving cohabitees to resort to the courts and common law remedies, which in some cases meant no remedies at all.[33] The *Matrimonial Property Act* is in this sense a throwback to an earlier time when cohabitees were made to carry a certain badge of legal, as well as social, inferiority, in order to validate the preferred status of marriage.

In spite of its modern gender-neutral language, then, the *Matrimonial Property Act* is fundamentally traditional in its approach to families. It re-privileged the marriage-based family by creating a new, more favourable economic regime which applied only to married parties. The *Act* presents a view of marriage which is to some extent influenced by the contemporary idea that marriage is an economic partnership, but at the same time it regards marriage as a status to which certain kinds of rights and privileges are necessary in order to fulfil the responsibilities which are imposed on spouses.

(ii) clarifying issues of parental responsibility

This objective of the *Matrimonial Property Act* is in fact carried out by other legislation, such as the *Family Maintenance Act* and the *Children and Family Services Act.*[34] Children are not totally absent from the *Matrimonial Property Act,* however. For example, child care is said in the preamble to be a joint responsibility of the spouses, which justifies the equal sharing of matrimonial assets. Similarly under section 11(3) a child can apply for possession of the matrimonial home in certain cases and under section 13 an unequal division of matrimonial assets or a division of non-matrimonial assets may be justified with reference to the needs of children or the assumption of child care responsibilities. The court may also order that property allotted to either spouse may be "transferred to or held in trust for a child to whom a spouse must provide support" (s.15(d)). Finally, the court may disregard any provision of a marriage contract or separation agreement which the court finds to be contrary to the best interests of a child of the marriage (s. 26).

The effect of the restriction of the *Act* to marriage-based families is that children of parents who are not married are not only excluded directly from these rights, but also excluded indirectly from those rights from which their parents are excluded. A common law spouse

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[33] It is still the case, for example, that where cohabitees are living in a home owned solely by one of them, there is nothing to prevent that spouse from evicting the other from the premises, regardless of how long the relationship has lasted and whether there are any children.

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

who becomes the custodial parent after termination of the relationship is excluded from an automatic division of "matrimonial" assets and from the right to equal possession of the "matrimonial" home which may be held in the name of the other spouse. This state of affairs may have a direct and immediate impact on the welfare of children of such relationships.

The Commission does not intend to make wide-ranging recommendations regarding the law of parent and child in this *Discussion Paper.* It does point out, however, that the "two-tier" system outlined above is contrary to the spirit of its recent Report on the *Legal Status of the Child Born Outside Marriage in Nova Scotia* (1995) which recommended the removal of all legal distinctions based on circumstances of birth as being contrary to the *Canadian Charter of Rights and Freedoms* and to Canada's obligations under the *United Nations Convention on the Rights of the Child*. The suggestions made later in this *Discussion Paper* regarding the definition of "spouse" will, if accepted, remove one of the most important (if largely indirect) legal distinctions between children with different birth status.

(iii) promoting spousal equality

In the 1960s and 1970s it was assumed that full equality for husbands and wives was hindered partly by the injustice of the separate property system and partly by the stereotyped assumptions in family law about the roles of husbands and wives. The separate property problem was believed to have been addressed by the property division provisions and matrimonial home protections of the *Matrimonial Property Act*, and the problem of stereotyping by making all family law legislation gender-neutral. Similar changes were incorporated in federal divorce legislation.

By the late 1970s in the United States (where similar reforms had occurred earlier) and by the late 1980s in Canada, however, researchers began to notice that far from achieving equality, the economic position of wives and children after divorce or separation had deteriorated markedly, compared to the position of their former husbands. The author of a 1992 report, based on Canadian data, noted that:

> *The end of a marriage or common law relationship increased the likelihood of poverty substantially. For those who were married and had children, the risk of poverty rose from 3.1% to 37.6% after divorce or separation ... In 1982-86, the family income of women (adjusted for changes in family size) dropped by an average of about 30% in the year after their marriage ended. Incontrast, the family income of divorced or separated men rose by an average of 12%.*[35]

This trend toward the "feminization of poverty", which has been noted by the Supreme Court of Canada,[36] has been associated with changes in the law and practice of post-divorce support awards under the *Divorce Act*, 1985. A 1990 Federal Department of Justice study of

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[35] T. Lempriere, "A New Look at Poverty" (1992) 16 *Perceptions* 18 at 19-20, cited in M. Mossman, "'Running Hard to Stand Still': The Paradox of Family Law Reform" (1994) 17 *Dal. Law J.* 5 at 6.

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

several hundred divorce files from selected centres across Canada revealed that "women requested support in only 16 % of the [divorce] applications, and were awarded support in only 6 % of all cases in 1988".[37] This has meant that after divorce, most women must rely on their share of the matrimonial assets (if any), on child support awards, and on their own labour to support themselves and their children. In many cases there are no matrimonial assets and default on child support awards is frequent, particularly as people encounter employment problems.[38] Given that women working full-time in Nova Scotia earn about 64% of what men earn, it is not surprising that the risk of poverty for post-divorce female-headed households is high.[39]

Increasingly, the 1970s assumptions that gender-neutral legislation and equal sharing of matrimonial assets would lead to spousal equality, have been shown to be naive and unrealistic. In most cases the equality achieved by matrimonial property legislation will be what is described as formal equality, in that, although the division is equal, the result for the two people is quite different because their situations differ. The law may also produce "substantive" equality (i.e., where both people are in a similar situation after the division) in those situations where there are no children and both spouses work outside the home for approximately the same salary. However, such cases are still a minority at present. Especially for couples with children, it is still the case that the primary care-giver will suffer some long-term economic disadvantage. People who become parents are prepared to accept that having children involves some economic responsibility. However what is sometimes seen as unjust is the fact that such burdens are often not equally shared after divorce or separation.

Reform of matrimonial property law will not in and of itself solve the problem of post-divorce poverty or the lower economic status of women. Property division is only one aspect of the post-divorce or port-separation legal and economic situation: child and spousal support are another. Recent Supreme Court of Canada decisions in the area of spousal support suggest a shift away from the emphasis on the "clean break" theory of divorce and on the rapid achievement of financial self-sufficiency after divorce, both of which are based mainly on ideas of formal equality.[40] In the field of child support, new national child support guidelines based on a more realistic estimate of the actual costs of child-rearing are about to be added to the *Divorce Act*.[41] As well, Nova Scotia's new maintenance enforcement system

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[37] Department of Justice Canada, *Evaluation of the Divorce Act*: *Phase II: Monitoring and Evaluation* (Ottawa: Department of Justice, 1990).

[38] See Law Reform Commission of Nova Scotia's Final Report, *Enforcement of Maintenance Obligations in Nova Scotia* (1992).

[39] *Women in Nova Scotia: A Statistical Handbook,* 2d ed. (Nova Scotia Department of Human Resources: Women's Directorate, 1995) at 4-9. Including part-time workers increases the gap to 59%.

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

[41] See generally A. Bissett-Johnson, "Reform of the Law of Child Support: By Judicial Decision or by Legislation? (Pt.1)" (1995) 74 *Can. Bar Rev.* 585.

should ensure that a higher percentage of all maintenance payments are in fact received by the family.[42] These are all important measures which move in the direction of creating real equality. The Commission believes that some proposed changes to the *Matrimonial Property Act* will also advance substantive equality. These changes relate principally to the definition of family assets and are dealt with in Part III.

(iv) ***providing for the orderly and equitable settlement of spouses' affairs upon marriage termination***

The dramatic increase in the divorce rate[43] after the *Divorce Act, 1968* was passed, was undoubtedly the principal factor motivating the need to find "orderly and equitable" ways to settle ex-spouses' financial affairs. The concept of separate property, which assumed each spouse to be equally positioned to earn an income and acquire property, was revealed to be inadequate at both a practical and a psychological level. Practically speaking, the prevalence of the male-provider/female-dependent model in the postwar period meant that the assumption of an equal opportunity to earn income was meaningless. The separate property model also seemed to be based on a model of emotionless and rational calculation which was psychologically at odds with the acceptance of romantic love as the basis of marriage.

The *Matrimonial Property Act* "recognizes the contribution made to a marriage by each spouse" and treats the contributions to a marriage, whether in "child-care, household management [or] financial support" to be equal, so as to justify an equal division of the matrimonial assets. Most provinces in Canada go so far as to label marriage as a partnership, based on a theory of joint contribution, but the Nova Scotia *Act* does not use the word "partnership", and the *Act* does not fully reflect a "contribution-based" approach to the division of matrimonial assets. Instead, a number of its provisions seem to be based more on the idea that marriage inherently involves certain rights and responsibilities, regardless of any contribution by the parties. This can be seen in one provision, unique in Canada, that not just property acquired after the marriage but <u>all</u> property owned by the spouses on their wedding day, is subject to equal division. Similarly, another provision which is unique to Nova Scotia and Newfoundland is the possibility that a child may in certain circumstances be awarded possession of the matrimonial home. Both of these provisions seem to be based more on a concept of need or on a concept of family solidarity, rather than on a theory of contribution. At the same time Nova Scotia excludes "business assets" from being considered in the division of property even though one spouse may have indirectly assisted the other spouse to acquire those assets. It can be seen that an equitable or fair arrangement of property on marriage breakdown may not be achieved under the current law.

3. Summary

The Commission's research suggests that the values underlying the current law, while still relevant, are not being fully achieved, partly because of assumptions in the law itself and

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

[43] As noted earlier, the divorce rate increased tenfold between 1961 and 1981.

partly because of changes in society.

Although reforms that occurred to the law of matrimonial property in 1980 were appropriate to the views and understandings of time, the needs of society have altered. In addition, many other ideas behind the changes in 1980 have altered as ideas about equality and fairness in the context of the family have undergone significant change. The rest of the *Discussion Paper* will set out some preliminary suggestions developed by the Commission regarding changes to the law governing the division of family property on the ending of a marriage or marriage-like relationships.

III SUGGESTIONS FOR REFORM

1. Should the *Matrimonial Property Act* be reformed?

In Part II, social changes and some of the changes in legal understandings of and approaches to family law were discussed. In addition the Commission notes that changes have occurred, or have been recommended in other provinces in Canada to address these concerns.[44]

Accordingly the Commission has taken the view that the law dealing with matrimonial property is in need of significant reform. In addition, although not the specific focus of this project, the Commission suggests that the Minister of Justice for Nova Scotia should raise the need for federal reform to respond to the situation of separating couples resident on Aboriginal reserves. The Commission has also noted that the *Family Maintenance Act* is in need of significant reform which requires specific consideration. Such reform is better addressed separately from this Paper as it raises other broader policy questions relating to parental responsibility.

The Commission suggests that:

1. **The *Matrimonial Property Act* of Nova Scotia is in need of reform.**
2. **There is a need for federal law reform to deal with the situation of separating couples resident on Aboriginal reserves.**
3. **Reform to the *Family Maintenance Act* should be considered by the Minister of Justice.**

2. Should there be a new law?

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

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

One of the difficulties in making suggestions for law reform is to determine whether it is in the public interest to change the existing law or create a new law. The Commission has a concern about creating too many new laws as this becomes confusing and costly for members of the public and for the legal community. At the same time, creating change by amendments to existing laws means that people must then check two statutes and it may create a problem for accessibility. After some consideration, the Commission has taken the view that it would be best to suggest the repeal of the existing *Matrimonial Property Act* and replacement by a new *Act*. In order to take into account the Commission's suggestion that the *Act* should apply to both marriage and cohabitation relationships, the new *Act* should be called the *Family Law Act.*

The Commission suggests that:

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

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

3. What values should the new *Family Law Act* reflect?

The four objectives of the *Matrimonial Property Act* were set out in Part II. The Commission feels that in principle these objectives and the values which they reflect are still relevant today. However, changes in society mean that the way in which these objectives are achieved and interpreted needs to be more reflective of today's needs and legal requirements. The *Matrimonial Property Act* tries to encourage and strengthen the role of the family in society in three main ways: (1) by recognizing that child-care, household management and financial support are joint responsibilities of the spouses, and that there is a joint contribution by the spouses, financial and otherwise, that entitles each spouse equally to the matrimonial assets; (2) by providing for the orderly and equitable settlement of the affairs of the spouses on marriage termination; and (3) by providing for mutual obligations in family relationships including the responsibility of parents for their children.

The Commission suggests that the *Family Law Act* should reflect the following values:

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

ending of a relationship;

The Commission suggests that:

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

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

4. Which relationships should be governed by the new *Family Law Act*?

(a) should the new *Family Law Act* include cohabitation relationships?

As noted in Part II the *Matrimonial Property Act* applies only to legally married couples. The effect of the *Act* is to draw a very clear line between married and unmarried couples. Such distinctions were historically justified on the basis that the state had an interest in fostering marriage and the legitimate family as fundamental social institutions. According to recent statistics marriage is still favoured by most Nova Scotians, as it is by most Canadians. Almost 80% of all Nova Scotian families are composed of married couples, either with or without children. A national survey of high school students in 1992 found that 85% of those surveyed planned to marry. While marriage and the association of childbirth with marriage are still statistically the norm in Nova Scotia, social practices are clearly changing. The marriage rate has been dropping slowly for at least the last 25 years, and the average age at marriage has been steadily rising. Unmarried cohabitation is becoming more socially acceptable, particularly among young people. In the survey mentioned above, nearly 90% of teenagers approved of unmarried couples living together. As of 1990, it was estimated that nearly one-third of Canadian couples 25 years of age and under were living in a common law relationship. Less than a quarter of these relationships were found to last more than five years.[45] Statistics Canada reports that the frequency of common law unions doubled between 1981 (when this information was first collected) and 1991; in Nova Scotia the increase was less dramatic but still significant.

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

At this point in history, it is difficult to tell whether common law relationships are principally a prelude to, or a substitute for, marriage. Sociologists of the family say that it is too early to tell whether unmarried cohabitation is likely to supplant marriage to a significant degree.[46]

Marriage itself is changing, as a high proportion of divorces puts into question the lifelong commitment formerly associated with marriage. It is clear that many individuals will be involved in more than one marriage-like relationship over the course of a lifetime. Divorced persons often remarry or form new cohabitation relationships, while cohabiting couples end their relationships and begin new ones. In 1985, in 29.5% of marriages one of the parties had been previously married, an increase of nearly 250% from 1967, when the figure was 12.3%. The 29.5% figure does not include previous common law relationships which one of the parties might have had.[47]

Although there are some laws governing support obligations and pension division between cohabiting couples, in general, the obligations of cohabiting couples towards each other are left to be decided mainly through court cases. Court decisions have found that parties to a marriage-like relationship, may assert a claim to assets owned by the other party.[48] This can happen where one party amasses assets during a relationship and the other partner's contributions to the relationship are such that they can reasonably expect compensation upon termination of the relationship. This is part of the law of unjust enrichment. Historically the court had required that there be a direct connection established between the assets and the contribution, however, this position seems to be altering. The courts have not imposed any presumption of equal sharing of assets acquired during quasi-marital relationships. In each case the court must decide what amount is "fair" given the contributions of each "spouse".[49]

There is some provision in the statute law in Nova Scotia for support obligations and pension division for cohabitation relationships. The support obligation is found in the *Family Maintenance Act,* which provides that a spouse "includes a man and woman who, not being married to each other, live together as husband and wife for one year" (s. 2(m)). Pension division for cohabiting couples who have lived together for three years is provided for under the *Pension Benefits Act* which allows for the division of pension benefits earned during the

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[46] 1981 census data indicated that about 6% of couples in Nova Scotia were involved in common law relationships, compared to approximately 9% a decade later: *Mothers & Children, One Decade Later* (Nova Scotia Department of Community Services, 1991) 22.

[47] *Mothers & Children, One Decade Later,* 24. A recent longitudinal study by Statistics Canada, which studies the same families over a period of time, reveals that the amount of change in Canadian families is even greater than previously thought: "Figures Reflect Changing Family Scene" [The Toronto] *Globe and Mail*, (12 April 1996) A 8.

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

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

relationship, to a maximum of 50% of the credits in favour of the non-member partner.[50] These two laws, as well as other provisions in laws which indirectly deal with cohabitation relationships, tend to define the relationship differently.[51] The combination of legal results under judge-made case law and a variety of statutes means that the legal situation of cohabiting couples is uncertain in terms of their obligations and rights towards each other and towards their children. Having to resort to the courts makes it expensive and unpredictable for people in Nova Scotia.[52]

The equality rights provisions of the *Canadian Charter of Rights and Freedoms* (s.15) also have a very significant impact on this issue. The Supreme Court of Canada has recently released one of its first decisions on the issue of whether distinguishing between people on the basis of marital status is discriminatory under the *Charter*. In *Miron and Valliere* v. *Trudel et al*.[53] a majority of the Supreme Court of Canada struck down a section in the Ontario *Insurance Act* which provided that certain benefits would only be payable with respect to an accident involving the insured's legally married spouse. The Court said the *Charter* required the *Act* to include common law spouses.[54] The entire Court in *Miron* accepted that marital status was a ground of discrimination similar to other grounds set out in the section 15(1) of the *Charter*. In another case, *Egan and Nesbit* v. *Canada*[55] the Supreme Court of Canada in a close 5-4 decision rejected a challenge by a same sex couple to the provisions of the federal *Old Age Security Act* which accord a pension to spouses (including common law spouses) between 60 and 64 years of age if their mates are aged 65 or older. In that case, although a majority of the judges found the distinction to be a reasonable limit on the equality rights of same sex couples, all of the judges agreed that sexual orientation constituted a ground of discrimination under the *Charter*. Five of the judges found that the provision in question violated the couple's equality rights.[56] Recently an Ontario court has found that the

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

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

[52] Among unmarried couples there appears to be a widely held, though incorrect, view that the *Matrimonial Property Act* already applies to them after one year.

[53] (1995), 181 N.R. 253.

[54] The legislation had been amended to achieve this goal after the accident in question, so that the effect of the Supreme Court's decision was merely to make the new *Act* apply to a situation before the *Act* was changed.

[55] (1995), 182 N.R. 161.

[56] One of the five judges found that the provision, although discriminatory, was a reasonable limit in the context of pensions.

One of the anomalies in Nova Scotia is that the *Human Rights Act* itself arguably discriminates in its definition of marital status against same sex couples. It should be noted that a Board of Inquiry under the Ontario *Human Rights*

considerations advanced in *Egan* with regard to eligibility for a public pension benefit were not as persuasive in the context of family law. In a *Charter* challenge relating to the support obligation which the Ontario *Family Law Act* imposes on common law spouses after three years of cohabitation or the birth of a child, the court read the provision so as to include same sex couples.[57]

Although the issue is under consideration in other provinces, to date only Newfoundland has extended provisions for property division on marital breakdown to cohabitation relationships. The Newfoundland law provides that common law spouses may "opt in" to the *Act* just as if they were married.[58] Some provinces (but not Nova Scotia) specifically recognize "domestic contracts" of cohabiting spouses. These agreements can result in situations similar to that provided for by the *Matrimonial Property Act*. All provinces provide in some way for a support obligation between common law spouses. The Ontario Law Reform Commission has recommended that the equalization of family property provisions of the *Family Law Act* apply after three years or the birth of a child to cohabiting couples and that same sex couples be permitted to "opt in" to it through a domestic contract.[59]

The Commission notes that currently same sex couples cannot obtain a legal marriage in Canada, a fact which reflects social ideas about marriage. Including all cohabiting couples under the proposed *Act* will not affect the law governing who can marry in Canada. The Commission recognizes that legal recognition of cohabitation relationships in family law, particularly where the partners are of the same sex, may be difficult for some members of the public to accept. However, the Commission also notes increasing public recognition of same sex spousal-type relationships in employment law. Unions and corporations have voluntarily recognized couples in some collective agreements and employment benefit packages, and various provincial governments and the federal government have recognized such relationships for the purposes of many civil service benefits.[60] In addition, the

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Code has found that *Act's* definition of "marital status" (which is very similar to Nova Scotia's) in so far as it excludes any reference to same sex couples, to be contrary to the equality guarantees of the *Canadian Charter of Rights and Freedoms; Leshner* v. *Ontario* (No. 2) (1992), 16 C.H.R.R. D/184 (Ont. Bd. of Inquiry). The Board ordered that the definition of marital status be "read down" to omit the words "of the opposite sex". The Ontario government chose not to appeal this decision, and has implemented it by setting up a separate pension plan to provide benefits for government employees who are in same sex relationships. A Board of Inquiry has recently been set up under the Nova Scotia *Human Rights Act* to consider a similar complaint.

[57] *M.* v *H.,* [1996] O.J. No. 365 (February 9, 1996) (Ontario Court of Justice, Federal Division).

[58] *Family Law Act*, R.S.N. 1990, c.F-2, s.63.

[59] *Report on the Rights and Responsibilities of Cohabitants under the Family Law Act* (1993). A Bill containing such a change as well as changes to the definition of "spouse" in numerous other statutes was defeated in the Ontario Legislature in the spring of 1994.

[60] The Nova Scotia Department of Human Resources announced the extension of employee medical, dental and applicable special leave benefits to same sex partners effective October 23, 1995. British Columbia, New Brunswick, Ontario and the Yukon had previously done so. The federal government followed in November 1995. See generally J. Yogis, R. Duplak, R. Trainor, *Sexual Orientation and the Law: An Assessment of the Law Affecting Lesbian and Gay*

Commission notes the amendment of the Nova Scotia *Human Rights Act* in 1991 to include sexual orientation and marital status as prohibited grounds of discrimination.[61]

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

The Commission has reached the view that most cohabitation relationships are functionally similar to marital relationships.[62] Human beings seek out intimate long-term relationships for a variety of reasons, including companionship, love, emotional support, sexual intimacy, procreation, economic need and social expectation. Such relationships, especially but not exclusively where there are children, often generate patterns of economic dependency. These patterns, which may not be apparent during the relationship, are exposed on its termination. The state has determined that it is appropriate to address this situation as a matter of policy in the form of laws governing the division of property and ongoing support and child custody arrangements. In opposite sex relationships the economically disadvantaged partner has traditionally been the woman. New patterns of life have given rise to situations where the male partner may now be the economically disadvantaged one where he has been a stay-at-home parent,[63] and current case law makes it clear that patterns of economic dependency can arise in same sex relationships as well. The reason for the law to impose mandatory property division in marriage and marriage-like relationships is not to alleviate poverty as such, but to ensure that the dependent partner is not punished for the role which he or she has played during the relationship. If the government wishes to encourage

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Persons (Toronto: Emond Montgomery, 1996), ch.6; B. Ryder, "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege" (1990) 9 *Can J. Fam. Law* 39.

[61] S.N.S. 1991, c.12.

[62] The Nova Scotia Family Violence Prevention Initiative has taken the same view, noting in its most recent newsletter (*(1996)Initiatives* No. 4) that there is a need for a broader definition of family and suggesting that "family refers to a grouping of individuals who are related by affection, kinship, dependency or trust".

[63] The federal Department of Justice study of the effects of the *Divorce Act*, *1985* found that 42% of men with sole custody had incomes below the poverty line compared to 11% of all men after divorce.

and support family life, it must assure a basic level of fairness on the termination of marriage and marriage-like relationships.

After reflecting on the matter and considering the legal, constitutional and social changes outlined above, the Commission is of the view that there is no valid legal or policy reason for distinguishing between people on the basis of sexual orientation or marital status in family property legislation. To promote reform which contains or perpetuates discriminatory distinctions is, in the Commission's view, contrary to human rights law and the Constitution of Canada. The Commission suggests that a new *Family Law Act* in Nova Scotia should automatically include all cohabitation relationships.

(b) should the law apply automatically or should all couples be allowed to "opt in"?

The Commission, in determining that the *Act* should include all cohabitation relationships, has reached a preliminary view that the *Family Law Act* should apply automatically with provision for "opting out" in the form of a domestic contract, as currently allowed under the *Matrimonial Property Act*.

The Commission had considered whether there should be an "opt in" provision for cohabitation relationships and also whether there should be an "opt in" provision only for same sex cohabition relationships as suggested in Ontario. The argument that is usually advanced in favour of not including cohabiting couples under family property legislation is one based on a respect for individual autonomy. If the parties have chosen to avoid marriage, why should the law intervene? Allowing parties to "opt in" to family property legislation appears to respect their autonomy. The Commission notes that same sex couples cannot legally marry, so the argument cannot apply to them. Further, all provinces currently provide for some form of support obligation between common law spouses, which is already inconsistent with a total respect for autonomy.

After reflecting on this issue the Commission has reached the view that there is no reason to distinguish between married and cohabitation relationships in connection with property division issues, irrespective of sexual orientation, and that to do so would, in fact, perpetuate a discriminatory distinction. On a more practical level, the Commission believes that people are more likely to turn their minds to the financial implications of a relationship where the decision is to contract out of the law by domestic contract. It does not seem realistic in the context of a couple setting up a home and life together to expect them to give detailed consideration to their economic affairs if the relationship does not continue. If the law provides a fair division of property which recognizes the likelihood of more than one relationship in a lifetime, then it will not be detrimental to the interests of the couple if they do not address the issue. If they have concerns, as is the case currently for married couples, then they may develop a domestic contract regarding the division of property. Any contract would still, as the case is now, be subject to the court considering the best interests of any children that may be affected. In addition the Commission was concerned that an "opt in" process depends on negotiation, and allows for the continuance of any existing inequality of bargaining power, which may work against women and children. Family law lawyers in

Newfoundland who were consulted about the experience with that province's "opt in" provision reported that they had rarely drafted such contracts, although they had often drafted domestic contracts of other kinds for common law couples.

(c) when should the new *Family Law Act* apply?

Having reached this preliminary view on which relationships should be covered under the proposed *Act*, a related question that arises is how to determine when the relationship of cohabitation is established. The application of the law to legally married people is reasonably simple in that marriage is a legal change of status. A more difficult issue arises with respect to cohabitation arrangements.[64] The Commission considered whether there should be some form of time limit as the indicator. For example, the *Family Maintenance Act* includes in its definition of spouse a man and woman who have cohabited as husband and wife for a period of one year, while the *Pension Benefits Act* requires cohabitation for three years. The *Victims' Rights and Services Act* extends its coverage to a man and woman who, "although not married, ... co-habited as husband and wife and were known as such in the community where they lived, and the relationship was of some permanence".[65] The Ontario Law Reform Commission, although recommending that common law couples be covered mandatorily under the Ontario *Family Law Act*, has not recommended any change in the current definition of "spouse" in that *Act*, which requires either three years of continuous cohabitation, or a relationship of some permanence where the couple are parents of a child.

The Commission feels that the determination of when the *Act* applies should be related to the purpose of extending the *Act* to include cohabitees. As stated earlier, the primary reason for inclusion is based on functional similarity to married couples, and on the likelihood of economic dependency by one partner on the other. This approach might suggest a minimum period of cohabitation if a cohabitation test were adopted. The three-year period of cohabitation required by the *Pension Benefits Act* is presumably motivated by such concerns. However, the one-year cohabitation test used for purposes of family maintenance has been in
place for over 25 years, is used in a number of other statutes, and people are generally familiar with it. One year is also the period used in many federal laws such as the *Income Tax Act*.[66]

Alternatively, the *Act* might adopt a "public recognition" test, as referred to in the *Victims' Rights and Services Act*. This has the benefit of allowing the parties some control over the

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

[65] R.S.N.S. 1989, c.14, s.11A(3). New regulations under the *Maintenance Enforcement Act* adopt a simpler definition, defining "spouse" as including "a man or woman who is living with a payor in a marriage-like relationship": N.S. Reg. 40/96, s. 2(c).

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

definition of their relationship. Along the same lines, the Commission defined "partner" in its draft *Adult Guardianship Act* using both approaches as "a person of the same or opposite sex with whom ... the person has a close personal relationship of one year that is of primary importance to both of them". At the same time the Commission considered whether there is any reason to distinguish between married and cohabiting couples in terms of when the *Act* applies. For example, one option might be to make the *Act* apply to all relationships only after a set period of time, (i.e., between one to three years). However, while justifiable in principle, the Commission felt that this approach would not be in accordance with general social expectations upon marriage.

After some consideration the Commission has come to the view that the new *Family Law Act* should apply to the following people:

(a) persons who are legally married; and to

(b) any two persons who are recognized in their community as cohabiting in an intimate relationship of some permanence; or

(c) any two persons who have cohabited in an intimate relationship of some permanence, if they are, or have assumed the role of, parents of a child.

The Commission suggests that:

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

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

3. The *Act* should apply to:

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

5. Definition of family assets

If the Commission's suggestions regarding extension of the proposed *Family Law Act* to

cover cohabiting couples are accepted, the term "matrimonial assets" will no longer be appropriate. Accordingly, the Commission suggests that a new term, "family assets", be used.

At present, all assets of a married couple which fall within the definition of matrimonial property are subject to a presumption that they will be divided equally unless there is some basis for an unequal division under s. 13 of the *Act*. Assets are divided on the termination of the marriage through divorce, death or annulment. "Matrimonial assets" are not specifically defined in the *Act* but are understood to include all assets of a married couple, whether acquired before or after marriage, unless they are specifically excluded by the *Act*. There are 7 specific exclusions under the *Matrimonial Property Act:*

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

The Commission felt that the exclusions listed under 4 (personal effects), 6 (property excluded under a marriage contract) and 7, (property acquired after separation) are not in need of reform and do not raise any significant policy issues. Subject to any public comment to the contrary, the Commission suggests these should be maintained in a new law. The remaining exclusions do, however, raise broad policy questions, and are treated quite differently in various provinces.

(a) the theory behind equal property division

Before looking at the specific exclusions it is useful to consider the philosophy which underlies the division of assets. Most provincial *Acts* across Canada answer this question in a fairly straightforward way. Marriage is treated as an economic partnership of a particular kind. It is seen as a partnership in which different kinds of contributions to the "common enterprise", whether in the form of homemaking services, child-rearing, or employment outside the home, are seen by the law to be equal. These contributions entitle both parties to share equally the value of assets built up by the parties over the course of the marriage.

The Nova Scotia *Matrimonial Property Act* shares a number of features which characterize the partnership model. For example, the preamble recognizes the contributions of spouses to a marriage to be equal, no matter how they are provided. However, as mentioned in Part II some provisions in Nova Scotia are hard to reconcile with the partnership theory. For example, the treatment of all property which the spouses own on their wedding day as shareable matrimonial assets, when by definition there was no "partnership" during the pre-

marriage period, seems inconsistent with the partnership theory. The notion that gifts and inheritances are excluded from sharing unless used for the benefit of the spouses or their children also does not fit with the partnership theory. This provision and others which recognize the interests of the children of a marriage as significant factors in division decisions, are also difficult to reconcile with a pure partnership theory.

These features of the Nova Scotia *Act* show that it treats marriage as a rather more complex relationship than is the case in other provinces, with the result that the theory underlying family asset division is less clear. The inclusion of all property owned on the day of marriage as shareable assets (unique to Nova Scotia) suggests a more organic view of marriage, one which treats each spouse as a product of their past, not just a partner in a new venture. The references to children, even if found in sections of the *Act* which are not used very often, suggest that there is another tier of interests besides that of the spouses which must be taken into account: the *Act* is about "family", not just about "marriage". This approach has sometimes been referred to as a theory of inherent matrimonial obligation which treats marriage as a special legal status in which certain rights and responsibilities must exist in order to allow the spouses to carry out their roles, one of which is the role of parent. It is an approach which is more receptive to the issue of need, which is in principle excluded from the economic partnership theory. The Nova Scotia *Act* treats asset division as based partly on a theory of inherent matrimonial obligations, and partly on a theory of economic partnership.

The Commission is considering both the current model (called the integrated model below) and the economic partnership model as possible approaches to the question of asset division. The Commission itself is unresolved on this issue at this point, and specifically invites comment on which of the following two models is appropriate for Nova Scotia.

(i) economic partnership model

The first approach is a pure economic partnership model. Under this model the partnership begins on the day of marriage, or at the beginning of cohabitation for unmarried couples, so that all property owned by either party before that date (including pension contributions made before that date) would be excluded from division. The contributions of the parties during the course of the relationship are considered as equal, regardless of their form, and each person is entitled to an equal share of what is accumulated during the relationship. There is very little discretion to vary the presumption of equal shares under this model: it involves a strict 50-50 division. What is shared at the end of the relationship is not property or assets, however, but value. Each party's property is valued at the date the relationship commenced, and again at its termination, debts are deducted, and the resulting net worth of each party is compared. The person with the higher net worth must pay to the other party half of the amount by which his or her net worth exceeds that of the other party. This can be done by transferring property or by making a cash payment.

The economic partnership model takes a fairly practical approach to the frequency of divorce and multiple family-like relationships in people's lives. Such an approach deals with family assets as somewhat similar to any other form of partnership where the primary

interest is in finality and clarity, to allow people to move forward to form new alliances. This approach is attractive in that it focuses specifically on valuation of the assets during the marriage and makes use of formulas to determine the settlement. This has the advantage of eliminating a great a deal of judicial discretion and providing for more uniformity, consistency and predictability for members of the public. It may result in increased costs, however, in that family property needs to be evaluated twice, at the beginning and end of the relationship. As well, there is a concern that such an approach might result in an overly rigid system. In particular, the issue arises in connection with decisions on pensions, as will be discussed later, where the value of the asset may be greater when it matures than at the time of the termination of the marriage.

(ii) the integrated model

The second approach is an adaptation of the current model in the *Matrimonial Property Act*, referred to as the "integrated model", which combines economic partnership with recognition of certain unique attributes of marriage and families. This model reflects the same basic approach of the partnership model in that the contributions of each party to the family relationship are considered as equal regardless of their form, entitling each party to share equally at the end of the relationship. However, it treats spousal relationships as special units of economic welfare, partly but not exclusively because of the possibility of parenthood. The economic interdependence which arises in such relationships justifies treating as shareable certain assets which would not be "shareable" in an ordinary business partnership. This means that all property owned by either party at the date of marriage or commencement of cohabitation, including pension entitlements built up at that time, would continue to be included in the division. The *Act* would continue to be based on a theory of asset division rather than sharing of value, and only one evaluation of the couples' assets would have to be done at the end of the relationship. Under this model, the presumption of equal sharing would remain, but the discretion on the part of judges to make an unequal division in some cases, i.e., where the relationship is very short, would be given more emphasis than at present.

The Commission feels that there are merits and problems with both approaches and seeks comment on this issue.

(b) treatment of debts

At present the *Matrimonial Property Act* makes almost no reference to debts. The only reference to debts is contained in s. 13, the section which allows the court to make an unequal division of the spouses' property in certain cases. Section 13(b) states that one of the factors which the court can take into account is the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred.

The *Act* does not define matrimonial debts, but the courts have generally asked whether the debts were incurred for the benefit of the family unit, whether they were ordinary household debts and, if they were incurred after separation, whether they were necessary to meet basic living expenses or to preserve matrimonial assets, the overall consideration being whether

the debts were reasonably incurred.[67] The court has occasionally decided that a debt was personal to one spouse and was not therefore a "matrimonial" debt, as in the case of the legal bill for advice in a custody dispute over the child of a husband's previous marriage.[68]

The practice of the courts has been to distinguish between two kinds of matrimonial debts, which might be called "specific" and "general". Where specific matrimonial assets are subject to debts, the courts will deduct them before deciding what net value exists to be shared. For example, if a couple have $30,000 equity in a matrimonial home and still owe $70,000 on the mortgage, the court will direct the sharing of only the $30,000 equity and not the theoretical market value of $100,000. General matrimonial debts, on the other hand, are those incurred for the usual living expenses of the family, such as the purchase of ordinary home furnishings, clothes, vacations, entertainment and the like. With general matrimonial debts the courts have not adopted a strict presumption of equal responsibility because the *Act* is silent on the point. Where the parties have not been able to agree on who will pay off which debts, Nova Scotia courts have been willing to look at the respective ability to pay of each party, and to divide the debts unequally.

For example, in *Davey* v. *Davey*, the spouses had debts of some $36,000, minimal equity in the matrimonial home, and no other assets.[69] The husband's post-divorce annual income was $50,000, while the wife's was $20,000. The court directed that the husband pay 75% of the debts and the wife 25%, because the wife had been financially disadvantaged by the marriage and did not have the income to manage paying off an equal share of the debts. This case illustrates the courts' tendency to treat the discharge of general matrimonial debts more as a support issue than as a property issue. It will be recalled that spousal support after divorce is governed by the *Divorce Act* and takes into account need and ability to pay, while property division occurs under the *Matrimonial Property Act* and is dealt with as a matter of right rather than need. Consideration of the future earning capacity of the spouses is relevant if one treats the discharge of debts as relating to issues of entitlement to future support, while it is not relevant to the division of property under the *Matrimonial Property Act*.[70] This approach is also consistent with recent Supreme Court of Canada decisions on support under the *Divorce Act, 1985*, which state that property and support entitlements are simply two tools to achieve an equitable distribution of family resources on marriage breakdown, and that they may be combined in flexible ways.[71]

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

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

[69] *Ibid*.

[70] In *Donald* v. *Donald*, the Court of Appeal overturned the trial judge on this point, noting that post-divorce disparity in income-earning capacity is not mentioned in s. 13 as a factor to be considered in making an unequal division of spousal assets; (1991), 103 N.S.R. (2d) 322 (CA), reversing (1990), 98 N.S.R. (2d) 77 (TD).

[71] See, e.g., *Moge* v. *Moge*, [1992] 3 S.C.R. 813 at 849, adopted in *Legere* v. *Legere* (1992), 118 N.S.R. (2d) 446 (TD).

The courts' treatment of debts seems sensible. Clearly it is not appropriate to share the full value of assets which are not paid for. With regard to the matrimonial home, generally any outstanding mortgage debt will be dealt with either by selling the home, or by one party remaining in the home and becoming solely responsible for the debt (although other possibilities are open under the *Act*). It is with regard to general living expenses that courts have exercised their discretion more freely. At first glance it may appear as if such treatment infringes spousal equality. It may also appear unfair that one spouse may have had the benefit of a certain standard of living without ultimately being responsible for half the debts incurred in reaching that living standard. However, the parties presumably incurred the debts on the basis of their joint incomes, which were not necessarily equal. Viewed in this light, it does not seem unfair that the spouses' responsibility for such debts should be roughly proportionate to their post-divorce incomes, rather than equal.

The Commission agrees with the current practice of the courts as regards the definition of matrimonial debts, the treatment of debts specific to particular assets such as the matrimonial home, and the treatment of general matrimonial debts. It suggests that the proposed *Act* should deal with debts in the following way if the integrated approach to asset division is retained:

> 1. direct the court to hear all relevant evidence relating to the spouses' debts and future income-earning capacity;
>
> 2. exclude from consideration any debts considered to be purely personal, which will remain the responsibility of the spouse who incurred them;
>
> 3. with regard to substantial capital assets such as the family home, deduct outstanding debts related to such assets in calculating the net equity which exists to be shared; and
>
> 4. divide responsibility for all remaining debts on an equal basis, except that the court may order an unequal division if, in its opinion, an equal division would be unjust taking into account any factor currently mentioned in s. 13 of the *Matrimonial Property Act* and any disparity in income-earning capacity which is expected to exist between the spouses after the court order.

The effect of this suggestion is to create a process for dividing responsibility for debts which is distinct from the asset division process. It is based on the idea that asset division is a matter of right which relates principally to past events, while the division of debts is a matter which relates principally to the future and may involve questions of need and ability to pay. A greater discretion in the division of debts as opposed to assets can be justified on this basis.

In principle, the economic partnership model requires that all debts other than purely personal ones be deducted from the gross value of each spouse's property in order to arrive at his or her net worth. It also provides for less discretion to attribute debts according to the ability to pay. However, it is possible that some aspects of the above suggestions could be

used even if the economic partnership model were adopted.

(c) unequal division of family property

Under the *Matrimonial Property Act* it is possible in some circumstances to apply to the court for an unequal division of matrimonial assets and a division (equal or otherwise) of non-matrimonial assets. The situations where it is possible for the court to make an unequal division is set out in s.13. Section 13 states:

> *Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:*
>
> *(a) the unreasonable impoverishment by either spouse of the matrimonial assets;*
>
> *(b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;*
>
> *(c) a marriage contract or separation agreement between the spouses;*
>
> *(d) the length of time that the spouses have cohabited with each other during their marriage;*
>
> *(e) the date and manner of acquisition of the assets;*
>
> *(f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;*
>
> *(g) the contribution by one spouse to the education or career potential of the other spouse;*
>
> *(h) the needs of a child who has not attained the age of majority;*
>
> *(i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;*
>
> *(j) whether the value of the assets substantially appreciated during the marriage;*
>
> *(k) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse;*

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

(m) all taxation consequences of the division of matrimonial assets.

Although these are broad provisions, in fact, an unequal division is generally difficult to obtain.[72] The Commission considered whether a new *Family Law Act* should include (1) the same discretion regarding unequal division; (2) more discretion on the part of judges, or, (3) less discretion. In principle, the Commission felt that it was important to provide for some discretion to account for the circumstances currently covered. The Commission was concerned however, about the need to more clearly provide for judicial consideration of the length of relationships. This issue is particularly important if the "integrated model" is adopted as the basis for the new *Act* in that it includes all assets owned by each of the people at the time they began the relationship. Where a relationship is very short, a 50/50 division

would clearly create unfairness. While this would be covered under the current section 13, the Commission feels that if the integrated model is the basis of the new *Family Law Act* there should be a clearer direction to the courts to consider this factor. This will allow for greater predictability for people in the relationship. If the economic partnership model is adopted, the length of the relationship will be automatically part of the calculation which would have excluded pre-marriage assets of each person. Nevertheless, the Commission would suggest retaining this discretion to avoid unfairness.

(d) assets exempt from the definition of "family property"

(i) gifts and inheritances

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

Some Commissioners believe that such assets should no longer be exempt. Others support

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[72] *Tibbetts* v. *Tibbetts* (1993), 119 N.S.R. (2d) 26 (CA).

the current exemption. The Commission is proposing two alternatives for the treatment of gifts and inheritances and calls for comment.

One approach is to maintain the current exemption in some form.[73] There are two main reasons for this exemption. First, it is considered that the acquiring of such property is not due to the efforts of either spouse, and is extraneous to their relationship. Since it does not arise as a result of a "contribution" by either spouse, its exclusion is not unfair. Second, the exemption is considered to accord better with the desires of the person giving the gift or inheritance, who is usually a parent or close relative. They would normally prefer to see such property left with the spouse they have benefitted rather than see it shared with the ex-spouse. The current provision tries to strike a balance between the assumption, recognized in most provinces, that gifts and inheritances are usually meant to be personal to the person receiving it or to be passed on to that person's children; and the reality that certain tangible gifts may be regularly used by the family as family assets (or in the case of money, used to acquire what would otherwise be family assets) and therefore may give rise to reasonable spousal expectations that such assets will be shared.

Another approach is to end the exemption and allow gifts and inheritances to be divided, or their value shared, like any other family asset. Several reasons can be advanced in favour of ending the exemption. If intimate relationships are regarded as units of economic welfare rather than just partnerships, the source of the income or asset is not all that relevant. Parties to such relationships plan their economic lives together, and often treat such assets as belonging to the couple rather than to the individual who received the gift. For example, a person receiving an inheritance might pay off the mortgage on the family home. The current exception to the exemption, which allows gifts and inheritances to become family assets to the extent that they are "used" by the family, is an attempt to recognize this fact. It is a test which is not always easy to apply, however, and could be avoided entirely by making such assets in principle divisible, subject to being excluded under an application for an unequal division. Such a change would provide a possibly increased role for judicial discretion, but there is already considerable room for judicial discretion with the "use" test. Finally, it can be argued that the wishes of the person giving the gift should not be controlling in this instance. The "dead hand" should not be able to prevail over the substantial public policy considerations which motivated the passage of matrimonial property legislation.

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

This exemption probably contemplates personal injury awards, but it does not draw any distinction between the portions of an award which deal with non-monetary losses (e.g., pain and suffering) and with future care expenses, which should properly remain exempt, and those portions dealing with lost income. The Newfoundland *Family Law Act* provides a

[73] It should be noted that the exclusion or inclusion of gifts and inheritances as matrimonial assets is not necessarily determined by which general approach to division one adopts under part (a) above.

possible model in that it exempts personal injury awards from division, "except the portion of the award that represents compensation for economic loss".[74] However, where a spouse receives a substantial sum as compensation for permanent lost earning capacity not long before separation, it may be unfair to divide that capital sum, since it relates principally to a period after termination of the relationship. The spouse receiving such an award would, in all likelihood, remain liable for maintenance, even if the sum itself is not divided. The Commission is unresolved on this point and calls for comment.

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

The Commission is unclear as to the original intent of this section, which must be read in conjunction with s.4(2). It has received little judicial interpretation. Insurance policies may be taken out for a variety of reasons unconnected with risks to property: accident insurance and disability insurance are two kinds which come to mind. People may also take insurance to provide them with an income stream upon retirement, in the form of an annuity. In the latter example, it is not clear why the benefit should not be shared, since presumably it was paid for with money which would otherwise have been available to the household.

In the case of accident and disability insurance the policy issue is more difficult. At present such payments are excluded from sharing under s.4(1)(c), presumably according to the same rationale which allows personal injury awards to be exempted under s.4(1)(b). The argument in favour of non-division is that the spouse subject to the disability is receiving insurance benefits for a very specific and personal reason; these are not an ordinary form of property. The argument in favour of division is based on treating the household as a unit of economic welfare. The insurance benefits are simply meant to make up lost employment income, and their source is not relevant. A third approach would be to treat disability insurance benefits, which are normally paid periodically rather than as a lump sum, as an issue relating to maintenance rather than property division. In other words, they would be excluded from division under the new *Family Law Act*, but taken into account under the *Divorce Act* or the *Family Maintenance Act*. The Commission calls for comment on this issue.

(iv) business assets

Four provinces presently include business assets as matrimonial property: Alberta, Manitoba, Ontario, and Saskatchewan. The Maritime provinces, British Columbia, Newfoundland and Quebec do not. Ontario did not initially include business assets in its definition of matrimonial assets, but was moved to do so in 1986. There is no doubt that the line between business assets and matrimonial assets has been a difficult one for the Nova Scotia courts to draw. Without going into a lengthy discussion of the various case authorities, it is clear that there are many decisions which are difficult to reconcile.[75] In

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[74] *Family Law Act*, R.S.N. 1990, c.F-2, s.18 (c)(ii).

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

particular, the courts have tried to draw a line between assets held for long-term investment or appreciation, which tend to be characterized as providing security during retirement and are therefore matrimonial assets, versus assets held for short-term investment or speculation, which are treated as business assets and excluded from division. Obviously any such classification, relying on intentions of the parties which may not be well-formulated at the outset and which may change over time or which may not be shared by both spouses, will be a problem.

The current exclusion of business assets is difficult to justify on the basis of either theory of property division. If looked at on the basis of economic partnership theory, each spouse is entitled to one-half of whatever "net worth" was built up over the marriage, except in respect of those assets which are purely personal to one spouse. Business assets are not "purely personal", since in most cases the business of one or both spouses will very much determine the way in which a couple lives. If looked at from the perspective of the "integrated" theory, similarly it would appear that business assets should be included as shareable assets.

Ending the exempt status of business assets would also end an anomaly which exists under the present system. At present the pension entitlements earned by an employed spouse during marriage are shareable, but the other self-employed spouse's business is not. This does not seem to represent either formal or substantive equality. Logically, either both should be shareable or neither should be shareable.

The termination of the exempt status of business assets does, however, pose a practical issue of how such assets are to be shared. At present, all those jurisdictions which provide for business assets to be shared have adopted a "sharing of value" rather than "sharing of assets" approach. This approach means that no property rights are created in one spouse with regard to business assets held by the other spouse. This is important because it avoids what may be potential disruption for a business if a "new" partner is suddenly part owner of an enterprise. Such an involvement may result in ending the business thereby defeating the purpose of the division of the asset itself. In most provinces the claims of the non-business owning spouse are resolved by sharing the increase in value of the business over the marriage, rather than sharing the business itself. A cash payment is the usual way of resolving such claims.

As outlined above, one option is to adopt a sharing of value approach. If that is not done, however, and the new *Family Law Act* retains the integrated model with its sharing of assets approach after business assets are included, then some consideration will have to be given to the mechanics of sharing. It would create considerable uncertainty and transaction costs if the spouses of business owners were suddenly perceived to be "shadow partners" who might have to be consulted about business decisions. Another option which the Commission favours is that irrespective of which theoretical approach is adopted (the economic partnership or integrated model) for family assets in the *Act*, the more sensible approach to division of business assets would appear to be to make use of the valuation or economic approach for this form of asset.

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

This is a new exemption recommended by the Commission. It is intended to respond to the situation where furniture necessary to the care and maintenance of a child or children is treated as an asset of the custodial parent, which means that it is treated as the property of that parent and subject to equal division. The result is that the value of the custodial parent's property can be unrealistically inflated. A number of judges deal with this problem at present by ordering an unequal division of household furniture in favour of the custodial spouse.[76] This suggestion will have the same result.

[76] *Clancey* v. *Clancey* (1991), 99 N.S.R. (2d) 147 (TD); *MacDonald* v. *MacDonald* (1994), 126 N.S.R. (2d) 17 (SC).

The Commission suggests that:

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

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

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

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

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

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

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

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

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

6. Rights in relation to the family residence

(a) language

If the Commission's suggestions regarding extension of the new *Family Law Act* to cover cohabiting couples are accepted, the term "matrimonial home" will no longer be appropriate. Accordingly, the Commission suggests that a new term, "family residence", be used.

(b) exclusion of leaseholds

Under section 3(1) of the *Matrimonial Property Act* a matrimonial home is defined as "the dwelling and real property occupied by a person and that person's spouse as their family residence and in which either or both of them have a property interest other than a leasehold interest". Nova Scotia and Newfoundland are the only provinces in Canada which do not permit a leasehold interest to qualify as a matrimonial home. For purposes of property division, the exclusion of leasehold premises is probably not significant. Long residential leases are not common in the Canadian context, so that it is unlikely that a spouse would want to claim half the capital value of the unexpired portion of such a lease.

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

In some provinces courts have awarded possession of leased premises to a spouse whose name is not on the lease. Both Alberta and Saskatchewan give the court power to deem that

spouse a tenant for the purposes of the lease in question.[77]

In its Report *From Rhetoric to Reality Ending Domestic Violence in Nova Scotia (1995),* the Commission recommended that the *Matrimonial Property Act* be amended to include leasehold premises within the definition of matrimonial home, and it repeats that recommendation here in connection with the new *Family Law Act*.

(c) orders for exclusive possession and domestic violence

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

The Commission notes that it has heard some concern expressed that inclusion of domestic violence as a factor in such proceedings might be seen as a step backward – a return to the concept of fault in divorce. There has also been some concern that if this approach is taken then there will be more reliance on civil remedies instead of treating the matter as purely criminal law. While the Commission's preliminary view is that the recommendations in the *Domestic Violence* Report are the appropriate direction for reform, it seeks public comment on these concerns.

The Commission did not specify in its 1995 Report how domestic violence should be taken into account when applications for exclusive possession were heard, and wishes to put forward two possibilities and ask for comment. One possibility is the creation of a specific civil law procedure to be used in cases of domestic violence. A model which is used in some jurisdictions is an *ex parte* application for exclusive possession of the matrimonial home, returnable within 48-96 hours. An *ex parte* application is one which does not have to be served on the other party, and it is used only in situations where urgent relief is required. Any court order made in response to such an application is of short duration, since the court has not been able to hear both sides of the story. Usually a day is set for the hearing of the other side's case, at which time, the court decides whether an interim order for possession should be made. This order would govern the situation until the filing of an application for division of assets under the *Act* or until such other time as the court should specify.

Another alternative is to leave the existing system intact. Under section 11(4) a court may

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

[78] At 102.

make an order for possession of the matrimonial home where other provision for shelter is not adequate in the circumstances, or it is in the best interest of a child to make such an order. The new law could add the factor of domestic violence to this list of factors which allow a court to make an order, particularly since under section 19 the court can already make such interim orders "as it considers necessary for the proper application of this *Act*", and the Civil Procedure Rules provide that an application for an interim order can be obtained on short notice. It is possible at present, in theory, to achieve something like the civil remedy outlined above, although this is less certain outside Halifax, where the Supreme Court is not always "on call".

The advantage of this alternative is that it is more respectful of the rights of both sides. A possible disadvantage is that it may not be speedy or accessible enough in cases of genuine emergency.

In general, the Commission has found that one concern, at least for lawyers acting on behalf of clients needing these orders, is that the order be available in the Family Court which is seen as more accessible and less costly.The Commissioners note that progress toward the realization of a Unified Family Court is underway, with the province having recently made public a *Proposal to Establish a Family Division of the Supreme Court of Nova Scotia*.[79]

A related issue is whether a new *Family Law Act* should contain a provision allowing for punishment if an exclusive possession order is violated. As with any other order of the court the Commission notes that, in principle, a breach of the order would be subject to contempt of court provisions. British Columbia, Ontario and Saskatchewan currently provide some sanctions, but no province maintains statistics on how often these sanctions are used. The Commission suggests that breach of these orders in the context of domestic violence should be responded to in the same way that the justice system has currently been directed by the Government of Nova Scotia to respond to other incidents of domestic violence: zero tolerance in enforcement.

[79] (Department of Justice, Province of Nova Scotia, January 1996).

The Commission suggests that:

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

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

3. **The Commission notes the recommendation in its Final *Report Rhetroic to Reality Ending Domestic Violence in Nova Scotia* that domestic violence be taken into account as a basis for granting orders for exclusive possession of the family residence, and suggests that an *ex parte* civil remedy be available in such circumstances. However, the Commission notes that there is some concern about whether the adoption of this approach might reinstate fault as an element in property division and soften the criminal aspect of domestic violence. The Commission seeks comment on these concerns.**

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

7. Division of pensions

(a) the current treatment of pension division

After initial hesitation in the Nova Scotia courts, the Supreme Court of Canada decided that pensions could be considered matrimonial assets under the *Matrimonial Property Act*.[80] There was considerable confusion, however, about how pension entitlements should be valued, and about the mechanics of the division. Pensions are in some sense an ongoing asset, where there is a need to assign a right to an amount reflective of the length of the relationship. This could be done by valuing the pension during the time of the relationship and then simply paying the spouse in cash the amount they are entitled to. However the true value of a pension is really only realized when it matures and is then paid out on retirement. To provide someone with a lump sum amount does not then truly reflect the value of the pension if received later in life. Until 1987, in Nova Scotia it was not possible for a court to direct division at source of an unmatured pension on marriage breakdown. Therefore, the pension benefit itself was not divided, but it was valued and the member spouse was required to transfer cash or other property to the non-member spouse to acquit the

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

obligation. If marriage breakdown occurred after a pension was being paid out (in pay), the spouse in receipt of the pension could execute a trust agreement whereby he or she agreed to hold a set portion of each payment in trust for the non-member spouse.

As of January 1, 1988, the *Pension Benefits Act* provided a mechanism for the division of pension benefit in an unmatured pension, whereby the non-member spouse would be entitled to a separate pension upon the commencement of the member spouse's pension, or the normal retirement date of the member, whichever was the earlier. A court order including such a division is binding on pension plan administrators, and in effect makes the non-member spouse a member of the plan in some respects.[81] Upon the earlier of the two dates mentioned, the plan administrator will set up a separate account for the non-member spouse, and he or she will begin receiving payments directly from the plan. From that point on, the pension will not be affected by the death of the member spouse, since the separate pension of the non-member spouse will have been calculated using actuarial assumptions appropriate for that spouse (s. 61(4)(e)). Nor will the pension of the member spouse increase if the non-member spouse dies after beginning to receive a separate pension (s. 61(4)(f)). If the member spouse should die before retirement, the practice is that the non-member spouse's entitlement is preserved, although that is not presently stated in the *Act*.[82] If the non-member spouse dies before receiving the separate pension, his or her estate is entitled "to a refund of the contributions plus interest made in respect of that spouse's proportion of the pension benefit earned during the marriage" (s. 61(4)(c)).

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

There are two general limitations on the power of the court under s. 61 of the *Pension Benefits Act*: it may not award more than 50% of the pension benefit earned during the marriage to the non-member spouse; and it may only consider contributions made during the marriage. This leads to some inconsistency since the *Matrimonial Property Act* provides that all property of both spouses which they own at marriage or acquire thereafter, unless specifically exempted, falls within the category of matrimonial assets. In *Dort* v. *Dort*, for example, the Court of Appeal decided that it was wrong for the trial judge to exclude an Armed Forces pension from the division of assets under the *Matrimonial Property Act* solely

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

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

on the basis that all contributions to it were made before the marriage.[83] The conditions for applying the *Pension Benefits Act* were not met, but the court could still deal with the value of the pension under the *Matrimonial Property Act*.

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

In considering suggestions for reform it is important to understand that pensions are a very special form of property. They are established for the purpose of providing financial security for employees during their retirement years, and there is a strong public interest in ensuring that pension funds remain financially solvent and thus able to satisfy liabilities which will arise over a very extended period of time. It is this public interest which justifies the very extensive regulatory apparatus contained in the *Pension Benefits Act* of this province, and similar legislation in every other province and at the federal level. The public interest in ensuring financial security upon retirement is so strong that members of pension plans are forbidden from dealing with their entitlements as they would with other forms of property. No interest in a pension can be assigned, charged, or given as security, and money payable under a pension plan is exempt from execution, seizure or attachment (ss. 70, 71).[84] The general principle is that money can be withdrawn from a pension plan only in the situations contemplated by the *Act*, and any other form of dealing with such funds is strictly forbidden. Given the stringent treatment of pension contributions and entitlements under existing legislation, one might question whether pension benefits should be divided at all. When people retire at present, their pensions usually provide them with substantially less income than they had while employed. If such pension rights are divided, clearly the financial security of employed persons during their retirement years will be affected to some extent. The response to this objection is that there is also a public interest in ensuring an equitable sharing of family assets upon marriage breakdown. Achieving this goal may require that a spouse who has had the opportunity to acquire the prospect of financial security upon retirement may be required to forego some of that security in order to provide some security to an ex-spouse who might otherwise have had none, or very little. The basic philosophy of the *Matrimonial Property Act* is that each spouse is entitled to an equal share of family assets regardless of the role which he or she played during the marriage. For many couples, the pension entitlement of one or both spouses will be the primary "investment" (aside from the family home) which remains at the end of a relationship.

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[83] (1994), 126 N.S.R. (2d) 313. When remitted to the trial judge, however, an unequal division was awarded which left all the pension benefit with the husband, on the basis that the benefit did not flow from the marriage.

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

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

All provinces now treat the division of pensions upon marriage breakdown as a matter of right rather than need. Given the values involved in the division of pensions, that of ensuring equitable recognition of contribution, a change in approach does not seem appropriate. However, it does seem appropriate to temper the "division as of right" approach by looking at the relative need of the parties in one specific situation. The Commission has suggested that the exemption of business assets be ended, but it has not made a suggestion on the status of gifts and inheritances. If their exempt status is maintained, the situation could arise at the breakdown of a relationship that one party is relatively wealthy by reason of such assets which are beyond the reach of the other party, whose only asset is a relatively modest occupational pension. While one might hope that the wealthier party would not insist on a division of the pension in such cases, there is no guarantee of such a result. The court should be given a discretion to deny division of the pension in such cases, under the provision for the unequal division of assets.

At the time when the *Pension Benefits Act* was adopted, it was not clear that pensions were going to be divisible assets under the *Matrimonial Property Act* and it was not contemplated that there were going to be two approaches to dealing with pensions on marital breakdown. There is nothing wrong with spouses having a number of options about how to order affairs after marital breakdown, but at present there are some inconsistencies between the two *Acts* which need to be addressed. The Commission believes that the best way to achieve consistency is to locate all the provisions relating to pension division on the termination of a relationship in the proposed *Family Law Act*, as has recently been done in British Columbia.[85] This would have the effect of treating pensions like other forms of family property with regard to the presumption of equal sharing and the circumstances justifying an unequal division, with one exception outlined below.

As noted above, the two Nova Scotia *Acts* are inconsistent with regard to whether pre-marital pension entitlement is shareable. This inconsistency will be resolved when the final decision is made about which approach to property division will be taken. Under the "economic
partnership" approach, pre-marital pension entitlement would be excluded, while under the "integrated" approach, it would be included, subject to judicial discretion to exclude it.

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

With regard to pension benefits earned during marriage or during cohabiting relationships, the presumption of equal sharing should be stated clearly. The current floor of a 50% interest to the member spouse should be retained. This provision will mean that pensions are treated differently from other matrimonial assets, where no such floor exists upon an unequal division, but such treatment is justified by the unique nature of pension assets. All other provinces have a similar provision for this reason. Where there is more than one potential "spouse" claiming a right in a member's pension, the length of cohabitation in a relationship should be the exclusive criterion for attributing pension entitlement.

(b) methods of dividing pensions

There are questions that also arise as to the best way to divide pensions fairly. Currently there are several methods:

(i) valuation and asset trade/cash buyout

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

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

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

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

An immediate payout upon marriage breakdown of the calculated value of the non-member spouse's entitlement, into another locked-in pension vehicle, is not permitted.[86] Nonetheless, the Commission has heard of cases where this is currently being done by some trust and insurance companies at the request of both spouses. Clearly there is a demand for such an option, which is permitted in several provinces and being contemplated in others. Non-member spouses might want to exercise this option if they feel that their own plan is likely to have a better rate of return than that of the member spouse. However, at present it is not

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

clear on what basis the commuted value of the non-member spouse's entitlement is being determined. It is possible that in requesting an immediate payout, the non-member spouse is accepting less than he or she would ultimately receive under a benefit split.

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

There is a debate over whether it is appropriate in any case to take such future enhancements into account. The Alberta Law Reform Institute has suggested that it is unfair to the member spouse to take post-separation enhancements into account. The British Columbia Law Reform Commission meanwhile, has refused to allow immediate payouts on the basis that there is no fair way to evaluate the non-member spouse's share.[87]

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

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

Although the *Pension Benefits Act* contemplates the eventual payment of a separate pension in cases where the member's pension is unmatured, it does not expressly permit division at source in cases where the pension has matured (i.e., where the member has retired and the pension is in pay) by the time marriage breakdown has occurred. Aside from an asset transfer/cash buyout under the *Matrimonial Property Act* which leaves the member with the entire pension, the only alternative is to set up a trust agreement, where the member receives the entire periodic payment but holds a specified portion of each payment in trust for the non-member spouse. Such arrangements leave the non-member spouse vulnerable and pose a number of practical problems regarding income tax, etc. A more convenient arrangement would be to allow division at source, whereby the pension plan would send out two cheques directly to each ex-spouse, having first made the appropriate income tax deductions. Anecdotal evidence suggests that some pension plans already do this, in spite of there being

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

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

no authorization for it under existing law.

It is suggested that the two principal modes of dealing with pensions on the termination of a relationship continue to be valuation and asset transfer/cash buyout, as currently carried out under the *Matrimonial Property Act*, and a deferred benefit split, as currently carried out under the *Pension Benefits Act*. The choice of method should initially be left to the parties, but if they cannot agree, it should be presumed that a deferred benefit split will be ordered, unless it is clearly inequitable or impracticable to do so. This weighting aims to satisfy the policy goal that pension funds be preserved to provide security in retirement, unless there is strong reason to act otherwise. The presumption of a deferred benefit split is in accordance with the current practice of the Supreme Court of Nova Scotia. Justice Bateman has recently stated that, especially in the case of a non-member spouse who has not been employed outside the home, "it is particularly important to preserve future pension entitlement".[89]

The Commission suggests that:

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

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

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

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

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

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

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

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

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

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

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

8. Rights of surviving spouses on death

The failure to address the interaction of the various inheritance rights which arise on the death of one spouse was probably the single biggest drafting failure of the 1980 *Act*. A surviving spouse may have rights under a will, or if there is no will under the *Intestate Succession Act*, and may also have a right to apply for additional relief under the *Testators' Family Maintenance Act*, in addition to the rights granted under the *Matrimonial Property Act*. Section 12(1)(d) simply provides that rights under the *Act* are "in addition to the rights that the surviving spouse has as a result of the death of the other spouse, whether these rights arise on intestacy or by will". Read literally, the section would allow surviving spouses to claim virtually all assets of the deceased spouse in many cases, and this result cannot have been intended. Few cases have arisen to assist in interpreting this provision.

The new Part IV of *The Marital Property Act* of Manitoba provides a model which might

well be adapted to Nova Scotia.[90] The personal representative of a deceased spouse is required to serve on the surviving spouse a notice advising him or her of their possible rights under *The Marital Property Act,* and that an application must be launched within six months of the grant of letters of probate or administration; the notice itself must be served within one month of the grant. The question of what is to be included and excluded in calculating the equalization payment (similar to a division of assets on divorce) is specifically addressed, and equalization on death is expressly stated not to be subject to any variation by the court.

The Manitoba *Act* also states that intestate succession and testamentary benefits are to be deducted from the equalization payment, which presumably means that where the former are higher than the latter, there will be no incentive to apply for equalization. However, *The Dependants Relief Act* of Manitoba was also amended to clarify that a spouse entitled to division of the assets may also apply for an order for maintenance and support from the estate of the deceased spouse, if the equalization payment will still leave the spouse without adequate provision for his or her proper support. An equalization payment is stated to have priority over all legacies and over orders made under the *Dependants Relief Act*.

The Commission suggests that this approach would be an appropriate way to deal with these issues in the new *Family Property Act.*[91]

The Commission suggests that:

1. **The new *Family Law Act* should specify that when a spouse applies for a division of family property on the death of the other spouse, the applicant spouse must deduct any benefits received under the will or intestacy of the deceased.**

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

9. Mediation of family property division

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

[91] The Commission is not recommending any changes to the definition of "spouse" in the *Intestate Succession Act* or the *Testators' Family Maintenance Act* at this time. Both *Acts* currently include only legal spouses. However, if the suggestions in this Paper are accepted, the definition of "spouse" in those two *Acts* should be reviewed. The Commission notes that the Alberta Law Reform Institute has recently suggested that the definition of "spouse" in the Alberta *Intestate Succession Act* be amended to include opposite sex cohabitants who have lived together for three years or are the parents of a child: *Reform of the Intestate Succession Act, Report for Discussion No.16* (January 1996).

Mediation and other conflict resolution processes are increasingly being used in Canada and elsewhere to deal with family law matters.[92] This reflects the view that the adversarial process of the court room creates even more problems for couples and any children involved in these personal conflicts. The court process is also seen as very costly to the individuals concerned and the public. The Commission has recommended previously that there should be a Unified Family Court in Nova Scotia which is fully resourced to provide a range of services including mediation. The Commission notes a recent proposal to create such a court in Nova Scotia, which includes both education on conflict resolution methods for parents and couples as well as provisions for court-connected mediation opportunities for some family law issues such as custody and support.[93] Mediation is believed to be a method which enhances the personal autonomy of the individuals while also equipping them with better communication and conflict resolution skills to deal with other matters that may arise. A number of provinces have expressly provided for the possibility of court-connected mediation in their matrimonial property legislation.[94] The Commission is aware, however, that concerns have been raised by some people that mediation may not always operate to the benefit of the person with less power (usually the woman) in the relationship. Most mediation processes in Canada provide for screening out cases where domestic violence may be occurring or may be a factor in the relationship. In addition to this concern, with which the Commission agrees, there are also some concerns that mediation might perpetuate existing inequalities. The Commission notes that mediation is a process that the parties may always choose to assist them in settling disputes regarding the division of property. The question that the Commission is considering is whether court-connected publicly funded mediation should be available for property division issues, and, if so, should it be a mandatory or purely optional procedure? The Commission suggests that where publicly funded mediation is available to resolve some family conflict then, in principle, it would seem appropriate to seek to resolve all related conflicts at the same time. However, the Commission invites comments on both these issues.

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

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

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

The Commission suggests that:

1. In principle, court-connected publicly funded mediation should be available to deal with all family law disputes in appropriate cases, including family property division. However, the Commission invites comment on this question and also whether a new *Family Law Act* should require that the parties attempt to resolve disputes over property through mediation before going to court.

10. Domestic contracts and legal advice

The *Matrimonial Property Act* refers at present only to "marriage contracts", in which spouses may agree on their respective rights and obligations while cohabiting, and upon separation, death or divorce, including the power to "opt out" of the *Act*. This power is subject to two constraints: a court may disregard any provision in a marriage contract which is unduly harsh, fraudulent or unconscionable; and any provision contrary to the best interests of a child.

The Commission suggests that, consistent with other language changes in the *Act*, these should be called "domestic contracts" rather than "marriage contracts".

One issue that arises with respect to such contracts is the need for independent legal advice to people entering into them. The *Matrimonial Property Act* is currently silent on the issue of whether parties to a marriage contract should have independent legal advice. The Commission understands that lawyers are seldom willing to act for both sides in such matters. However, the Commission feels that an explicit provision would impress upon the parties the desirability of obtaining independent legal advice. The New Brunswick *Marital Property Act* states that a court may disregard any provision of a domestic contract "if the spouse who challenges the provision entered into the domestic contract without receiving legal advice from a person independent of any legal advisor of the other spouse, where the Court is of the opinion that to apply the provision would be inequitable in all the circumstances of the case".[95]

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

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

The Commission suggests that:

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

2. **The current power of the court to overturn a domestic contract where it is unduly harsh, fraudulent, unconscionable or contrary to the best interests of a child should be maintained.**

3. **There should be a new provision dealing with the need for independent legal advice to each of the parties.**

11. Other issues

The suggestions of the Commission in this project are not yet finalized and it is recognized that there may be some concerns that have not been addressed in these suggestions. There are also a number of technical legal issues which need to be addressed in a Final Report including interim measures, the presumption of advancement and the limitation period for applications for division under the Act. The Commission invites comments on these or any other family property matters not dealt with in the Paper which you would like to see addressed.

IV SUMMARY OF SUGGESTIONS

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

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

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

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

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

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

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

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

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

9. The *Act* should apply to:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

33. The new *Family Law Act* should specify that when a spouse applies for a division of family property on the death of the other spouse, the applicant spouse must deduct any benefits received under the will or intestacy of the deceased.

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

35. In principle, court-connected publicly funded mediation should be available to deal with all family law disputes in appropriate cases, including family property division. However, the Commission invites comment on this question and also whether a new *Family Law Act* should require that the parties attempt to resolve disputes over property through mediation before going to court.

36. Marriage contracts should be called "domestic contracts" in the new *Family Law Act* and should be available on the same basis as they currently are under the *Matrimonial Property Act*.

37. The current power of the court to overturn a domestic contract where it is unduly harsh, fraudulent, unconscionable or contrary to the best interests of a child should be maintained.

38. There should be a new provision dealing with the need for independent legal advice to each of the parties.