Research Priorities Report

Submitted to the Board of Governors
Of the Law Commission of Ontario

By:
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A. Introduction & Background

In February of 2007, the Law Commission of Ontario (LCO) requested a Research Priorities Report recommending projects and initiatives that the LCO might undertake as its initial research priorities.

The purpose of this Report is to provide a resource to the Board of Governors, the Executive Director and the Research Advisory Board in the process for selecting the first slate of LCO research projects.

This Report will elaborate:

- the basis upon which the recommended projects have been identified,
- the nature of the problems or needs which give rise to the project(s) identified,
- the potential significance or importance of the projects, and
- the likely impact of the proposed projects.

Part of the mandate of this Report was to engage in consultations with each of the organizations who are participating in the Memorandum of Agreement and other organizations with expertise or interest in law reform. The goal of the consultations was to be as inclusive as possible within the time and resource constraints of this Report. Consultations have taken place in person, by phone, fax, email and written correspondence. Those contacted were provided with background information on the LCO, including that the Agreement creating the LCO sets out that its purpose is to recommend law reform measures to:

(a) enhance the legal system's relevance, effectiveness and accessibility;
(b) improve the administration of justice through the clarification and simplification of the law; and
(c) consider the effectiveness and use of technology as a means to enhance access to justice.

They were also told that the Report of the Creative Symposium on the LCO held on November 30, 2006, had further emphasized, "The Law Commission must be able to consistently demonstrate that work it is doing is valuable and relevant."

Those contacted were asked to briefly explain their affiliation, the topic of their proposed project, why they believe it should be a priority for the LCO, and what the impact of the project would be.

Below, I summarize the proposals submitted as part of this consultation, discuss the criteria by which one might evaluate these proposals, and set out the recommended projects.

B. Summary Proposals Received

While the timelines of this Report precluded a full and comprehensive consultation on possible law reform, over 60 distinct proposals for research ideas were received, including submissions from academics representing every law school in Ontario, from all levels of Court, the Law Society, the Law Foundation, a host of legal aid clinics, professional and public interest organizations and from individuals.[1] Some of these proposals overlap with the brief listing of ideas generated as part of the Creative Symposium, but for the most part the list contained in the Report of the Creative Symposium should be treated as distinct.[2]

Below, I attempt to organize the various proposals into six categories for the purpose of this analysis:[3] "Access to Justice," "Social Rights," "Family and Estates Law," "Administration of Justice," "Corporate and Commercial Law," and "Law and Government".

1) Access to Justice

A number of proposals may be clustered under the category of "access to justice". The phrase 'access to justice' has no single meaning. Professor Rod Macdonald recently characterized the term as an umbrella covering a variety of relationships between individuals and the justice system.[4] While this relationship was once linked to concerns over how litigants could obtain affordable legal representation (which was addressed primarily through legal aid), more recent approaches have included organized pro-bono, creating specialized courts (*Gladue* courts, domestic violence courts, etc), replacing courts with tribunals, promoting ADR and Collaborative Law, replacing tort with no-fault accident compensation schemes, community and public legal education, self-help and the prevention of disputes. Access to justice is also closely linked to the promotion of equity, fairness and the elimination of barriers to justice (whether physical, psychological, financial or social). In this sense, access to justice raises questions about "the degree to which the citizen has access to and can participate in the procedures by which substantive law is made."[5] The "access to justice" proposals submitted include:

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[1] All of these submissions can be provided on request. An appendix to this Report will contain a more detailed summary of all the submissions.

[2] One reason for this is that the list contained in the Creative Symposium Report (pp.1-3) does not contain the rationale or anticipated impact of the projects, as do the submissions received for this Report.

[3] Not every proposal received is summarized herein – in some cases, a substantially similar proposal was received from more than one source and in these cases, I consolidated the proposals into one, and in other cases the threshold for inclusion was not met, for example, as some proposals were to fund particular groups to undertake research and not suggestions for projects to be undertaken by the LCO.

[4] Rod McDonald, "Access to Justice in 2003: Scope, Scale and Ambitions" (Paper prepared for the Symposium on Access to Justice, Law Society of Upper Canada, May 2003).

[5] For discussion, see Martin Partington, "The Relationship Between Law Reform and Access to Justice: A Case Study – The Renting Homes Project" (2005) 23 Windsor YB of Access to Justice 375.

- **Access to Justice by Aboriginal People** (proposed by Aboriginal Legal Services)
- **Review of the Class Proceedings legislation** (proposed by a Superior Court Justice)
- **A Study of how to address self-represented litigants in civil justice** (proposed by a U. of T. law professor)
- **An Empirical Study of ADR processes in Ontario, including cross-jurisdictional comparisons** (proposed by the ADR section of the OBA)
- **A Study of the optimal relationship between legal aid and pro bono services** (proposed by Community Legal Education Ontario (CLEO))
- **A Study of self-help tools and resources to enhance access to justice** (proposed by Community Legal Education Ontario (CLEO))
- **A study of the role and value of public participants in the justice system** (proposed by MAG)

2) Social Rights

Social rights refer to a spectrum of legal responses to material individual and community needs. This spectrum incorporates economic rights, labour rights, environmental rights and programs aimed at the protection of vulnerable individuals and groups.

This category raises the question of the extent the LCO should distinguish between the reform of legal and administrative structures on the one hand, and legally necessary or desirable operational policies on the other hand.

- **A Study of housing rights in Ontario** (proposed by Kensington Bellwoods Community Legal Services)
- **A Study of environmental justice in Ontario** (proposed by a law professor from Osgoode)
- **A Study of Elder Law: defining a coherent approach to protecting the rights and interests of the elderly in Ontario** (proposed by a law professor from Queen's)
- **A Study of the accountability of Provincial and Municipal Governments for implementing social and economic rights protection under International Human Rights Law** (proposed by a law professor from Osgoode and the Social Rights Advocacy Centre)
- **A Study of barriers to disabled individuals through Provincial Laws** (proposed by the Alliance for the Equality of Blind Canadians)
- **A Study of the procedural barriers faced by applicants to and recipients of social benefits in Ontario** (proposed by the McQuesten Legal and Community Services)
- **A Study of improved benefits and protections for self-employed persons and contract workers in Ontario** (proposed by the Feminist Legal Analysis Section, Ontario Bar Association)
- **A Review of the *Employment Standards Act*** (proposed by the Labour Section, Ontario Bar Association)

3) Family & Estates Law

Few areas of law could claim to touch as many lives, and in as fundamental ways, as family law and estates law. While both areas were frequent subjects of study for the predecessor Ontario Law Reform Commission,[6] neither of these areas has been the subject of substantial law reform since the OLRC disbanded. The cluster of proposals relating both to substantive and procedural aspects of family/estates law reform include:

- **Substantive** –
  - **A Study of the statutory division of pensions upon family dissolution** (proposed by law professors at U. of T., Queen's and Dalhousie)
  - **A Study of the scope of legal definition of the family** (proposed by law professors at Osgoode. Ottawa (Common Law) and Queen's)
  - **A Study of the legal gaps leading to continued discrimination against same sex families** (proposed by a law professor at Queen's)
  - **A Review of the bonding requirement under the *Estates Act*** (proposed by the Trusts and Estates Section of the OBA)
  - **A Review of the *Succession Reform Act*** (proposed by the Trusts and Estates Section of the OBA)
  - **A Review of the *Family Law Act* equalization provisions relating to death** (proposed by the Trusts and Estates Section of the OBA)
  - **A Review of the Power of Attorney System in Ontario** (proposed by a Bencher and former Treasurer of the Law Society of Upper Canada)
  - **A Study of tax and same sex family benefits** (proposed by a law professor from Queen's)
  - **A Study of the establishment of a mandatory registry that records the genetic parents of all children born in Ontario** (proposed by MAG)

- **Procedural** –
  - **A Review of alternatives to self-represented litigants in Family Law** (proposed by law professors at U. of T., Osgoode and Queen's) –
  - **A Review of enforcement of custody and access orders** (proposed by the Ontario Court of Justice)
  - **A Review of the coordination of multiple court responses (family court, criminal court, civil courts, etc) to family breakdown** (proposed by the Ontario Court of Justice)
  - **A Study of the potential adjudicative models which would permit full jurisdiction in one location in family law matters (e.g. hybrid court model, expanded jurisdiction of provincial court, etc)** (proposed by MAG)

[6] See, for example, OLRC, *Report on the Administration of Estates of Deceased Persons (1991), Report on family property law* (1993), *Report on the rights and responsibilities of cohabitants under the Family Law Act* (1993) and *Report on Pensions as Family Property : Valuation and Division* (1995).

4) Administration of Justice

The Administration of Justice reflects a cluster of proposals looking at how dispute resolution and other aspects of the justice system are structured, including their legislative underpinnings, and how the system of delivering justice could be made more effective, efficient and responsive to public needs. Proposals received relating to the administration of justice include:

- **A Study of whether Ontario should codify the law of judicial jurisdiction by implementing the Court Jurisdiction and Proceedings Transfer Act?** (proposed by a law professor from Osgoode)
- **A Study regarding the creation of a Unified Criminal Court in Ontario** (proposed by a law professor from Queen's)
- **Review of the regulation of the legal profession** (proposed by a law professor from Queen's)
- **Review the incidence and implications of the privatization of civil justice dispute resolution** (proposed by a law professor from Osgoode)
- **Review of the Small Claims Court System** (proposed by a law professor from U. of T.)
- **Review the Current Crisis in Ontario Criminal Proceedings: What has caused the Mega-Trial and What are the Solutions**? (proposed by a law professor from U. of T.)
- **A cross-jurisdictional Study of potential approaches to the cost impacts of different stages/steps in civil actions** (proposed by MAG)

5) Corporate/Commercial Law

One of the areas widely believed to be in need of significant reform is the body of corporate and commercial law in Ontario. A review of law reform initiatives across the country and beyond suggest significant interest in reviewing issues involving corporate/commercial law and new technologies. For example, the topic of identity theft has become an important subject of law reform.[7] Proposals relating to corporate and commercial law reform include:

- **A Review of more unified approaches to contract and commercial law** (proposed by professors from Osgoode, U. of T. and Windsor)**.**
- **A Review of a universal personal injury compensation system** (proposed by a law professor from Windsor)
- **A Review of Enforcement Schemes for Consumer Protection Laws** (proposed by a law professor from U. of T.)
- **A Study of the regulation of confidential information and trade secret protection in Ontario** (proposed by a law professor from Western)

[7] There is presently a working group of the Uniform Law Conference of Canada devoted to related topics. See J. Twohig, "Communiqué: Report from the President" (ULCC March 2007)

- **A Study of the Legal Framework for Ethical Trustees and Prudent Investors** (proposed by a member of the profession)

6) Law & Government

One of the most sensitive areas for Government is areas of law reform which implicate governmental structures and relationships. It is in such settings that a law commission can perform a key role both in stimulating debate and in fostering consensus. For example, recent attempts at democratic reform in Ontario and elsewhere have built on the foundation provided by the Law Commission of Canada's groundbreaking study on the topic.[8] Proposals relating to law and government include:

- **A Study of Indigenous Law in the Ontario Legal System** (proposed by the Aboriginal Law Section, Ontario Bar Association)
- **A Study of the Ontario Government's "Duty to Consult" Aboriginal Peoples in relation to lands and resources** (proposed by a law professor from Osgoode)
- **A Review of the appointment process for administrative tribunals** (proposed by the Administrative Justice Working Group)
- **The Impact of Fiscal Accountability Legislation on Public Budgeting in Ontario** (proposed by a law professor from Osgoode)

C. Criteria and Analysis of Priorities

In addition to the mandate contained in the Memorandum of Agreement, cited above, it is possible to glean related criteria from other sources.

The Report of the Creative Symposium, for example, canvassed various methods for selecting projects and highlighted the importance of sensitivity to the issue of relevance, including but not limited to the number of people affected by law reform initiatives and the project's resonance with the public. This same sensitivity means the likelihood of implementation and/or the nature of the impact of proposed projects must also be a key consideration.

Representatives from other law reform organizations who attended the Creative Symposium confirmed that the manner in which a law reform organization is established and funded will affect its project selection. For example, where a law reform commission is a creature of statute and wholly funded by government, the role of the government in project selection will be quite different than in the context of a commission which is independently established and funded.[9] For example, the role of the LCO as a catalyst for collaboration and partnership in law reform is an important consideration which flows

[8] Law Commission of Canada, *Voting Counts* (2004)
[9] For a review of the various models of law reform commissions in Canada, and their history, see Gavin Murphy, "Law Reform Agencies," available on-line at http://www.justice.gc.ca/en/ps/inter/law_reform/page2.html.

from the very nature of the partnership which has established, funds and governs the LCO.

Continuing this theme, in its submission to the present consultation, the Law Foundation of Ontario has encouraged the LCO undertake projects with the goal of bringing fresh and dynamic voices into the law reform discussion and should, wherever appropriate, undertake research in partnership with other academic and/or public interest organizations.

A number of submissions to this consultation mentioned the importance of continuing the work of the predecessor Ontario Law Reform Commission ("OLRC") (which was disbanded in 1996). One proposal was to return to the small claims court study undertaken by the OLRC, for example, and explore its unimplemented recommendations to determine if they are timely and necessary today. Another cluster of proposals concerned revisiting the OLRC report on the division of pensions in family law. The Report of the Creative Symposium acknowledges the importance in other jurisdictions (for example, B.C.) in linking present law reform to previous unimplemented law reform proposals.[10]

The Creative Symposium Report also highlighted the importance of looking to other law reform bodies as an evaluative tool. If other law reform bodies have undertaken successful projects in areas of need identified in Ontario, this may also suggest the advisability of the LCO either undertaking a similar study or undertaking more modestly how to adapt the findings of a sister law reform commission to the Ontario environment. As noted in the Creative Symposium Report, the LCO should also be open to considering and/or proposing joint research initiatives with other law reform commissions where a subject matter suggests such an approach is appropriate and in light of the disbanding of the Law Commission of Canada.

In addition to these considerations, other criteria also would seem clearly to be applicable to the question of why certain otherwise meritorious project ideas should not be selected as part of the LCO's first projects. These include:

- The LCO's projects should not duplicate an existing law reform initiative – for example, some of the submissions relate to civil justice reform issues and it may be advisable to defer consideration of these until the ongoing Civil Justice Review headed by Coulter Osborne has reported to the AG. Similarly, the LCO's projects should avoid duplicating ongoing government law reform initiatives.

- The LCO's projects should avoid specific questions that are the subject of ongoing litigation before the Courts, statutory bodies or public inquiries.

- The LCO's projects should avoid questions that are the subject of ongoing partisan dispute.

[10] See Report of the Creative Symposium, p.6.

In light of all of these various considerations, I have analyzed the submissions received with the following seven criteria in mind (which are not intended to be exhaustive):

1) will the project be widely seen by the public as relevant and necessary;
2) will the project affect a significant number of people;
3) will the project advance the areas highlighted in the LCO's mandate;
4) will the project address a significant need that is not being addressed by government and not interfere with another institution's mandate;
5) will the project produce information and recommendations likely to be implemented and/or to influence in a constructive fashion the dialogue on law reform in the area;
6) will the project produce forward looking, original and innovative ideas; and
7) will the project be achievable within the relevant timelines and resources available.

Below, applying these criteria, I suggest a short-list of priorities for recommended projects, with suggested timelines.

D. Short-List of Priorities for Recommended Projects

The list of possible projects is diverse and impressive. Many could represent promising projects for the LCO. In terms of priorities, I set out below a proposed short-list of seven projects, indicating for each a suggested timeline.[11]

Optimally, the LCO will develop a mix of first projects including short, medium and long term initiatives. Some projects are discrete, focused and lend themselves to shorter timelines for completion. There also may be several reasons why a longer timeline will be appropriate for some projects. These reasons could relate to the scope and ambition of the study, and the need for empirical analysis or other kinds of background study, or the desirability of consultations, circulating draft recommendations for comment, and so forth.

Where a project does have a longer timeline, it would be useful to identify opportunities for interim reports, publishing background papers, conduct consultations, presenting preliminary findings at symposia or other measures to maintain a profile for the project.

[11] While those respondents submitting project ideas were not asked to estimate how long it might take to undertake the project they proposed, I have provided a suggested timeline as an aid to this aspect of the selection discussion.

- **1) A Study of Elder Law: Defining a Coherent Approach to Protecting the Rights and Interests of the Elderly in Ontario** (proposed by a law professor from Queen's)

  The broad goal of "elder law" is to take a more holistic approach to how we regard the elderly person at law - to ensure that legal doctrine takes adequate account of the need to preserve an older person's autonomy, as well as to protect such a person against those seeking to take advantage of his or her special vulnerabilities. This is not to say that the law should stigmatize an older person as weak or not fully competent because of their age *per se*, but rather that the realities of the process of aging should be accounted for in developing legal doctrine. It is suggested that what is required to drive law reform forward in this area is a principled, pragmatic and coherent vision of how doctrine from different areas of law can be brought together in respect of the elderly.

  The impact of this study would be to advance the coherence of the laws which have an impact on the rights of the elderly. Presently, practitioners working in one area are often without the expertise to deal with problems that face the elderly client in another area. A lawyer consulted on access to subsidized housing has little to say in respect of the abuse of a financial power of attorney. Sometimes the Public Guardian's office is available to assist, often not. A clearer set of guiding principles and protections would assist greatly in ensuring the elders and their families can turn to the law for protection and to vindicate their rights. Moreover, clarification of guiding principles may set the stage for both legislation and administrative supervision through an expanded role for the Office of the Public Guardian. As such, it is suggested that research in this area will have great practical importance.

  This proposal also builds on related undertakings from other law reform bodies. The Law Commission of Canada conducted a study on elder abuse.[12] The Law Reform Commission of Nova Scotia recently has completed a study on the topic of grandparent-grandchild access in family law, requested by the Department of Justice of that Province.[13] The British Columbia Law Institute, in collaboration with its sister institution, the Canadian Centre for Elder Law Studies, is undertaking a significant study on adult guardianship and recently released a comparative analysis (including a review of laws in BC, NZ and Ontario).[14]

  This proposal might also incorporate the "Power of Attorney" proposal suggested by a Bencher of the Law Society. A significant law reform project on Powers of

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[12] Beaulieu, Marie and Charmaine Spencer. *Older Adults' Personal Relationships and the Law in Canada: Legal, psycho-social and ethical aspects*. Paper prepared for the Law Commission of Canada (1999).

[13] This is available on-line at http://www.lawreform.ns.ca/introduction.htm.
[14] This is available on-line at http://www.bcli.org/.

Attorney is also now being undertaken by the Manitoba Law Reform Commission.[15]

Suggested Timeline: 12-24 months (this initiative could also be divided into a "cluster" of law reform projects, with some discrete issues carved out of the whole on which reports or discussion documents could be created in the 6-12 month period, leading to consultations and symposia, culminating in a final report in the 12-24 month period).

❖ **2) A Review of the coordination of multiple court responses (family court, criminal court, civil courts, etc) to family breakdown** (proposed by the Ontario Court of Justice)

Many times, a family can face both criminal law and family law proceedings. This can occur when a family dissolves or when a family has contact with a Children's Aid Society. As an example, one spouse may accuse the other spouse of assault. Or, a parent may be charged with assault in a criminal court while the family faces child protection proceedings in the family court. Unfortunately, there can be inconsistency and little communication between the criminal and family justice systems. As a result, families are not dealt with in a holistic way.

Some of the common problems associated with the lack of coordination between family and criminal courts include:

- Conflicting appearance schedules or requirements to appear too frequently, resulting in unnecessary scheduling of court time and resources;
- Some aspects of a dispute being adjudicated more than once by more than one court;
- Inadequate paperwork from self represented litigants and resulting adjournments (or dismissals);
- Duplicative orders or referrals for a variety of social services;
- Critical information unavailable to judicial officers, thereby potentially interfering with their ability to make comprehensive, fully informed decisions;
- Conflicting orders issued by different judges in different departments.[16]

This proposal is about the delivery of justice services, and would study ways to improve the relationship between the two courts when one family is facing proceedings in each of the courts. The impact of this proposed study is apparent. The current system is inefficient and needs to be improved. Families in family court are often under a great deal of stress. Related proceedings in criminal courts only increase and exacerbate this stress. Improved communication and a coordination of proceedings between the courts will positively impact the lives of

[15] Information on this project is available on-line at http://www.gov.mb.ca/justice/mlrc/projects.html.
[16] Judicial Council for California, Center for Families, Children & the Courts, *Unified Courts for Families Deskbook*, 2004, pages I-5 and I-6.

families in the court system. This project is premised on the view that if it is easier for a family to navigate the court system, the administration of justice will be improved. Further, the legal system's accessibility and effectiveness will be enhanced if the criminal and family courts could be coordinated.

This proposal is also closely related to the proposal from MAG for a study of the potential adjudicative models which would permit full jurisdiction in one location in family law matters (e.g. hybrid court model, expanded jurisdiction of provincial court, etc)**.** It may be possible to combine these proposals as part of a broader study of the administration of justice in relation to family law disputes.

Suggested Timeline: 6-12 months (12-24 months if expanded to include the MAG proposal as well)

- **3) A Study of self-help tools and resources to enhance access to justice**
  (proposed by Community Legal Education Ontario (CLEO))

  CLEO proposes that the Commission examine the potential role of self-help initiatives in the context of significant gaps in access to justice in Ontario. It remains difficult for low-income and even many middle-income individuals to obtain legal representation. In the United States, Australia and now some Canadian jurisdictions, significant resources are devoted to the development and promotion of "self-help" materials and services, intended to assist these individuals.

  The reliance on self-help in the field of law generates concern: it is based on the premise that most people without legal training and experience can take steps in the legal process, and do a competent and informed job, thus obtaining "access to justice". In fact, unrepresented individuals who cannot afford to pay for legal advice and representation do not enjoy "equal" access to justice.

  The opportunities presented by self-help tools and materials will be of increasing importance to governments, legal aid plans, the courts and the public. Thus, it is critical that research and analysis be undertaken to examine and provide guidance as to how self-help tools can be used as effectively as possible in enhancing access to justice. (For example, see Thompson, D.A. Rollie. The Judge as Counsel, Canadian Forum on Civil Justice, Spring 2005.)

  The proposed research would look at self-help initiatives that have been tried in other jurisdictions, their strengths and weaknesses, and any evaluations of those initiatives. In what circumstances have self-help tools and materials been particularly effective? How has their effectiveness been measured? Are particular types of legal information conducive to being communicated vis-à-vis self-help tools? Are audiences with particular characteristics more likely to use self-help tools, and to use them effectively? This would include reviewing the experience with, and evaluations of, self-help tools and materials in selected

jurisdictions in which such tools have been used extensively, particularly British Columbia, some states in the United States, and Australia.

This issue implicates all three purposes of the Ontario Law Commission. It is claimed that self-help measures (a) enhance the legal system's effectiveness and accessibility; (b) improve the administration of justice by simplifying the law for unrepresented individuals, and (c) effectively use technology as a means to enhance access to justice.

Through a combination of interview and informal survey questions, CLEO consulted with staff at the Ministry of the Attorney General and with Legal Aid Ontario (LAO), including family law offices (FLOs), LAO advice lawyers at Family Law Information Centres (FLICs) and duty counsel. Staff at these offices provided useful feedback based on their first-hand experience. Generally, the feedback indicated that such materials could be useful to low-income individuals, but that there are certain challenges and implications that must be explored before embracing self-help. For example, individuals may be incorrect in believing their divorce is uncontested or free of corollary issues or may be unaware of their legal rights and could, without adequate legal representation, sign away entitlements, such as support, pension benefits, etc. Also, how would concerns about power imbalances between parties be addressed? As well, individuals using self-help materials are likely to approach overextended resources, such as Family Law Information Centres and Family Law Offices, for help in completing the forms. Staff at these offices could get pulled away from providing more critically-needed services to respond to questions relating to the uncontested divorce forms. Are there opportunities for pro bono services or innovative technologies to address the need for assistance in using self-help materials?

Suggested timeline: 12-24 months

- **4) A study of the role and value of public participants in the justice system** (proposed by MAG)

Currently lay persons participate as jurists (Justices of the Peace, for example), as part of the Law Society of Upper Canada's governance, as advisory members of some key justice system committees (such as the Judicial Appointments Advisory Committee), but are there other opportunities for greater, more meaningful participation by lay persons?

The Commission would make suggestions to help the public gain a greater understanding and stake in the justice system. The proposal from MAG is quite brief but it is possible to imagine a range of directions such a study could take.

For example, research in this area could consider the role of paralegals, community legal workers and other legal professionals who are not lawyers but who possess relevant expertise on the justice system. Research could also

consider the role of lay persons in the justice systems across Canada and in comparable jurisdictions.

Suggested Timeline: 6-12 months

- **5) A Study of the Ontario Government's "Duty to Consult" Aboriginal Peoples in relation to lands and resources** (proposed by a law professor from Osgoode)

  This proposal flows from the landmark Supreme Court of Canada decision in *Haida Nation v. British Columbia* [2004] 3 S.C.R. 511 which held that the provincial Crown has a duty to consult Aboriginal peoples over the use of land and natural resources where aboriginal title or aboriginal rights may be affected. Throughout the court's decision there is a clear call for legislative reform to provide processes and procedures to ensure proper consultation and accommodation.

  In a recent case, the Supreme Court of Canada has recognized the right to harvest tress for domestic uses, which opens a new front for consultation in areas where forest licenses are already in existence. (see *R. v. Sappier*, 2006 SCC 54). The implications of the "duty to consult" are both vast and uncertain for Ontario. To give one example, in the recently decided case of *Hiawatha First Nation v. Ontario (Minister of Environment)*,[17] the Divisional Court considered a challenge from several First Nations to a land exchange undertaken between the Ontario Realty Corporation and developers in order to protect environmentally sensitive land around the Oak Ridges Moraine. The land exchanged is subject to a land claim and the Government consulted with the Huron-Wendat Nation, which it believes has the closest connection to the territory at issue. Several other aboriginal groups who alleged a connection with the land attempted unsuccessfully to persuade the Court that they should have been consulted as well.

  This proposal appears to overcome the jurisdictional objection which might be raised in the context of other submissions for law reform studies in the aboriginal rights field. The "duty to consult" clearly operates in the context of provincial Crown-aboriginal relations and the proposed topics of study (land use, forestry, mining, etc) are all areas of provincial jurisdiction.

  The submission suggests that the LCO would be an ideal vehicle for undertaking work in this area for two reasons. First, it can undertake research into this area and involve government, industry and First Nations without being seen to be directly tied to any of those parties. One of the difficulties with a government led consultation is that parties may fear that there is an underlying agenda. Second, within government, there are a number of ministries with distinct interests as well as political pressures from a variety of sources that make it a challenge to find

[17] [2007] O.J. No. 506 (Div. Ct.).

consensus. An external body that can recommend, but not impose, may provide a neutral space for a frank exchange of views. In this respect, the example of the Law Commission of Canada is useful. Over the years it has released a number of studies relating to Aboriginal peoples. When it was closed down, it had other studies in the works, including pioneering work on indigenous law. The LCC was able to develop a framework for addressing difficult issues. There is no reason why the LCO should be less ambitious.

Relations between Aboriginal people and the Crown are fraught with difficulty. The disputes cannot be resolved by a single study (as RCAP demonstrated). Rather, the relationship requires continuous attention and negotiation. The work of the LCO on consultation could provide an important framework for the discussions that will have to take place for many years to come.

Suggested timeline: 12-24 months

- **6) A Study on the Legal Framework for Ethical Trustees and Prudent Investors** (proposed by a member of the profession)

This topic relates to the legal framework within which trustees operate, and the inclusion of non-financial criteria which may be considered by trustees with respect to the exercise of investment powers.

[18]The issue has received significant attention in recent law reform initiatives in Alberta, Manitoba and British Columbia. The Alberta Law Reform Institute is presently engaged in a project considering whether or not to adopt special investment standards that apply to not-for-profit bodies having charitable or other public purposes.[19] In an earlier Report entitled *Trustee Investment Powers* in February 2000, the ALRI recommended that Alberta adopt the "prudent investor" approach to the scope of a trustee's investment powers where the trust instrument does not define them.[20] This approach would replace the "legal list" approach which the ALRI concluded had become outmoded. The Manitoba Law Reform Commission undertook a similar study on the "prudential investor" in the 1990s.[21] In 2004, The BCLI completed a major Report on recommendations to overhaul the province's *Trustee Act*.[22]

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[18] Freshfields Bruckhaus Deringer, *A Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment* (November 2005). See also Fair Pensions "UK Pension Scheme Transparency on Social, Environmental and Ethical Issues" (November 2006) available on-line at www.fairpensions.org.uk/pdf/Pension%20Scheme%20Transparency%20Report%20Nov2006.pdf.

[19] This is available on-line at http://www.law.ualberta.ca/alri/Work-in-Progress/Current-Projects/Prudent-Investor--Not-for-Profits.php.

[20] Cited in ibid.

[21] Manitoba's Law Reform Commission released a Report on "Ethical Investments by Trustees" in 1993. This is not available on-line.

[22] This is available on-line at http://www.bcli.org/pages/projects/trustee/Trustee_Act_start.html.

The issue was also explored by the Freshfield's 2005 Report on the legal framework for the integration of environmental, social and governance issues into institutional investment.

Suggested timeline: 6-12 months

- **7) A Review of more unified approaches to contract and commercial law** (proposed by professors from Osgoode, U. of T. and Windsor)**.**

Although Ontario has enacted the *Consumer Protection Act* which covers consumer transactions, we do not have the same legislative overlay in other commercial areas. Thus, the *Sale of Goods Act* still operates, as does the *Bulk Sales Act*. Other jurisdictions, particularly Australia and New Zealand have moved to enact "Fair Trading Acts" which generally give more discretionary ground to courts and commissions to regulate the market place so that it adheres to acceptable standards of commercial morality and good faith.

Such a project could also draw on the previous work of the Ontario Law Reform commission in their *Sale of Goods Act* report.

This may also dovetail with a review of other law reform topics related to contract law, including third party liability, which was the subject of a recent 2004 Report published by the Nova Scotia Law Commission.[23]

Suggested timeline: 6-12 months

This short-list of seven recommended projects is not intended to be exhaustive. Some other projects deserve to be highlighted because they showed significant promise but were not sufficiently fleshed out as proposals to compare with others against the criteria set out above. The proposal by MAG to explore the legal issues associated with establishing a registry to record the genetic parents of all children born in Ontario is one example of such a project. The proposal to conduct a review of the Small Claims Court from the access to justice standpoint and the proposal is another.

The seven short-listed projects, however, appeared to be the most promising on the basis of multiple factors included in the evaluative criteria. This short-list represents suggested projects from the judiciary, the academy, the profession and government on topics drawn from a cross-section of all of the categories in which submissions were received.

E. Additional Research Initiatives

Beyond the projects recommended above, additional research initiatives should be considered by the LCO as part of its initial priorities. These initiatives are designed to further the aims of the LCO, and to broaden and deepen its impact.

[23] This is available on-line at http://www.lawreform.ns.ca/final_reports.htm.

The initiatives outlined below do not represent an exhaustive list of the possible programs which the LCO might consider but, once again, are intended to serve as a point of departure for discussion.

(1) Strategic Partnerships Initiative

In addition to the projects noted above and keeping in mind the goal that the LCO serve as a catalyst for research and partnerships related to law reform, it is also recommended that the LCO establish a Strategic Partnerships initiative designed to stimulate and develop such collaborations.

Partners could include governmental bodies (for example, government departments outside of MAG, or agencies like the Human Rights Commission or Canadian Judicial Council which have a law reform mandate), quasi-governmental bodies (e.g. LAO is setting up a new Strategic Research Department with a mandate for law reform and consultation), and non-governmental bodies (the ULCC, the Advocates Society, the Canadian Forum on Civil Justice, the CBA/OBA, etc).

Strategic partnerships should also be pursued with other Canadian law commissions. For example, in 2002, the Minister of Justice and Attorney General of Manitoba asked the Manitoba Law Reform Commission to review and make recommendations on the issue of private title insurers. Shortly, thereafter, discussions between the Manitoba Law Reform Commission, the Saskatchewan Law Reform Commission and the Alberta Law Reform Institute resulted in the decision to collaborate on the project.[24]

(2) Seeding Law Reform Grants Initiatives

Initiatives such as the present consultation and Research Plan demonstrate the tremendous interest in and commitment to law reform in Ontario. While the LCO cannot pursue all projects and cannot respond to all need, it may be possible to foster this activity in other ways. One mechanism for achieving this goal would be to establish within the first 6-12 month program a small grants initiative. The LCO could disburse small, seed grants of $5-10K or matching grants to academic or community researchers (or partnerships between them) for law reform related projects.

These grants could come with various conditions tailored to achieve specific objectives. For example, a condition of such projects could be the inclusion of students or an interdisciplinary/thematic focus or dissemination of the fruits of the research at an LCO sponsored symposium. The former Law Commission of Canada's "Legal Dimensions" program represents one model for this type of endeavour. The Research Advisory Board could play a lead role in selecting these projects.

[24] Alberta subsequently withdrew from the collaboration in 2006. The description of this collaboration and resulting research is available on-line at http://www.gov.mb.ca/justice/mlrc/projects.html.

If this idea were pursued, it is unlikely that it could be funded from the existing resources of the LCO. It could be the subject of a separate grant application to the Law Foundation of Ontario or one of the other funders of the LCO, and/or could be undertaken in collaboration with other funding bodies, much as the Law Commission of Canada joined with the Social Sciences Research Council to create a "Virtual Scholar" program.

(3) Outreach, Input and Education Initiatives

If the response to this modest and time-limited consultation is any indication, there is a reservoir of interest in and ideas for law reform which has been barely tapped. This suggests opportunities both for outreach and for input. A priority for the research agenda of the LCO ought to be pursuing both opportunities.

Outreach initiatives should be aimed at ensuring the LCO remains relevant and connected to the public. The Creative Symposium held in November 2006 and the consultation surrounding this Report represent two different forms of outreach. The structure of the Board of Governors and the Research Advisory Board will further facilitate outreach to the legal community. The greater challenge will be to facilitate outreach to the public. Coordinating public consultations, town-hall meetings, virtual forums, partnerships with public interest groups and community organizations, etc, should be a key priority for the LCO.

Forging a relationship with the public requires not just outreach but also meaningful and engaging windows for input. The mechanisms for input are varied and have traditionally included consultations with stakeholders, circulation of draft papers and general requests for input. These mechanisms for input should now involve innovative uses of technology (one of the aspects of law reform highlighted in the Memorandum of Agreement). The Australian Law Reform Commission, for example, which is in the midst of a major review of Australian privacy laws, has created an ambitious portal to its website on this project specifically aimed at involving youth in the work of the ALRC and highlighting how law reform affects young people and their concerns.[25]

Building on the emphasis on outreach and input, the LCO should also consider the ripple effects of its activities in better educating the legal community and the public with respect to law reform and its implications. For example, the LCO could consider a partnership with the Ontario Justice Education Network (OJEN) to bring awareness of law reform and debates about specific initiatives, consultation or recommendations, to Ontario's high schools. OJEN is am umbrella organization which supervises and coordinates "courtrooms and classrooms" programs, outreach initiatives whereby lawyers, prosecutors and law professors take part in high school law classes and the development of curricular materials on the justice system.

The LCO should also explore sponsoring or co-sponsoring conferences and symposia on law reform, encourage law school courses (and legal courses taught in colleges and Universities outside of law schools) based on its work, and perhaps also consider

[25] See http://www.alrc.gov.au/inquiries/current/privacy/talk/flashsite.html.

sponsoring a province-wide essay prize for research undertaken in law reform related areas. The Law Commission of Canada/SSHRC collaboration to create a "Virtual Scholars" program to provide a mechanism for academics to participate more fully in the Commission's work is yet another model.

(4) Obsolete Laws Initiatives

In addition to special projects, which are the focus of this Report, the LCO may also consider the usefulness of certain standing committees or continuing projects. An example of such a standing committee or continuing project would be a body or group set up by the LCO for the purpose of reviewing obsolete laws in Ontario and recommending their repeal. This could be a "one-off" project to deal with a range of obsolete laws in an omnibus statute, or an ongoing effort resulting in recommended statute revision legislation every few years.

The "Statute Law Revision" committee of the UK Law Commission is one such example.[26] The stated rationale for this committee is that a key function of a law commission is to modernize statute law, and this may involve repealing obsolete laws as much as creating new law. Since 2003, the UK Law Commission has consulted stakeholders and the public on a variety of repeals, including criminal law repeals, repeals to the law on town and country planning, repeal of obsolete laws on the police, and repeal of obsolete laws relating to county jails.

A project of this kind also lends itself to the involvement of law students. One could imagine law students becoming involved in the review of statutes for obsolete provisions either as part of a research course offered for credit at a law school, or as a pro bono project, or as part of paid research assistance work.

F. Summary

The aim of this Report has been threefold. Below, I restate these aims and summarize my findings:

1) **to consult with stakeholders in the LCO and obtain suggestions for law reform projects**

   While modest in scope and time, the consultation conducted as part of this Report resulted in over 60 submissions, which contained proposed projects from a diverse group ranging over a variety of legal areas.

2) **to develop criteria for assessing suggested law reform proposals**

   Building on the goals of the LCO contained in the Memorandum of Agreement, the results of the Creative Symposium and the nature of the LCO's mandate and

[26] The Committee's homepage can be viewed at http://www.lawcom.gov.uk/statute.htm.

environment, I have proposed a set of criteria by which to assess the LCO's research priorities and to evaluate the submissions received.

3) to recommend a first set of priority law reform projects and initiatives

Based on an analysis of the various submissions and an analysis of recent projects undertaken by other law reform commissions, I have provided a short-list of seven recommended projects.

- A Study of Elder Law: Defining a Coherent Approach to Protecting the Rights and Interests of the Elderly in Ontario
- A Study of self-help tools and resources to enhance access to justice
- A Review of the coordination of multiple court responses (family court, criminal court, civil courts, etc) to family breakdown
- A study of the role and value of public participants in the justice system
- A Study of the Ontario Government's "Duty to Consult" Aboriginal Peoples in relation to lands and resources
- A Study on the Legal Framework of Ethical Trustees and Prudent Investors
- A Review of a unified approach to contract and commercial law

Additionally, other projects were highlighted which demonstrated promise but which were incomplete and did not permit a full analysis in light of the criteria.

I also have recommended several additional initiatives in order to advance the goals of the LCO:

- strategic partners initiative
- seeding law grants initiative
- outreach, input and education initiative
- obsolete laws initiative

This Report is presented to the LCO as a resource to the Board of Governors, the Research Advisory Board and the Executive Director, and is intended to serve as a point of departure for the important discussion and deliberations to come as the LCO determines its initial priorities.