

Divorce Reform in Canada: New Perspectives; An Analytical Review of Bill C-10 (Canada), 1984

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Résumé de l'article

Le projet de loi C-10 de 1984 porte le titre de *Loi modifiant la Loi sur le divorce*. En réalité, certaines des modifications proposées ont un caractère fondamental et constituent une réforme quant au fond du droit du divorce, tandis que d'autres annoncent des changements radicaux dans la procédure contradictoire.

La notion de divorce sans faute, proposée par la Commission de réforme du droit du Canada dans ses Documents de travail et dans son Rapport sur le Droit de la famille, est à la base du projet de loi C-10, relativement à la liberté de divorcer et à la détermination judiciaire du droit des époux à une pension et du montant de celle-ci. Mais le projet ne fournit guère de cadre à la mise en oeuvre des recommandations de la Commission en ce qui concerne les nouvelles règles de procédure qui pourraient corriger les effets néfastes de la procédure contradictoire. Par exemple, le recours à la médiation, plutôt qu'à la voie contentieuse, pour le règlement de certains points litigieux, est prévu aux articles 5 et 16 du projet; mais ces articles, particulièrement l'article 5, sont mal rédigés et ne sont pas de nature à encourager la conciliation puisque l'avocat de chacune des parties est engagé dans une bataille devant le tribunal.

Le projet de loi C-10 donne aux tribunaux les critères nécessaires pour les aider à décider s'il convient, lors de la dissolution du mariage, de rendre une ordonnance pour l'entretien de l'un des époux. Ici encore, cependant, la rédaction n'est pas aussi précise qu'il serait souhaitable. Le « meilleur intérêt de l'enfant » est présenté comme critère principal dans les demandes d'entretien, de garde, de soin et d'éducation des enfants, mais aucune indication précise n'est donnée sur les facteurs qui pourraient servir à le déterminer. Les ordonnances de garde conjointe ou confiée à des tiers sont expressément permises, mais non expressément encouragées, par l'article 10 du projet.

Les critères juridictionnels prévus au paragraphe 5 (1) de la *Loi sur le divorce* (S.R.C. 1970, c. D-8), ont été simplifiés par l'article 3 du projet, qui retient seulement celui de la résidence ordinaire pendant un an. Des modifications de concordance ont été introduites à l'article 6, qui régit la reconnaissance des jugements étrangers de divorce.

Le projet de loi C-10 de 1984 mélange ainsi l'ancien et le nouveau. Quant à savoir si ce mélange donne du bon vin ou du vinaigre, les avis peuvent être partagés.

C H R O N I Q U E
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L É G I S L A T I O N

**Divorce Reform in
Canada: New
Perspectives; An
Analytical Review
of Bill C-10
(Canada), 1984***

by
**Professor Julien D.
Payne****

ABSTRACT

Bill C-10 (Canada), 1984 is entitled An Act to Amend the Divorce Act (R.S.C., 1970, c. 10). In reality, however, the fundamental character of some of the changes proposed therein constitutes a major reform of substantive divorce law and provides a limited foundation for radical changes in the adversarial legal process.

The concept of "no-fault" divorce that was proposed by the Law Reform Commission of Canada in its Working Papers and Report on Family Law constitutes the basis of Bill C-10 with regard to the freedom to divorce and the judicial determination of the right to and quantum of spousal maintenance. But Bill C-10 provides little by way of a

RÉSUMÉ

Le projet de loi C-10 de 1984 porte le titre de Loi modifiant la Loi sur le divorce. En réalité, certaines des modifications proposées ont un caractère fondamental et constituent une réforme quant au fond du droit du divorce, tandis que d'autres annoncent des changements radicaux dans la procédure contradictoire.

La notion de divorce sans faute, proposée par la Commission de réforme du droit du Canada dans ses Documents de travail et dans son Rapport sur le Droit de la famille, est à la base du projet de loi C-10, relativement à la liberté de divorcer et à la détermination judiciaire du droit des époux à une pension et du montant de celle-ci. Mais le projet ne fournit

* Where the provisions of Bill C-10 are quoted in the text, the words *underlined* indicate the proposed changes to the *Divorce Act*, R.S.C., 1970, c. D-8.

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framework for the implementation of the Law Commission's recommendations for new processes that would ameliorate the injurious effects of the adversarial legal process. For example, the use of mediation as an alternative to the litigation of disputed issues is endorsed in clauses 5 and 16 of Bill C-10, but these clauses, and particularly clause 5, are badly drafted and are unlikely to foster mediated settlements where either lawyer representing the parties is intent on a battle in open court.

Bill C-10 introduces much-needed policy objectives to assist the courts in determining whether spousal maintenance should be ordered on the dissolution of the marriage. Here again, however, the drafting is less precise than might be considered appropriate. The "best interests of the child" is declared to be the paramount criterion in applications for the maintenance, custody, care and upbringing of children, but no specific guidelines are provided with respect to the factors that might be relevant to a determination of a child's best interests. Joint custody orders and third party orders are expressly permitted, but not expressly encouraged, by clause 10 of Bill C-10.

The jurisdictional requirements of section 5 (1) of the Divorce Act,

guère de cadre à la mise en œuvre des recommandations de la Commission en ce qui concerne les nouvelles règles de procédure qui pourraient corriger les effets néfastes de la procédure contradictoire. Par exemple, le recours à la médiation, plutôt qu'à la voie contentieuse, pour le règlement de certains points litigieux, est prévu aux articles 5 et 16 du projet; mais ces articles, particulièrement l'article 5, sont mal rédigés et ne sont pas de nature à encourager la conciliation puisque l'avocat de chacune des parties est engagé dans une bataille devant le tribunal.

Le projet de loi C-10 donne aux tribunaux les critères nécessaires pour les aider à décider s'il convient, lors de la dissolution du mariage, de rendre une ordonnance pour l'entretien de l'un des époux. Ici encore, cependant, la rédaction n'est pas aussi précise qu'il serait souhaitable. Le « meilleur intérêt de l'enfant » est présenté comme critère principal dans les demandes d'entretien, de garde, de soin et d'éducation des enfants, mais aucune indication précise n'est donnée sur les facteurs qui pourraient servir à le déterminer. Les ordonnances de garde conjointe ou confiée à des tiers sont expressément permises, mais non expressément encouragées, par l'article 10 du projet.

Les critères juridictionnels prévus au paragraphe 5 (1) de la Loi sur

R.S.C. 1970, c. D-8 have been simplified by clause 3 of Bill C-10, which retains only the one year ordinary residence requirement. Corresponding adjustments have been made to section 6 of the Divorce Act, which governs the recognition of foreign divorce decrees.

Bill C-10 (Canada), 1984 thus constitutes a blending of the old and new. Whether this blend produces vintage wine or vinegar is a matter of opinion.

le divorce (S.R.C. 1970, c. D-8), ont été simplifiés par l'article 3 du projet, qui retient seulement celui de la résidence ordinaire pendant un an. Des modifications de concordance ont été introduites à l'article 6, qui régit la reconnaissance des jugements étrangers de divorce.

Le projet de loi C-10 de 1984 mélange ainsi l'ancien et le nouveau. Quant à savoir si ce mélange donne du bon vin ou du vinaigre, les avis peuvent être partagés.

On January 19, 1984, Bill C-10 (Canada), 1984, *An Act to Amend the Divorce Act*, R.C.S., 1970, c. D-8, received First Reading in the House of Commons of Canada. The Second Reading commenced on February 24, 1984. In addressing the need to reassess Canada's divorce laws, The Honourable Dr. Mark MacGuigan, Minister of Justice and Attorney General of Canada, has observed:

When Canada's first uniform divorce laws were passed in 1968, the federal government promised to review those laws as circumstances changed. In the fifteen years since then, much has happened in Canada. There have been shifts in the traditional roles of family members, a broader understanding of the complexity of marriage relationships, and greater acceptance of divorce as a reasonable solution to a marriage that has broken down. It is time, therefore, to reassess our divorce laws in terms of current social realities.

That view is supported by legal associations, church representatives, mental health professionals, social workers, women's groups and concerned individuals across Canada. They agree with our belief that the current Divorce Act is needlessly adversarial. They share our concern that the present law, which places an emphasis on the fault of one spouse for the marriage's failure, makes a difficult situation even more difficult, and minimizes any chance of reconciliation.

In addition, the Divorce Act, as it now stands, is vague about the rights of children, even though divorce can have a tremendous impact on their welfare.

Our proposals for reform in no way undermine the important role that marriage and family play in our society. They simply recognize that when a marriage does break down beyond repair, it should be dealt with as realistically, painlessly and fairly as possible. The proposals also recognize the need for explicit guarantees that the best interests of children be protected when their parents

divorce. (Department of Justice, *Preface to Divorce Law in Canada: Proposals for Change*, 1984).

Marriage and Divorce in Canada

The *Divorce Act*, S.C., 1967-1968, c. 24, which introduced the first dominion-wide, and, therefore uniform, divorce regime in Canada, has remained substantially unchanged since it came into force in 1968. Between 1966 and 1978, the incidence of divorce in Canada increased approximately five hundred per cent. The following statistics are recorded in Statistics Canada, *Divorce: Law and the Family in Canada*, 1983, at 59:

In 1921, the divorce rate was 6.4 (per 100,000 population), a number that more than doubled to 14.3 by 1936. After World War II, the rate rose dramatically to 63.1 and then subsequently declined to 37.6 by 1951. During the fifties, the rate held, without any serious fluctuations, but by the mid- and late sixties, it had once again begun to move upward, reaching 51.2 by 1966. The most momentous change occurred in 1969, immediately after the passage of the new *Divorce Act*. At that point, the rate stood at 124.2, and subsequently soared to 148.4 in 1972, 200.6 in 1974, 235.8 in 1976, and 243.4 in 1978.

Current projections indicate that forty per cent of all marriages in Canada will be terminated by divorce. Marriages ending in divorce in the last decade lasted an average of ten years compared to sixteen years in 1969. Canadians are divorcing at a younger age than ever before. Less than one per cent of all divorce petitions are dismissed by the courts and only five per cent of all divorce cases are contested at the time of the trial. It has been conservatively estimated that Canadians have spent no less than \$500 million in legal fees over the last decade in seeking the judicial dissolution of their marriages.

Between 1969 and 1978, 48.3 per cent of all dissolved marriages involved no dependent children. The remaining 51.7 per cent involved a total of 504,358 children. Wives received the custody of the children in 85.6 per cent of all cases and in 95.7 per cent of the cases wherein the wife was the divorce petitioner (see *Payne's Digest on Divorce in Canada*, 1983, tab, at 83-1273/1275). These Canadian statistics, like their counterparts in other jurisdictions, manifest an overwhelming judicial inclination to grant the custody of children, regardless of age, to mothers rather than fathers. In the vast majority of instances, the courts simply rubber-stamp the status quo, without any contest between the parents respecting custody or access. The courts simply leave things as they were at the time of the spousal separation. In view of the fact that it is usual for the husband to withdraw from matrimonial cohabitation, without carrying a child or children under either arm, the preservation of the status quo naturally tends to place the wife in a preferred custodial position. The aforementioned

statistics, nevertheless, offer support for the conclusion that maternal preference is a significant factor in custody dispositions on divorce. Subject to a finding of parental unfitness on the part of the wife, a husband is most unlikely to obtain the custody of the children over his wife's objections on the judicial dissolution of their marriage. Notwithstanding popular assumptions that public opinion has changed its attitudes towards sexual stereotyping, reconstituted family structures, the "new morality" and the "rights" of children, there is no evidence of any fundamental change in judicial attitudes towards the rearing of the children of divorcing parents. It is open to debate whether current judicial attitudes reflect the reality of public opinion or whether they follow the normal legal pattern of lagging behind contemporary public opinion. Whatever the case, only one father in seven is granted the custody of the children of the marriage on its dissolution. Although fathers are usually granted an order for reasonable, or even generous, access, current judicial decisions in Canada assert that access privileges do not confer any authority on the non-custodial parent to directly participate in any decision-making respecting the child(ren)'s upbringing and development: see Julien D. Payne and Kenneth L. Kallish, "A Behavioural Science and Legal Analysis of Access to the Child in the Post-Separation/Divorce Family", published in *Payne's Digest on Divorce in Canada, 1968-1980*, 745, at 763/765; and compare *Dipper v. Dipper*, [1981] Fam. 31, [1980] 3 W.L.R. 626, [1980] 2 All E.R. 722 (Eng. C.A.). Furthermore, the prospect of any father securing this authority by an order for joint custody is virtually non-existent in contested custody litigation where the mother is adamantly opposed to joint custody: see text *infra*. To all intents and purposes, therefore, current judicial practices confirm that the legal divorce process severs not only the marital bond but also the child's bond with the non-custodial parent. The considerable increase in the number of married and divorced women in the full-time Canadian labour force that has occurred in the last fifteen years may eventually be reflected in a significant growth in the number of custody dispositions in favour of fathers, but this has not yet occurred. Nor is it likely to occur until such time as the courts and the populace recognize or assume that fathers, like mothers, have a capacity for nurturing their children.

The Need for Reform

Shortly after the Law Reform Commission of Canada was established, it circulated a questionnaire to a broad cross-section of the Canadian public inviting submissions as to fields of law that required reform. In light of a significant demand for reform of the laws regulating marriage breakdown and divorce, the Law Reform Commission of Canada appointed this writer as the Director of The Family Law Project, as it became called. Pursuant to the research undertaken by the Director, the full-time research

personnel assigned to the Project, and a substantial number of research consultants, fundamental changes were proposed in the substantive law of divorce. These were accompanied by innovative proposals for reorganizing the legal divorce process. It was found that exclusive reliance on the traditional adversarial legal process and the fault-orientation of substantive law tended to provoke hostility and bitterness between the spouses and aggravated the emotional trauma that are a natural concomitant of marriage breakdown. In the words of a Report of the Department of Justice, Canada:

Over the years it has become apparent that the current approach to divorce is no longer the best way to resolve marital conflict. Divorce is based on an adversarial process, where spouses are encouraged to fight with each other. This heightens already painful tensions, encourages bitter court scenes, and effectively reduces the possibility of reconciliation. The hostile nature of such a divorce process, often dehumanizing and negative throughout, extends beyond the courtroom and interferes with any chance that the family might have to establish a semblance of positive post-divorce contact.

Reform has been urged by legal associations, church representatives, mental health professionals, social workers, women's groups and concerned individuals throughout Canada. All agree that the current divorce process is needlessly adversarial and fails to promote reconciliation or mediation between parties involved in divorce; the Divorce Act does not guarantee that financial and child custody arrangements after divorce are fair to all involved, including the children; and the formal court procedure required for divorce is excessively complicated, at tremendous expense to both society and the individuals participating in the process. (*Divorce Law in Canada: Proposals For Change, 1984*, at p. 3).

In an attempt to foster the more constructive resolution of family disputes on marriage breakdown, the Law Reform Commission of Canada recommended that marriage breakdown should constitute the sole criterion of divorce in Canada and that Unified Family Courts should be established across Canada with an exclusive and comprehensive judicial jurisdiction over family disputes. Bill C-10 endorses the conclusion of the Law Reform Commission of Canada that fault-finding is a futile and injurious pursuit in the divorce process by eliminating spousal misconduct as a basis for divorce or as a relevant consideration in the judicial determination of the right to or quantum of spousal maintenance on the dissolution of marriage.

The Objectives of Reform

The primary objectives of a sound divorce law are (i) to facilitate the legal termination of marriages that have irretrievably broken down with a minimum of hurt, hostility, humiliation and hardship; (ii) to promote an equitable disposition of the economic consequences of the marriage breakdown; and (iii) to ensure that reasonable arrangements are made for the upbringing of the children of divorcing parents.

These objectives will be reviewed in light of the proposed amendments to the *Divorce Act*, R.S.C., 1970, c. D-8 that are included in Bill C-10.

Promoting the Stability of Marriage

Although it has been commonly asserted that divorce laws should seek to buttress the stability of marriage, it is a mistake to assume that divorce laws either encourage or discourage marriage breakdown. Divorce laws exist for the purpose of legally terminating a marital relationship that has in fact irretrievably broken down. Legislative measures and governmental policies to promote the stability of marriage must be found in sources other than divorce legislation. This was readily conceded by the Minister of Justice on the Second Reading of Bill C-10. He stated:

“[M]arriage breakdown is a fact, and the Divorce Act is not intended as preventative but as curative legislation, aimed at organizing the legal status of people whose marriage has already broken down”. (House of Commons Debates, Official Report (Hansard), Vol. 127, No. 41, 2nd Session, 32nd Parliament, Friday, February 24, 1984, at 1716).

Grounds For Divorce

Bill C-10 repeals sections 3 and 4 of the *Divorce Act*, R.S.C., 1970, c. D-8, thereby eliminating fault as a relevant consideration in proceedings for divorce. In substitution for the grounds for divorce defined in sections 3 and 4, clause 2 of Bill C-10 provides that the sole basis for divorce is the breakdown of marriage. Marriage breakdown will be established if, and only if:

(a) both spouses want a divorce and they assert that the marriage has broken down; in this event, a decree of divorce may be pronounced after the expiration of one year since the date of the presentation of the petition;

or

(b) either spouse wants a divorce and the spouses have been living separate and apart for a period of one year or more immediately preceding, including or immediately following the date of the presentation of the petition.

There are, therefore, no obstacles to either spouse presenting a petition for divorce at any time, provided that the jurisdictional provisions of the Bill have been complied with (see text *infra*), but a decree of divorce will not be available unless and until the one year waiting period has elapsed or the spouses have lived separate and apart for one year. Where

the spouses are not in agreement, either spouse may petition for divorce, notwithstanding cohabitation, provided that the spouses separate immediately after the presentation of the petition. The designated separation period will not be interrupted or terminated by reason that either spouse has become incapable of forming or having an intention to live separate and apart or of continuing to live separate and apart, if it appears to the court that the separation would probably have continued, had the spouse not become so incapable. In addition, the separation period will not be interrupted or terminated by a resumption of cohabitation on one or more occasions with reconciliation as its primary purpose, provided that such resumption of cohabitation does not exceed a total period of ninety days.

The right of either spouse to proceed forthwith with the presentation of a petition for divorce is likely to have a major impact on claims for maintenance and custody. Such claims, which were previously made pursuant to provincial statutes by reason of the absence of any of the designated grounds for divorce, can now be brought by way of corollary relief in divorce proceedings. In this context, it is not unusual for provincial statutes to stipulate that proceedings thereunder shall be stayed upon the commencement of divorce proceedings, except where the court, by leave, permits their continuance. One might reasonably expect the proposed changes to result in some degree of "game-playing" and forum shopping by lawyers representing the respective parties and in the erosion of the family law jurisdiction currently being exercised by provincially appointed judges.

In addition to imposing conditions with respect to the earliest date on which a decree of divorce may be granted, Bill C-10 imposes a time limit within which the court must grant the decree, when the grounds for divorce have been established. Clause 4 of Bill C-10 provides that the court "may not" grant a decree of divorce at any time later than the expiration of one year after the earliest date on which the granting of the decree would have been possible. This limitation does not apply to a petition that "is or remains opposed" after the expiry of the one year waiting or separation period, nor does it apply where the delay in seeking the decree of divorce is not attributable to the petitioner's failure to exercise reasonable diligence.

Bars To Divorce

Consistent with its abolition of the offence grounds for divorce, Bill C-10 abrogates the traditional bars to divorce, namely collusion, connivance and condonation. The additional bars to divorce introduced by paragraphs 9 (1) (d) and (f) of the *Divorce Act*, S.C., 1967-68, c. 24, which were applicable to the "marriage breakdown" grounds stipulated

in section 4 of that Act, have also been eliminated. Clause 6 of Bill C-10 substitutes the following provision:

6. Section 9 of the said Act is repealed and the following substituted therefor:

Duty of court on petition

“9. On a petition for divorce, it is the duty of the court

(a) not to grant a decree except *in the exercise of jurisdiction* by a judge, without a jury; and

(b) to refuse the decree if there are children of the marriage and the granting of the decree would prejudicially affect the making of reasonable arrangements for their maintenance.”

Paragraph (b) *supra* is identical to paragraph 9 (1) (e) of the *Divorce Act*, R.S.C., 1970, c. D-8. For judicial decisions interpreting and applying paragraph 9 (1) (e), see *Payne's Digest on Divorce in Canada*, § 26.0 “PROTECTION OF CHILDREN”.

The Trial Process

Bill C-10 extends an opportunity to the provinces to devise rules of practice and procedure that will eliminate the ritual of the uncontested divorce hearing in open court: see Bill C-10, clause 2 (the proposed paragraphs 3 (1) (b) and 3 (2) (a)); clause 6 (the proposed paragraph 9 (a)) and clause 15 (the proposed paragraph 19 (1) (a.1)).

In addressing the merits of this proposed change, the Report of the Department of Justice, Canada (*Divorce Law In Canada: Proposals for Change*, 1984, at pp. 20-21) states:

Subjecting the breakdown of a marriage to an adversarial trial seems inherently inconsistent with the constructive resolution of family disputes, and the practice should be limited to those cases where it is absolutely necessary. The requirement of a formal trial is certainly questionable where no issues are contested.

Thus the requirement of a formal trial in all cases should be abandoned, and procedures should be developed for handling divorce cases where no trial is necessary. For example, a system could be established where an officer of the court examines written evidence submitted by the parties involved concerning their grounds for divorce, and its consequences in terms of financial and child custody arrangements. If the evidence shows that all legal requirements are fulfilled and there are no contested issues, further court proceedings would not be required, and a judge could grant the divorce.

By dropping the requirement of a trial in uncontested cases, the provinces would be allowed to develop appropriate methods for dealing with such cases. Since divorce procedure is generally governed by the provinces, specific details would not be developed in the Divorce Act.

Depending on the procedures used by the provinces when a trial is not necessary, a considerable simplification of the divorce process could be accomplished. This would yield substantial cost reductions for the legal system, both

in terms of court time and expense and (possibly) in the use of Legal Aid Funds. If the provinces wished to do so, the resources saved could be redirected to the use of counselling and mediation services, either attached to the court or within the community.

Counselling and mediation services offer valuable alternatives to the trial process as a means of resolving disputes. With the need for a trial in all cases eliminated, the use of such alternatives could be encouraged.

If mediation services were offered as an alternative to the adversarial trial, there would be less pressure on a spouse to translate marital problems into legal issues to "prove" marriage breakdown or "justify" dissatisfaction. As a result, spouses would be more likely to recognize marriage breakdown as a shared problem between equal partners, requiring reasonable and constructive cooperation for its resolution. Thus, the proposed reform provides a context in which counselling services might operate more effectively.

Jurisdiction

The jurisdictional requirements of section 5 (1) of the *Divorce Act*, R.S.C., 1970, c. D-8, which included a combination of domicile, ordinary residence and actual residence, have now been simplified. Clause 3 of Bill C-10 provides as follows:

3. Subsection 5 (1) of the said Act is repealed and the following substituted therefor:

"5. (1) The court for any province has jurisdiction to entertain a petition for divorce and to grant relief in respect thereof if either *spouse* has been ordinarily resident in that province for a period of at least one year immediately preceding the presentation of the petition."

As to the meaning of "ordinary residence", see *Payne's Digest on Divorce in Canada*, § 16.4 "Ordinarily resident; actually resident".

Recognition of Foreign Decrees

Consistent with the proposed changes in the jurisdictional rules, *supra*, Bill C-10 provides for corresponding changes in the rules regulating the recognition of foreign divorce decrees. Clause 4 of Bill C-10 provides as follows:

4. The heading preceding section 6 and section 6 of the said Act are repealed and the following substituted therefor:

"FOREIGN DECREES

Recognition of foreign decrees based on spouses' residence

6. For all purposes of determining the marital status in Canada of any person and without limiting or restricting any existing rule of law applicable to the recognition of decrees of divorce granted otherwise than under this

Act, recognition shall be given to a decree of divorce, granted *pursuant to* a law of a country or subdivision of a country other than Canada by a tribunal or other authority, on the basis of the *ordinary residence of* either spouse in that country or subdivision *for at least one year immediately preceding the institution of proceedings for the decree* if

- (a) *the tribunal or other authority* had jurisdiction under the law of that country or subdivision to grant the decree; and
- (b) the decree was granted after the *coming into force of this paragraph.*"

This proposed amendment, while confirming the retention of "any existing rule of law", which rules include, at least in the common law provinces, the extended *Travers v. Holley* doctrine (see Julien D. Payne, "Recognition of Foreign Divorce Decrees in the Canadian Courts", (1961) 10 Int. & Comp. L.Q. 846), proceeds to stipulate that the foreign court must actually assume jurisdiction on the basis of the ordinary residence of either spouse. In the absence of this provision, the extended doctrine of *Travers v. Holley* would entitle recognition to be afforded to a foreign decree regardless of the basis of jurisdiction in the foreign court, if either spouse were in fact ordinarily resident in that jurisdiction for one year immediately before the institution of the foreign divorce proceedings. It remains to be seen whether the express language of the proposed section abrogates this doctrine and now requires a matching of the jurisdictional rules between Canada and the foreign court, rather than a matching of the facts in the foreign jurisdiction with the jurisdictional rules set out in the proposed section 5, *supra*.

Duty of lawyers respecting conciliation, negotiation and mediation

Section 7 of the *Divorce Act*, R.S.C., 1970, c. D-8 imposes a duty on the lawyers representing the petitioner and respondent to examine the prospects of a spousal reconciliation and to inform the client of marriage counselling or guidance facilities that might assist the spouses in achieving reconciliation. This duty is now expanded to promote the settlement of disputes by negotiation and mediation.

Clause 5 of Bill C-10 provides as follows:

5. Subsection 7 (1) of the said Act is repealed and the following substituted therefor:

Duties of legal adviser respecting reconciliation and negotiation

"7. (1) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of any petitioner *or the spouse of any petitioner* on a petition for divorce under this Act, except where the circumstances of the case are of such a nature that it would clearly not be appropriate to do so,

- (a) to draw to the attention of his client those provisions of this Act that have as their object the effecting where possible of the reconciliation of the parties to a marriage *and, in the absence of any prospect of their reconciliation, the negotiation of matters in respect of which sections 10 to 12 provide for the making of orders and the giving of directions.*
- (b) to inform his client
 - (i) of the marriage counselling or guidance facilities known to him that might endeavour to assist the *spouses* with a view to their possible reconciliation, and
 - (ii) *in the absence of any prospect of their reconciliation, of the mediation facilities known to him that might endeavour to assist the spouses to negotiate matters described in paragraph (a); and*
- (c) to discuss with his client the possibility of the reconciliation of the *spouses and, in the absence of any prospect thereof, the advisability of negotiating those matters.*'

The experience under section 7 of the *Divorce Act*, R.S.C., 1970, c. D-8 demonstrates that it is treated as a *pro forma* requirement by the legal profession. Once divorce proceedings are instituted, thereby triggering the statutory duty, few, if any, lawyers perceive spousal reconciliation as a viable option. The very institution of the divorce proceeding is regarded as an extremely strong, if not conclusive, indication that at least one of the spouses is adamantly of the opinion that the marriage has irreparably broken down and that any attempts to reconcile will prove futile. Most lawyers will, therefore, discharge their statutory duty by a brief discussion to ensure that their client is "a serious client" and by handing out a xeroxed list of the available marriage counselling services in the community.

It remains to be seen whether lawyers will follow the same course of action with respect to the mediation of spousal disputes arising on divorce. Where the disputed issues relate to property and maintenance, lawyers for the respective parties will probably be averse to delegating these matters to a mediator with no qualifications or expertise in family law and tax law. Such reluctance is, in the opinion of this writer, fully justified. The ability of mediators to promote reasonable and fair property and maintenance settlements is, at best, doubtful, if they are ignorant of the legal rights and obligations of the parties and the tax implications of any proposed settlement. On the other hand, most lawyers are ill-equipped to deal with the family dynamics that generate "parenting" disputes on divorce. In this context, qualified mediators from other disciplines, including psychology, psychiatry and social work, offer an expertise that can facilitate the constructive resolution of parenting disputes.

The prospective impact of the proposed section 7 and the potential value of mediation will largely depend on the attitudes of the legal profession. Whether mediation will be viewed by lawyers as a practical and beneficial complementary or alternative process in family conflict resolution or as an unwarranted invasion of the exclusive domain of the legal

profession will be answered in the years ahead. Just as successful mediation requires the cooperation of the parties, so too, an inter-disciplinary professional approach to the resolution of family conflict requires the cooperation of the involved professions. In all probability, lawyers will themselves increasingly engage in the mediation of spousal maintenance and property disputes on marriage breakdown or divorce. This has already occurred in the United States and is gradually emerging in Canada. Consequently, the governing bodies of the legal profession in Canada can be expected to review the canons of ethics in order to accommodate this practice. The Province of British Columbia has already addressed this issue and permits lawyers to engage in family mediation under certain conditions.

Interim corollary orders

The provisions of section 10 of the *Divorce Act*, R.S.C., 1970, c. D-8 remain essentially unchanged. Whereas orders for interim access were formerly subsumed under the general jurisdiction of the court to make interim orders for "the custody, care and upbringing" of the children of the marriage, the proposed amendment to section 10 now expressly empowers the court to make interim access orders.

Clause 7 of Bill C-10 provides as follows:

7. Paragraphs 10 (a) and (b) of the said Act are repealed and the following substituted therefor:

"(a) for the payment of alimony or an alimentary pension by either spouse for the maintenance of the other pending the determination of the petition, accordingly as the court thinks reasonable having regard to the means and needs of each of them;

(b) for the maintenance of and the custody, care and upbringing of, *and for access to*, the children of the marriage pending the determination of the petition; or"

Specific directives and guidelines pertinent to the exercise of the court's discretionary jurisdiction over interim and permanent spousal and child maintenance, custody and access are included in clause 10 of Bill C-10 (see the proposed section 12.1 (3), discussed *infra*).

Permanent Orders

Bill C-10 introduces major changes in the law regulating permanent corollary relief in divorce proceedings. Clause 8 of Bill C-10 substitutes the following provisions for section 11 of the *Divorce Act*, R.S.C., 1970, c. D-8:

8. Section 11 of the said Act is repealed and the following substituted therefor:

“11. (1) On granting a decree of divorce, the court may, if it thinks it fit and just to do so having regard to the condition, means and other circumstances of each of the parties, make one or more of the following orders, namely,

- (a) an order requiring the husband to secure or pay *or to secure and pay* such lump sum or periodic sums as the court thinks reasonable for the maintenance of
 - (i) the wife,
 - (ii) the children of the marriage, or
 - (iii) the wife and the children of the marriage;
- (b) an order requiring the wife to secure or pay *or to secure and pay* such lump sum or periodic sums as the court thinks reasonable for the maintenance of
 - (i) the husband,
 - (ii) the children of the marriage, or
 - (iii) the husband and the children of the marriage; and
- (c) an order providing for the custody, care and upbringing of, *and for access to*, the children of the marriage.

Variation of order granting corollary relief

(2) *Subject to subsection (3),*

(a) a court that has made an order pursuant to this section,

(b) *such court for a province as the parties to the proceedings taken for that order may agree on in the manner prescribed by any rules of court or regulations made under section 19, or*

(c) *the court for the province in which either of the parties resides,*

may vary or rescind the order if the court thinks it fit and just to do so having regard to any change in the condition, means or other circumstances of either of the parties.

Exception

(3) *After the expiration of any time fixed under section 12 for an order to continue in force respecting maintenance, the order may not be varied for the purpose of continuing, resuming or increasing the maintenance or any portion thereof.*

Idem

(4) *The court for the province referred to in paragraph (2) (c) may decline to exercise, under subsection (2), jurisdiction based on residence in the province if the court determines on the balance of convenience that the province is inappropriate for the exercise therein, under that subsection, of such jurisdiction.”*

The proposed section 11 re-affirms that the jurisdiction of the court to grant corollary orders in divorce proceedings is discretionary. In the exercise of its discretion, the court shall have regard to “the condition, means and other circumstances of each of the parties”. The reference to “the conduct of the parties” in section 11 of the *Divorce Act*, R.S.C.,

1970, c. D-8 has been eliminated and "any misconduct committed by a party in the capacity of a spouse of the marriage" is now expressly excluded from consideration in the adjudication of maintenance claims (see proposed sub-section 12.1 (2), *infra*). Bill C-10 also defines specific policy objectives to be pursued by the courts in determining the right to and the quantum of permanent maintenance (see proposed sub-section 12.1 (1), *infra*).

Paragraphs 11 (1) (a) and (b), *supra*, which empower the court to grant an order "to secure and pay" maintenance by way of lump sum or periodic payments, is intended to negate the decision of the Supreme Court of Canada in *Nash v. Nash*, [1975] 2 S.C.R. 507, 2 N.R. 271, 16 R.F.L. (2d) 295, 47 D.L.R. (3d) 558, wherein it was held that orders to pay maintenance and orders to secure maintenance are mutually exclusive. In the words of Laskin, C.J.C., who delivered the majority judgment:

That provision is just not ample enough to support an order to pay periodic sums and concurrently an order to provide security without directing that the sums be paid out of the security. This is not a case of tweedledum and tweedledee. For the husband (or wife, as the case may be) to be ordered to put up security out of which a gross or annual sum or a periodic sum is to be paid is one thing (he or she is then free of any further obligation so long as the order remains in force without variation); for him (or her) to be ordered to make periodic payments and, in addition, to put up security to answer for any of such payments if there is default is something different. It is for Parliament to make this possible by amendment of the Divorce Act if it so pleases.

Paragraph 11 (1) (c), like the proposed paragraph 10 (b), *supra*, now provides express authority for the courts to grant access orders.

Sub-section 11 (2), *supra*, introduces a radical change to the current provisions of sub-section 11 (2) of the *Divorce Act*, 1970, c. D-8. Under the new provisions, the jurisdiction to vary or rescind a maintenance, custody or access order is no longer confined to the court that issued the original order. A concurrent jurisdiction is vested in extra-provincial courts if the parties submit to the jurisdiction. In addition, an application for variation or rescission may also be made to the court of the province wherein either of the parties reside. In this latter circumstance, the court may decline to exercise jurisdiction, if the court determines that the balance of convenience renders it an inappropriate forum for the disposition of the application. It is conceded that hardship sometimes ensues from the present mandatory requirement that any application to vary or rescind a corollary order granted in divorce proceedings must be made to the issuing court. But the modification of this requirement is likely to result in problems of its own. The existence of concurrent jurisdictions is likely to promote conflicting applications in the respective courts. Where the parties are not in agreement on the appropriate forum, each will turn to his or her own preferred forum. It would have been more appropriate, therefore, to devise some system whereby extra-provincial variation or

rescission could be achieved by way of a provisional order that is subject to review by the original issuing court. Such a procedure already exists in Canada under provincial reciprocal enforcement legislation. Alternatively, technological advances might provide a means whereby an absent party could present his or her side of the issue. It remains to be seen whether orders made in the absence of an affected party can survive the constitutional guarantees established by the *Canadian Charter of Rights and Freedoms*.

Consistent with the proposed amendments to section 11 (1) of the *Divorce Act*, R.S.C., 1970, c. D-8, spousal misconduct will no longer be relevant on an application to vary or rescind a corollary order for maintenance (see text, *supra*).

Pursuant to sub-section 11 (3), *supra*, where a maintenance order is subject to a fixed time limitation, the order cannot be varied or continued after the expiration of the time period. As presently drafted, sub-section 11 (3) requires the actual disposition of such an application before the date stipulated for the termination of the maintenance order. An application to vary or continue that is filed, but not adjudicated, before the expiry date of the order must be dismissed for want of compliance with the requirements imposed by sub-section 11 (3). This appears to be an oversight on the part of the draftsman and will hopefully be amended before the passage of Bill C-10.

Conditional Orders

Clause 9 of Bill C-10 amends the provisions of section 12 of the *Divorce Act*, R.S.C., 1970, c. D-8 to expressly include applications to vary corollary orders. Paragraph 12 (b) of the *Divorce Act* has been modified so as to expressly empower the court to impose time limitations on any order for corollary relief. Whether such time limitations should be imposed is a matter to be determined by the court in the exercise of the statutory discretion conferred by the proposed section 11, *supra*, having due regard to the policy objectives enunciated in the proposed sub-section 12.1. The impact of this amendment on the recent judgments of the Supreme Court of Canada in *Messier v. Delage*, (1983) 35 R.F.L. (2d) 337 is speculative. For valuable insights into the significance of the majority and minority judgments in *Messier v. Delage*, *supra*, see Professor B. Hovius, "Case Comment: *Messier v. Delage*", (1984) 26 R.F.L. (2d) 339; see also Pierrette Rayle, "Case Comment: *Messier v. Delage* — A Counsel's Eye View", (1984) 36 R.F.L. (2d) 356.

Objectives of maintenance on divorce; spousal misconduct no longer relevant

Bill C-10 introduces specifically defined objectives to be pursued by the courts in their determination of the right to or quantum of maintenance on divorce. Spousal misconduct, which is essentially personal rather than economic in character, is no longer relevant to maintenance claims. Bill C-10 also includes specific provisions to protect the best interests of the children of divorcing and divorced parents. All of these matters fall within clause 10 of Bill C-10, which provides as follows:

10. The said Act is further amended by adding thereto, immediately after section 12 thereof, the following section:

Objectives of maintenance orders

“12.1 (1) An order made pursuant to section 10 or 11 for maintenance shall, whether or not it is varied pursuant to subsection 11(2), be designed, in so far as is practicable, to

- (a) cause the spouses to share any economic consequences, to either spouse, of the care of any children of the marriage;
- (b) recognize the economic advantages and disadvantages, to the spouses, that have arisen out of the marriage and those resulting from its breakdown;
- (c) relieve any economic hardship that the court exercising jurisdiction to make or vary the order determines to be grave; and
- (d) assist adjustment to economic self-sufficiency by either of the spouses within a reasonable time of the making of any such order for maintenance of the spouse.

Maintenance regardless of spousal misconduct

(2) In deciding whether to order maintenance pursuant to section 10 or 11 or in assessing or otherwise making provision respecting maintenance pursuant to either of those sections or paragraph 12 (b), the court may not have regard to any misconduct committed by a party in the capacity of a spouse of the marriage.

Principles respecting children

(3) In the exercise of jurisdiction under sections 10 to 12 in respect of children, it is the duty of the court to take account of the best interests of the children as its paramount consideration and to give effect consistent therewith to the following principles, namely,

- (a) the spouses have a financial obligation to maintain the children of the marriage, which obligation shall, in so far as is practicable, be apportioned between the spouses according to their relative abilities to contribute to its performance, taking into account the means and needs of the spouses and children;
- (b) the jurisdiction conferred on the court by those sections includes power to make an interim or other order that either or both of the spouses, any other person who, with leave of the court, applies therefor,

or any such person and either spouse shall have the custody, care and upbringing of, or access to, the children of the marriage;

(c) the children of the marriage ought to have as much access to each of the spouses as the circumstances permit; and

(d) where, in the opinion of the court, the proper protection of the interests of any children of the marriage requires the appointment of a barrister, a solicitor, a lawyer or an advocate to represent them independently, the court has power to order the appointment."

The policy objectives defined in the proposed sub-section 12.1 (1), *supra*, are superimposed on the discretionary jurisdiction conferred on the courts by section 11, *supra*. In form, they resemble recent proposals of the Scottish Law Commission: Scot. Law Com. No. 67, *Family Law — Report on Aliment and Financial Provision*, November 4, 1981. In substance, however, they differ radically from those proposals in that the Scottish Law Commission sought to eliminate an unfettered judicial discretion by defining the objectives as the sole criteria to be applied to spousal maintenance claims on divorce: see generally, Julien D. Payne, "The Policy Objectives of Spousal Support Laws: Present and Prospective Judicial and Legislative Responses", published in *Payne's Digest on Divorce in Canada*, 1982 tab, at 82-769/815.

The provisions of the proposed sub-section 12.1 (2), *supra*, are clearly designed to eliminate "marital" misconduct from consideration in the judicial determination of spousal maintenance claims. Consequently, the commission of a matrimonial offence, such as adultery, cruelty or desertion, or the issue of either spouse's misconduct that supposedly contributed to the breakdown of the marriage, will become irrelevant to the adjudication of maintenance of divorce. Spousal maintenance dispositions can no longer seek to punish the "guilty" or reward the "innocent". The economic consequences flowing from spousal conduct or misconduct will, nevertheless, continue to be relevant in spousal and child maintenance claims. For example, the formation of a "common law" relationship by either spouse will continue to be relevant to the adjudication of a maintenance claim, insofar as that relationship bears economic consequences. By way of further example, the unjustified refusal of either spouse to accept suitable employment will continue to be relevant to a maintenance claim.

The provisions of the proposed sub-section 12.1 (3) are designed to protect the children of divorcing or divorced parents. In exercising its jurisdiction to grant corollary orders under sections 10 to 12 of Bill C-10, the court has "a duty . . . to take account of the best interests of the children as the paramount consideration". Subject to this overriding consideration, the following principles are applicable to all applications for corollary relief under sections 10 to 12 of Bill C-10. Paragraph (a), *supra*, legislatively endorses the criteria previously defined in *Paras v. Paras*, [1971] 1 O.R. 130, 9 R.F.L. 328, 14 D.L.R. (3d) 546 (Ont.

C.A.) and mandates their application to all interim and permanent child maintenance claims, whether by way of original or variation proceedings. Paragraph (b), *supra*, expressly empowers the court to grant interim and permanent orders for sole or "joint" custody. Orders for parental joint custody have in the past been granted pursuant to the *Divorce Act*, R.S.C., 1970, c. D-8 as well as pursuant to provincial statutes; they have taken a variety of forms: see Julien D. Payne and Patrick J. Boyle, "Divided Opinions on Joint Custody" and Julien D. Payne, "Co-Parenting Revisited", published in *Payne's Digest on Divorce in Canada, 1968-80*, at 694-713. Pursuant to paragraph (b), *supra*, the court may grant joint custody to the spouses *inter se* or it may order joint custody arrangements as between one of the spouses and any other person, such as a family relative. The court may also grant sole custody to either parent or to a third person. Paragraph (b), *supra*, expressly refers to "any other person who, with leave of the court, applies" for an interim or permanent order pursuant to sections 10-12 of Bill C-10. It remains to be seen whether an order conferring custody or access privileges on any other person than the spouses is confined to the circumstance where leave to apply for such relief has been sought and granted. Third party custody dispositions have been rare under the *Divorce Act*, R.S.C., 1970, c. D-8 and will presumably continue to be rare under Bill C-10. In all likelihood, however, the implementation of Bill C-10 will result in a significant number of orders whereby members of the extended family, and particularly grandparents, will be granted access privileges to their grandchildren on the dissolution of the parents' marriage. It will be observed that "third party" orders are expressly permitted only with respect to the custody of, care of, upbringing of, or access to, the children of the marriage. Whether a third party can also apply for leave to seek interim or permanent financial relief on behalf of the child(ren) of divorcing or divorced parents is unresolved, but such claims are likely to be approved where sole custody is vested in the third party. Although paragraph (b), *supra*, expressly empowers the court to order joint or shared parenting rights as between the spouses, it falls short of endorsing any presumption in favour of joint custody. Following the approach adopted in *Baker v. Baker*, (1979) 23 O.R. (2d) 391, 8 R.F.L. (2d) 236, 95 D.L.R. (3d) 529 (Ont. C.A.), *Kruger v. Kruger and Baun*, (1980) 25 O.R. (2d) 673, 11 R.F.L. (2d) 52, 104 D.L.R. (3d) 481 (Ont. C.A.) and *Zwicker v. Morine*, (1980) 38 N.S.R. (2d) 236, 63 A.P.R. 236, 16 R.F.L. (2d) 293 (N.S.S.C) (App. Div.), courts are likely to remain averse to joint custody orders, as between the parents, unless both parents have demonstrated a capacity and willingness to undertake cooperative shared parenting. Paragraph (c), *supra*, legislatively endorses the past and present trend whereby the courts normally grant liberal or generous access privileges to the non-custodial parent. Paragraph (d), *supra*, legislatively endorses a practice that has emerged informally in several Canadian provinces, whereby the interests of the children of divorcing or divorced parents

can be protected by the appointment of an independent legal representative. Whether this lawyer's role is to represent the wishes of the child or the "best interests of the child" or a combination of both has been a hotly debated issue in the context of child representation under section 20 of the *Child Welfare Act*, R.S.O., 1980, c. 66: see, for example, *Re W.*, (1979) 27 O.R. (2d) 314, 13 R.F.L. (2d) 381 (Ont. Prov. Ct.) (Abella, Prov. J.) and compare *Re C.*, (1980) 14 R.F.L. (2d) 21 (Ont. Prov. Ct.) (Karswick, Prov. J.). A similar debate is likely to ensue with respect to the child's lawyer's role in divorce proceedings: see *Burnett v. Burnett*, (1983) 46 A.R. 216, at 220-221 (Alta. Q.B.) (Veit, J.).

Form and effect of divorce decree

Clause 11 of Bill C-10 amends sections 13, 14 and 16 of the *Divorce Act*, R.S.C., 1970, c. D-8, which regulate the form and effect of divorce decrees. There will no longer be dual decrees by way of a decree nisi and a decree absolute. The proposed section 13 of Bill C-10 stipulates that there will be a single decree of divorce and that the decree "takes effect at the end of the period of thirty days after the date of the pronouncement of the judgment granting the decree" or at such later date as all rights of appeal have been exhausted. The words "at the end of" are ambiguous but presumably mean "on the expiry of" the designated thirty days. It would have been wiser for the proposed sub-section 13 (1) to have provided that the thirty days shall run from the date of "entry" of the judgment. This constitutes the logical point at which the time for appeal begins to run and would eliminate the danger of premature "remarriage", for the avoidance of which clause 12 in Bill C-10 provides as follows:

12. Section 16 of the said Act is repealed and the following substituted therefor:

Remarriage after divorce

"16. Where a decree of divorce has *taken effect under section 13*, either party to the former marriage may marry again."

The proposed sub-section 13 (2) of Bill C-10 empowers the court to shorten the thirty day period at the end of which the decree takes effect or to direct that the decree shall take effect forthwith. The exercise of this jurisdiction is conditioned on (i) the existence of special circumstances that render it in the public interest to do so; and (ii) the agreement of the parties and their undertaking that no appeal will be taken or that any pending appeal has been abandoned.

More specifically, clause 11 of Bill C-10 expressly provides as follows:

11. Sections 13 and 14 of the said Act are repealed and the following substituted therefor:

When divorce takes effect

“13. (1) *Subject to subsections (2) to (5), a decree of divorce takes effect at the end of the period of thirty days after the date of pronouncement of the judgment granting the decree.*

Special circumstances

(2) Where, on or after the granting of a decree of divorce,

(a) the court is of the opinion that by reason of special circumstances it would be in the public interest for the decree to *take effect* before the *end of the period referred to in subsection (1)*, and

(b) the parties agree and undertake that no appeal will be taken, or any appeal that has been taken has been abandoned,

the court may fix a shorter *period at the end of which the decree shall take effect* or, in its discretion, may *direct that the decree shall forthwith take effect.*

When decree appealed against takes effect

(3) A decree of divorce *in respect of which an appeal pursuant to this Act is pending at the end of the period referred to in subsection (1) shall take effect, unless voided on appeal, when an appeal no longer lies pursuant to this Act in respect of the divorce.*

Decision deemed appealable while leave required

(4) *For the purposes of subsection (3), during a period fixed or allowed by or under subsection 18 (2) for granting leave to appeal from a decision respecting a decree of divorce, an appeal, unless precluded as a result of any refusal of leave to appeal, shall be deemed to lie pursuant to this Act in respect of the divorce.*

Decree taking effect when appeal abandoned

(5) *Where a decree of divorce has taken effect under subsection (3) on abandonment of an appeal, either of the divorced spouses who wish to ascertain the time at which the decree took effect may apply,*

(a) *in the absence of proceedings under section 18 in respect of the decree, to the court of appeal, or*

(b) *after any such proceedings, to the Supreme Court of Canada, for a determination of that time.*

Effect of decree or order

14. A decree of divorce, *after taking effect under section 13*, or an order made under section 10 or 12 has legal effect throughout Canada.’’

In light of the above proposed amendments, consequential modifications to sections 17 and 18 of the *Divorce Act*, R.S.C., 1970, c. D-8, respecting appeals to the provincial courts of appeal and to the Supreme Court of

Canada, have been introduced in Bill C-10: see *ibid.* clauses 13 and 14. In addition, paragraph 17 (2) (b) of the *Divorce Act*, R.S.C., 1970, c. D-8 is amended so as to expressly empower a provincial appellate court "to refer the matter back for determination in accordance with such directions as it considers appropriate".

Rules of court

Clause 15 of Bill C-10 purports to increase the purposes for which Rules of Court may be made. It provides as follows:

15. Subsection 19 (1) of the said Act is amended by adding thereto, immediately after paragraph (a) thereof, the following paragraphs:

“(a.1) providing, notwithstanding anything in section 8 or subsection 20 (1), for dealing with petitions for divorce, so far as unopposed, and disposing thereof without trials and for the performance of the court's functions as described in paragraphs 8 (1) (a) and (b), including the exercise of its discretion as described in paragraph 8 (1) (b), by officers of the court on so dealing with any of the petitions;

(a.2) authorizing each or any of the judges of the court of appeal to exercise the jurisdiction of the court, subject to appeals to the court from their decisions, in respect of applications made pursuant to paragraph 13 (5) (a).”

This proposed amendment and other amendments in Bill C-10 (see, e.g., clause 2, proposed paragraphs 3 (1) (b) and 3 (2) (a); clause 6, proposed paragraph 9 (a); and clause 8, proposed paragraph 11 (2) (b)), which purport to delegate certain matters to the provincial rule-making authorities, raise a fundamental question respecting the constitutional validity of such delegation of powers. In this context, it is important to realize that Rules of Practice and Procedure cannot invade the field of substantive divorce law and that section 96 of the *British North America Act, 1867* (now *The Constitution Act, 1867*), fetters the legislative jurisdiction of the Parliament of Canada as well as that of the provincial legislatures: see *Court of Unified Criminal Jurisdiction; McEvoy v. Attorney General of New Brunswick and Attorney General of Canada*, (1983) 46 N.B.R. (2d) 219, 121 A.P.R. 219, *sub nom. McEvoy v. Attorney General of New Brunswick and Attorney General of Canada*, (1983) 148 D.L.R. (3d) 125 (S.C.C.).

Admissions and communications made during course of reconciliation or mediation process

Clause 16 of Bill C-10 modifies the provisions of section 21 of the *Divorce Act*, R.S.C., 1970, c. D-8 by providing as follows:

16. Section 21 of the said Act is repealed and the following substituted therefor:

Admissions and communications made in the course of reconciliation proceedings

“21. (1) A person nominated by a court or an officer thereof, under this Act or any rules of court or regulations made under section 19, to assist the parties to a marriage with a view to their possible reconciliation is not competent or compellable in any legal proceedings to disclose any admission or communication made to him in his capacity as the nominee of the court or its officer for that purpose.

Statements of which evidence inadmissible

(2) Evidence of anything said or of any admission or communication made in the course of an endeavour

(a) to assist the parties to a marriage with a view to their possible reconciliation, or

(b) through mediation facilities to assist the parties to negotiate any of the matters in respect of which sections 10 to 12 provide for the making of orders and the giving of directions,

is not admissible in any legal proceedings.”

Having regard to the fact that the proposed sub-section 21 (1) is confined to a court-ordered reconciliation process, whereas sub-section 21 (2) includes mediation as well as reconciliation processes, the statutory prohibition against the disclosure of admissions and communications is apparently intended to apply to all reconciliation and mediation conferences, and not only to those being conducted by a person nominated by the court or its officer. See *Shakotko v. Shakotko and Williamson*, (1977) 27 R.F.L. 1 (Ont. S.C.) (Grant, J.) and compare *Cronkwright v. Cronkwright*, [1970] 3 O.R. 784, 2 R.F.L. 241, 14 D.L.R. (3d) 168 (Ont. S.C.) (Wright, J.) and *Robson v. Robson*, [1969] 2 O.R. 857 (Ont. S.C.) (Wright, J.), interpreting and applying sub-section 21 (1) of the *Divorce Act*, R.S.C., 1970, c. D-8. Legislative endorsement of mediation as a means of securing an amicable and reasonable settlement of disputes arising on divorce is to be welcomed. Mediation has an obvious potential in promoting the constructive resolution of family conflicts. Mediation is, however, in its infancy in Canada and it is, as yet, a largely unproven process. With the recent emergence of private mediation services, as distinct from court-connected conciliation services, the proposed section 21 gives cause for concern in that it opens the door to abuse by self-styled mediators who work behind “closed doors”. Although there is evidence that court-connected conciliation services in Canada have made a positive contribution to the consensual resolution of family disputes, the quality of the services rendered by self-styled private mediators is unknown. In the absence of minimum requirements respecting the qualifications or training of private mediators and in the absence of any form of accountability, families in crisis are at risk in terms of both financial and emotional abuse. It might have been wiser, therefore, for the proposed section 21 to have been modelled on the provisions of section 31 of the *Children’s Law Reform*

Amendment Act, S.O., 1982, c. 20, which provides for the "open" or "closed" mediation of "parenting" disputes at the option of the parties and which presupposes some degree of judicial control over the appointment of qualified mediators: see generally, Julien D. Payne, "Protecting the Children of Fractured Families: Alternatives to the Adversarial Process", (1983) 14 *Revue Générale de Droit* 197, at 205-207. Whether "closed" mediation is compatible with the *Canadian Charter of Rights and Freedoms* is a question that will, no doubt, engage the attention of our courts in the future. In *M. v. K.* (1982), 186 N.J. Super. 363, 452 A. 2d 704 (N.J. Super. Ct.) (Ch. Div.), it was held that, in proceedings wherein the custody of a child is in issue, a statutory privilege respecting spousal communications to a marriage counsellor constitutes a violation of the child's right to due process under the United States and New Jersey Constitutions.

Concluding comments

Bill C-10 fails to address several problems that have arisen from time to time in the interpretation and application of the provisions of the *Divorce Act*, R.S.C., 1970, c. D-8 and in the management of divorce files by legal practitioners. For example, although the courts have, and will retain, the jurisdiction to grant periodic maintenance orders for the lifetime of the payee, thus binding the estate of the payor in the event that he (she) predeceases the payee, no provision is included in Bill C-10 respecting the judicial power, if any, to make orders with respect to life insurance policies or prospective lump sum final settlements on the death of the payor. The disputed jurisdiction of the courts to include some form of cost-of-living indexation in an order for periodic maintenance also remains unresolved. The words "on granting a decree" in the proposed sub-section 11 (1) of Bill C-10 invite criticism by reason that they preserve the uncertainty generated by diverse judicial decisions interpreting and applying sub-section 11 (1) of the *Divorce Act*, R.S.C., 1970, c. D-8: see Freda M. Steel, "The Award of Maintenance Subsequent to Decree Nisi: A Question of Jurisdiction or Discretion", (1981) 19 R.F.L. (2d) 33. In light of the proposed sub-section 11 (3), which expressly excludes any jurisdiction to vary a fixed term order for periodic maintenance, when that term has expired, will, or should, the courts construe the proposed sub-section 11 (1) so as to preclude an original application for corollary relief after the divorce decree has been pronounced or taken effect? If not, a spouse who does not seek or does not need maintenance at the time of the divorce may be in a preferred position, as compared to a spouse who seeks or is granted a fixed term order and encounters an unforeseeable economic crisis after the expiration of the order. In the opinion of this writer, the solution does not lie in any modification of the aforementioned

sub-section 11 (3), but rather in clarification of the proposed sub-section 11 (1). The proposed sub-section 11 (3) also invites inquiry concerning the jurisdiction of the court to vary lump sum orders. If fixed term orders are subject to the aforementioned limitation, it is questionable whether a lump sum order should be variable in the absence of fraud or a fundamental mistake that cries out for revision or rescission of the order.

These and other blemishes in Bill C-10 will, no doubt, ultimately be resolved by judicial decision. It is unfortunate that the costs of such enlightenment will be borne by the families in crisis. Bilingual statutes unquestionably impose heavy burdens on the draftsman, but one might reasonably have hoped that one of the two official versions would be clear and precise and readily comprehensible, if not to lay persons, then at least to lawyers and the courts.