SOME COMMENTS OF BILL C-47

Being an Act Respecting Divorce and Corollary Relief

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The divorce law of Canada is contained in the Divorce Act[1], a statute first enacted in 1968[2]. Constitutional authority for this enactment is furnished by s. 91.26 of the Constitution Act 1867[3], whereby exclusive legislative authority over "Marriage and divorce" is conferred upon the federal Parliament. Prior to 1968, there had been only limited exercise of this constitutional power and for many years the divorce laws of Canada continued without comprehensive review. The result was a patchwork of laws derived from pre-Confederation, English and federal statutes. The Divorce Act represented, therefore, the first occasion upon which the federal Parliament tackled, in a comprehensive manner, divorce legislation. Moreover, as the Act applies to the whole of Canada, this legislation provided, for the first time, a Canada-wide law of divorce.

Initially, the Act of 1968 was regarded - at least by some - as novel and, indeed, radical legislation. Nevertheless, in the years that followed 1968, as society grew more accustomed to the notion of divorce, increasing pressure developed to re-assess the law as enacted in 1968. On January 19, 1984, Bill C-10, being an Act to Amend the Divorce Act, was introduced into Parliament and read for the

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1. R.S.C., 1970, c. D-8, as amended.
2. The Divorce Act, S.C., 1967-68, c. 24.
3. 30 & 31 Vic., c.3, as amended.

first time.[4] This Bill, however, died on the Order Paper when Parliament was dissolved in the summer of 1984. Bill C-47, the proposed Divorce and Corollary Relief Act, received First Reading on May 1st, 1985 and Second Reading on May 24th, 1985, whereafter it was referred to the Standing Committee on Justice and Legal Affairs. The Bill proposes the repeal of the Divorce Act.[5]

The purpose of this Paper is to comment on some of the major provisions of Bill C-47. Before so proceeding, however, it may be useful to briefly sketch the position that obtained in Canada prior to the enactment of the present Divorce Act.

1. Prior to the Divorce Act[6]

Until 1968, in Newfoundland and Quebec the courts did not possess jurisdiction to grant a decree of divorce. For persons domiciled in these provinces the only method of obtaining dissolution of marriage was by a private Act of the Federal Parliament, a procedure also available to persons whose domicile was uncertain. Prior to 1930, this too was the position in Ontario. By the Divorce Act (Ontario), however, English law as that law existed on the 15th July, 1870, was introduced into this Province. In

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4. See, generally, Divorce Law in Canada: Proposals for Change, (1984).
5. See, clause 32 of the Bill.
6. This part of the Paper is extracted, without footnotes, from Mendes da Costa, Studies in Canadian Family Law, (1972), Chapter 7, Divorce, pp. 362-365.

substance, therefore, the divorce law of Ontario rested upon the terms of the Imperial Matrimonial Causes Act, 1857. This English statute also provided the foundation of the divorce laws of British Columbia, Alberta, Saskatchewan, Manitoba, the Northwest Territories and the Yukon Territory. By this Imperial Act a husband could obtain a divorce on the ground of his wife's adultery. For a wife to obtain a divorce, however, a showing of simple adultery was not enough; she had to prove that her husband had been guilty of either incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et thoro, or of adultery coupled with desertion, without reasonable excuse, for two years or upwards. A wife was, accordingly, placed in a more disadvantageous position. This so-called "double-standard" was removed in 1925 by the federal Marriage and Divorce Act, and adultery alone was made a ground for divorce upon the petition of the wife. Adultery, therefore, was a ground for divorce at the suit of either spouse. And rape, sodomy and bestiality were grounds available to a wife only. Pre-Confederation statutes were the source of the divorce laws of New Brunswick, Nova Scotia and Prince Edward Island. In all these provinces, adultery was a ground for divorce and so too was consanguinity within the degrees prohibited by an early statute. Cruelty and impotence were also grounds for divorce in Nova Scotia, while in New Brunswick

and Prince Edward Island the additional grounds were frigidity or impotence.

2. Movement to the Divorce Act

As the 1960's progressed, it became increasingly clear that the state of the law relating to divorce in Canada was unsatisfactory. A number of private members' bills were introduced. This activity culminated in the appointment of a Special Joint Committee of the Senate and the House of Commons. The terms of reference of this Committee were wide: "to inquire into and report upon divorce in Canada and the social and legal problems relating thereto, and such matters as may be referred to it by either House". Commencing on June 28th, 1966, the Special Joint Committee held 24 open meetings and received more than 70 briefs. The Report of the Committee, released in June, 1967, contained some 21 recommendations. Its proposals were restated in the form of a draft bill contained in Part V of the Report. On December 4th, 1967, the Divorce Bill, Bill C-187, was introduced in Parliament and read for the first time. The Report of the Special Joint Committee was used as a guide in the preparation of Bill C-187, though there were differences of substance between this Bill and the draft bill of the Special Joint Committee. Bill C-187 was assented to on February 1st, 1968, and was proclaimed in force on July 2nd, 1968.

PART I

PROVISIONS THAT RELATE TO DIVORCE

The Imperial Matrimonial Causes Act, 1857, transferred matrimonial matters from the ecclesiastical courts to the secular courts and introduced, for the first time, judicial divorce. Divorce by court process was, without doubt, a great improvement over the position taken by ecclesiastical law; that is, that marriage was indissoluble and divorce a vinculo impossible. Prior to the Act of 1857, some amelioration was afforded in that dissolution of marriage could be obtained by Act of Parliament. But this was a cumbersome and expensive procedure, a privilege available only to the very few and very rich. Small wonder, therefore, at the nineteenth century demand for judicial divorce.

1) Matrimonial Fault and the Adversary System[7]

Judicial divorce came, however, with two basic defects. If marriage was to be dissolved by the secular courts, in the teeth of the dogma of indissolubility of marriage, on what philosophy could this relief be satisfactorily based? The notion seized upon was the concept of matrimonial offence, a concept used "to give some justification for breaking an indissoluble union against the

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7. The following comment is based upon Mendes da Costa, Studies in Canadian Family Law, (1972), Chapter 7.

will of the offending party"[8]. Secondly, perhaps without realization, divorce was made part of the ordinary common law adversary process. These two factors became deeply embedded in the very foundation of the remedy of judicial divorce and have greatly impeded the development of a rational divorce law.

(a) Matrimonial Fault

By the doctrine of matrimonial fault, divorce is available if one party commits a "matrimonial offence". This party is the "guilty" party; the other is "innocent". Prescribed conduct must, therefore, be categorized as comprising a matrimonial offence, and matrimonial fault must be legally allocated to one, and only to one, party. In favour of this regime it can be asserted that the court is presented with a clear, concise issue and that legal advice can, accordingly, be given with some degree of confidence. Further, this relief is readily available immediately following the commission of a matrimonial offence, by a system of law which is generally understood by the public and which does not permit a divorce to be obtained against the will of the innocent spouse. But the disadvantages of the doctrine of matrimonial fault seem overwhelming. This doctrine is specifically designed to deal with superficialities, to focus upon the symptom and not the illness: by its very nature it shows no concern or interest in getting at the actual cause of marital failure. Also, to what extent,

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8. Williams v. Williams, [1964] A.C. 698, at p.752 per Lord Pearce.

it may reasonably be asked, is it realistic to label one party innocent and the other guilty? With so close a relationship as marriage envisages, involving as it does a continuous process of action and reaction, the task of allocating fault to one spouse, and to one spouse alone, seems an endeavour neither possible nor desirable. Further, if entitlement to divorce depends upon the establishment of matrimonial fault, if it rests upon a finding that the respondent-spouse is the guilty spouse, does it not follow that to obtain relief the petitioner must be innocent? This reasoning was accepted by the Imperial Act in that this statute conferred a discretion upon the court to refuse relief should a petitioner be found guilty of specified misconduct. Moreover, by the doctrine of condonation, a spouse was discouraged from attempting reconciliation. For the concept of matrimonial offence demands a guilty spouse. And should the "innocent" spouse forgive the "guilty" spouse as part of an endeavour to salvage a foundering marriage, guilt would be clothed with forgiveness: and, accordingly, condonation would be a bar to a petition for divorce.

(b) The Adversary Process

From its creation, judicial divorce was integrated into the ordinary common law process. But with one great difference. Unlike any other kind of civil proceeding, a divorce suit could not, and cannot, succeed by default. Even though a suit is not defended, a petitioner is nevertheless required to establish a ground for divorce.

The consequences of this requirement are manifold.

As strict proof is necessary, the suit cannot be initiated or conducted by agreement between the spouses: in more general terms, collusion will bar divorce. If, however, both parties want a divorce, one may be forced to commit adultery simply to provide the necessary ground for relief. Alternatively, one or both spouses may be forced into giving hypocritical, or, perhaps, even perjured evidence. In this way the integrity of the system of administration of justice may be brought into disrepute. Further, the petitioner is compelled to adopt an adversary stance: even if the proceedings are undefended, a wife must relate to the court the circumstances of the matrimonial fault committed by her husband. And if the suit is defended, assertions and allegations will be exchanged across the courtroom floor, and the shortcomings - real or alleged - of each spouse will be exposed to public view. Embarrassment, humiliation, rancour and bitterness may well pile one upon the other and the relationship between the spouses deteriorate steadily from lack of affection to open animosity.

It is in this climate that division of property, spousal maintenance and the custody and maintenance of the children of the marriage must be resolved. And there is a further point. Where one spouse desperately wants relief from marriage, the situation is ripe for bargaining: and rights may be relinquished which would otherwise have been most strenuously asserted. Of particular concern, in this respect, is the position of children of the marriage.

2. The Divorce Act

Grounds for divorce in Canada are exclusively contained in sections 3 and 4 of the Divorce Act. Section 3 provides as follows:

> "3. Subject to section 5, a petition for divorce may be presented to a court by a husband or wife, on the ground that the respondent, since the celebration of the marriage
> (a) has committed adultery;
> (b) has committed an assault involving sexual intercourse, an act of sodomy or bestiality or has engaged in a homosexual act;
> (c) has gone through a form of marriage with another person; or
> (d) has treated the petitioner with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses."

This section contains grounds for divorce that are associated with the traditional doctrine of matrimonial fault and the concept of matrimonial offence. Of these grounds, two grounds - adultery and cruelty - have been heavily relied upon by petitioners. Indeed, in relation to decrees absolute granted in 1983, adultery comprised 44.6% of the total number of alleged grounds based upon marital offence, while for physical and mental cruelty the figure was 55.1%. [9]

Section 4 contains the following provisions:

> "4.(1) In addition to the grounds specified in section 3, and subject to

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9. See, Marriages and divorces, Vital Statistics, Volume II, (1983), p.30, Table 20. Generally, see, Divorce: Law and the Family in Canada (1983), pp. 126-149.

section 5, a petition for divorce may be presented to a court by a husband or wife where the husband and wife are living separate and apart, on the ground that there has been a permanent breakdown of their marriage by reason of one or more of the following circumstances as specified in the petition, namely:

(a) the respondent

(i) has been imprisoned, pursuant to his conviction for one or more offences, for a period or an aggregate period of not less than three years during the five year period immediately preceding the presentation of the petition, or

(ii) has been imprisoned for a period of not less than two years immediately preceding the presentation of the petition pursuant to his conviction for an offence for which he was sentenced to death or to imprisonment for a term of ten years or more, against which conviction or sentence all rights of the respondent to appeal to a court having jurisdiction to hear such an appeal have been exhausted;

(b) the respondent has, for a period of not less than three years immediately preceding the presentation of the petition, been grossly addicted to alcohol, or a narcotic as defined in the Narcotic Control Act, and there is no reasonable expectation of the respondent's rehabilitation within a reasonably foreseeable period;

(c) the petitioner, for a period of not less than three years immediately preceding the presentation of the petition, has had no knowledge of or information as to the whereabouts of the respondent and, throughout that period, has been unable to locate the respondent;

(d) the marriage has not been consummated and the respondent, for a period of not less than one year, has been unable by reason of illness or disability to consummate the marriage, or has refused to consummate it; or

> (e) the spouses have been living separate and apart
> (i) for any reason other than that described in subparagraph (ii), for a period of not less than three years, or
> (ii) by reason of the petitioner's desertion of the respondent, for a period of not less than five years,
> immediatley preceding the presentation of the petition.
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> (2) On any petition presented under this section, where the existence of any of the circumstances described in subsection (1) has been established, a permanent breakdown of the marriage by reason of those circumstances shall be deemed to have been established."

Section 4 blazed a new trail, insofar as it introduced into Canadian law additional grounds for divorce predicated upon a permanent breakdown of marriage. In relation to decrees absolute granted in 1983, the separation grounds comprised in section 4(1)(e)(i) and (ii) accounted for 94.7% of the total number of alleged grounds, based upon marriage breakdown.[10]

3. Bill C-47

Under Bill C-47, provisions relating to "Divorce" are contained in clauses 8-14. The circumstances upon which relief may be granted are located in clause 8(1) and (2), which read as follows:

> "8. (1) A court of competent jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown of their marriage.

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10. See, Marriages and divorces, Vital Statistics, Volume II, (1983), p.30, Table 20. Generally, see, Divorce: Law and the Family in Canada (1983), pp. 126-149.

> (2) Breakdown of a marriage is established only if
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> (a) the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding; or
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> (b) the spouse against whom the divorce proceeding is brought has, since celebration of the marriage,
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> (i) committed adultery, or
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> (ii) treated the other spouse with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses."

Much has been written on the inter-relationship between divorce and marriage stability. In addition to the divorce law, a wide variety of factors have been said to contribute to marriage breakdown, including the following: economic problems; permissive attitude to non-marital sexual relations; choice of friends; changing values; use of leisure time; unrealistic expectations; diverse career plans; and, lack of communication. However this may be, the Canadian divorce rate has changed dramatically in the course of this century. As has been stated:[11]

> "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

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11. Divorce: Law and the Family in Canada (1983), at p.59.

> 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."

In the years following 1978, the divorce rate has been relatively stable: the rate was 251.3 in 1979, 259.1 in 1980, 278.0 in 1981, 285.9 in 1982, and 275.5 in 1983. Given, therefore, the seeming inevitability of divorce, the issue that must be determined is the manner by which termination of marriage can best be accomplished. Individual value judgments on this issue will, no doubt, vary from time to time as social mores fluctuate. However, it is suggested that clause 8 adopts a sensible and pragmatic approach, which should merit general support.

4. Summary

From a reading of the clauses relating to "Divorce", points of interest would appear to include the following:

(i) Clause 8(1) opens with the words, a "court of competent jurisdiction". These words refer to clause 3, which controls jurisdiction in divorce proceedings.

(ii) Clause 8(1) contemplates an application by "either or both spouses", and that a divorce may be granted to "the spouse or spouses". Presumably, therefore, spouses may combine to bring an application under clause 8(2)(a). However, the words of clause 8(2)(b), "the spouse against whom" the divorce proceeding is brought, envisage that only

the "non-guilty" spouse can be the applicant when relief is sought under this paragraph.

(iii) The philosophy of clause 8(1) is to introduce a single ground of divorce, "breakdown of marriage". By clause 8(2), this ground is established upon proof of the circumstances stipulated in clause 8(2)(a) and (b). In general, clause 8(2)(a) of the Bill carries forward, with modifications, section 4(1)(e) of the Divorce Act, and clause 8(2)(b) perpetuates section 3(a) and (d) of the Act.
The proposed legislation omits the other grounds for divorce now contained in sections 3 and 4. One possible consequence of this omission is that there will be pressure to bring under the rubric of "cruelty" conduct that would no longer be a ground for divorce: for example, the conduct contained in section 3(b) of the Divorce Act. Those who argue to the contrary will, no doubt, point to the reduction in the separation period to a period of one year.

(iv) Clause 8(2)(a) is based upon the separation ground. The time periods of 3 and 5 years, now contained in section 4(1)(e) (i) and (ii), have been collapsed to a single period of "at least one year".

(v) Under clause 8(2)(a), the cause of the separation appears irrelevant. This reading seems to be supported by clause 8(3)(a), which provides as follows:

> "8.(3) For the purposes of paragraph (2)(a),
>
> (a) spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other;"

By this provision, the spouses must have "lived apart", the factum of the separation ground. However, the words "either of them" had the required intention, indicate that the grounds may be established where this intention is possessed only by the applicant spouse; that is, in circumstances where the applicant spouse may be in desertion.

(vi) Section 4(1)(e) requires that the period during which the parties have been living separate and apart must immediately precede "the presentation of the petition". Under clause 8(2)(a), the period of at least one year is qualified by the words "immediately preceding the determination of the divorce proceeding". The phrase "divorce proceeding" is defined in clause 2(1) to mean "a proceeding in a court in which either or both spouses seek a divorce alone or together with a support order or a custody order or both such orders". The word "determination" is undefined. The "determination" of a divorce proceeding would appear to refer to the stage when the court pronounces its decision. If this is so, clause 8(2)(a) appears to authorize the filing of an application, even though the parties have not, at that stage, lived separate and apart for the prescribed period of at least one year. In this event, on the filing of the application, the circumstance of separation would be inchoate; indeed, by the

nature of the circumstance, it would remain inchoate up until the determination of the proceeding. However, by the concluding words of clause 8(2)(a), the spouses must have been living separate and apart at the commencement of the proceeding.

(vii) Of the grounds prescribed in section 3 of the Divorce Act, clause 8(2)(b) has retained only two: namely, adultery and cruelty. As under section 3, these grounds must have come into existence "since celebration of the marriage". Like the position under section 3, no "waiting period" is written into Bill C-47, and relief may be sought immediately upon the commission of conduct that constitutes either circumstance contained in clause 8(2)(b).

(viii) Clause 8(1) of Bill C-47 provides that a court may grant a divorce on the ground that "there has been a breakdown of their marriage". As noted, this ground is to be established by evidence of the circumstances contained in clause 8(2). However, adultery and cruelty, the circumstances contained in clause 8(2)(b), are, of course, fault oriented. While clause 8(2)(a), which contains the circumstance of separation, reflects the philosophy of marriage breakdown, it does so only in an incomplete way. For clause 8(2) provides that breakdown of a marriage is established "only if" one or other of the circumstances specified in paragraph (a) or (b) are satisfied. Even, therefore, in the case of applications based on separation, the question before the court will be

"has the applicant established the requirements of clause 8(2)(a)", rather than "has there in fact been a breakdown of marriage".

(ix) Clause 8(3)(b) contains provisions that control the calculation of the period of separation. The paragraph provides as follows:-

> "8(3) For the purposes of paragraph (2)(a),
> ...
> (b) a period during which spouses have lived separate and apart shall not be considered to have been interrupted or terminated
>
> (i) by reason only that either spouse has become incapable of forming or having an intention to continue to live separate and apart or of continuing to live separate and apart of the spouse's own volition, if it appears to the court that the separation would probably have continued if the spouse had not become so incapable, or
> (ii) by reason only that the spouses have resumed cohabitation during a period of, or periods totalling, not more than ninety days with reconciliation as its primary purpose."

The provisions of clause 8(3)(b)(i) are substantially similar to those contained in section 9(3)(a) of the Divorce Act, while the provision corresponding to clause 8(3)(b)(ii) is section 9(3)(b) of the Act.[12] However, whereas clause 8(3)(b)(ii) refers to a resumption of cohabitation during "a

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12. See, generally, Mendes da Costa, Studies in Canadian Family Law, (1972), Chapter 7, Divorce, at pp. 516-518.

period of, or periods totalling", section 9(3)(b) speaks of "a single period". This difference in language would appear to make it clear that clause 8(3)(b)(ii) permits a resumption of cohabitation on more than one occasion, provided that the periods, in totality, do not exceed the limit prescribed by the clause. Further, even though the separation period has, by clause 8(2)(a), been reduced to a period of one year, this limit continues to be one of "not more than ninety days".

(x) Clause 9 imposes a duty upon a legal advisor. The provisions of clause 9(1) and (3) are substantially similar to those contained in section 7 of the Divorce Act.[13] Clause 9(2), which has no counterpart in the Divorce Act, provides as follows:

> "9.(2) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him that might be able to assist the spouses in negotiating those matters."

The duty imposed upon a legal advisor by this provision is twofold. First, it is the duty of every legal advisor to "discuss" with a spouse the "advisability of negotiating" the matters specified. From the use of these words, it would

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13. See, generally, Mendes da Costa, Studies in Canadian Family Law, (1972), Chapter 7, Divorce, at pp. 376-378.

appear that a legal advisor is not required to engage in actual negotiation, a function for which he may have received no adequate training. Secondly, it is the duty of every legal advisor to inform a spouse of the "mediation facilities" known to him that might be able to assist the spouses in their negotiation. The expression "mediation facilities" is not defined in the Bill, and its meaning cannot be stated with precision. Further, assume that a legal advisor does not know of any "mediation facilities". Does he comply with this provision if, for this reason, he fails to impart information to his client? The expression "known to him" would appear to suggest that there would so be compliance. But to construe these words in this way would frustrate the purpose of clause 9(2), a purpose that would appear better served by interpreting the expression to mean either known or "ought reasonably to be known" to the legal advisor.
However this may be, the importance of clause 9(2) should not be overlooked. It is the first clear statement of policy, at the federal level, to support the mediation of issues relating to corollary relief.

(xi) Clause 9(2) refers to the negotiation of matters that may be the subject of "a support order or a custody order". There is no reference to circumstances that constitute the ground for divorce, and for good reason: conduct of this nature may well amount to collusion.
In this context, it should be noted that section 9(1)(b) of the Divorce Act imposes upon the court a duty to satisfy

itself that there has been no collusion in relation to the petition and "to dismiss the petition if it finds that there was collusion in presenting or prosecuting it". Collusion, therefore, remains an absolute bar to divorce under the Act. Section 2 of the Act defines collusion in this way:

> "2. In this Act
> ...
> "collusion" means an agreement or conspiracy to which a petitioner is either directly or indirectly a party for the purpose of subverting the administration of justice, and includes any agreement, understanding or arrangement to fabricate or suppress evidence or to deceive the court, but does not include an agreement to the extent that it provides for separation between the parties, financial support, division of property interests or the custody, care or upbringing of children of the marriage; ..."

Section 2 effected a change in the law in that certain matters are excluded from the definition of collusion: namely, "an agreement to the extent that it provides for separation between the parties, financial support, division of property interests or the custody, care or upbringing of children of the marriage".

Bill C-47 contains no reference to collusion, nor, therefore, is this word defined. It seems clear, however, that a court will surely dismiss any petition should it be satisfied that the applicant has been either directly or indirectly a party to an agreement or conspiracy for the purpose of subverting the administration of justice. While the provisions of clause 9(2) make it clear that disputes concerning matters that may be the subject of a support order or a custody order may be resolved by negotiation, section 2 of the Act renders non-

collusive additional matters: that is, an agreement to the extent that it provides for "separation between the parties" and the "division of property interests". Presumably, the Bill does not intend to effect a change in the law in this regard. A short amendment would, however, place the issue beyond dispute.

(xii) Clause 10 imposes a duty upon the court to ascertain if there is any possibility of reconciliation. Clause 10(1) provides as follows:

> "10.(1) In a divorce proceeding, it is the duty of the court, before considering the evidence, to direct such inquiries to the spouse bringing the proceeding and, where the proceeding is defended, to the spouse against whom the proceeding is brought as the court deems necessary to ascertain if there is any possibility of the reconciliation of the spouses, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so."

Clause 10(2) deals with adjournments and clause 10(3) with the resumption of proceedings.

Section 8 of the Divorce Act contains provisions that are substantially similar to those of clause 10.[14] However, there are differences. Clause 10(1) directs that enquiries be made "before considering the evidence". The equivalent expression in section 8(1) of the Act is "before proceeding to the hearing of the evidence". In considering this change of

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14. Generally, see, Mendes da Costa, Studies in Canadian Family Law (1972), Chapter 7, Divorce, pp. 378-82.

language, reference should be made to clause 25 of the Bill, which confers rule making power upon the "competent authority". By clause 25(2)(b), rules may be made respecting the conduct and disposition of any proceedings "under this Act without an oral hearing". Possibly, the use of the word "considering" was due to the difficulty of applying the word "hearing" to the reception of affidavit evidence.

There is another point. Under section 8, the court is to direct enquiries to the petitioner, and, "where the respondent is present, to the respondent." The language of clause 10(1) is dissimilar: namely, inquiries are to be directed to the spouse bringing the proceeding and, "where the proceeding is defended, to the spouse against whom the proceeding is brought". In other words, under the Bill, inquiries need not be directed to the non-applicant spouse, even if that party be present, unless the proceeding is defended.

(xiii) Clause 10(4) and (5) contain provisions rendering admissions and communications, made in the course of reconciliation proceedings, non-admissible in evidence. Clause 10(4) and (5) provide as follows:

> "10.(4) No person nominated by a court under this section to assist spouses to achieve a reconciliation is competent or compellable in any legal proceedings to disclose any admission or communication made to him in his capacity as a nominee of the court for that purpose.
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> (5) Evidence of anything said or of any admission or communication made in the course of assisting spouses to achieve a

reconciliation is not admissible in any legal proceedings."

Provisions equivalent to clause 10(4) and (5) are located, respectively, in section 21(1) and (2) of the Divorce Act. One point deserves mention. Both section 21(2) of the Act and clause 10(5) of the Bill speak only of statements made in a "reconciliation" proceeding. There is no reference to statements made where the purpose of the proceeding is not "reconciliation" but "mediation". This is understandable in the case of the Divorce Act, as that Act contains no reference to "mediation". However, as noted, clause 9(2) proposes the introduction of the concept of mediation into divorce law. It would seem that the policy that favours non-disclosure in "reconciliation" proceedings is - at least to some substantial extent - present where the proceedings are in aid of "mediation". If this is so, it would appear desirable to amend clause 10(5) by the addition of a reference to "mediation proceedings". It must, however, be recalled that mediation provisions already exist in provincial legislation.[15] Possibly, therefore, the intent of the Bill is that this issue should continue to be controlled at the provincial level.

(xiv) Clause 11 of the Bill contains factors that may preclude relief. Clause 11(1) provides as follows:

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15. See, for example, the Children's Law Reform Act, R.S.O., 1980, c.68, as amended, section 31. Under this section, mediation may be either "open" or "closed", depending upon the decision of the parties.

> "11.(1) In a divorce proceeding, it is the duty of the court,
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> (a) where a divorce is sought in circumstances described in paragraph 8(2)(a), to refuse to grant the divorce if the granting of the divorce would prejudicially affect the making of reasonable arrangements for the support of any children of the marriage; and
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> (b) where a divorce is sought in circumstances described in paragraph 8(2)(b), to satisfy itself that there has been no condonation or connivance on the part of the spouse bringing the proceeding, and to dismiss the application for a divorce if that spouse has condoned or connived at the act or conduct complained of unless, in the opinion of the court, the public interest would be better served by granting the divorce."

The corresponding provision to clause 11 of the Bill is section 9 of the Divorce Act.[16] In the case of the separation ground, the relevant provision is clause 11(1)(a), which takes the place of section 9(1)(d), (e) and (f) of the Act. This contraction of precluding factors should be viewed in light of the collapse of the grounds contained in section 4(1)(e)(i) and (ii) of the Act to the single circumstance specified in clause 8(2)(a) of the Bill. Clause 11(1)(b) deals with the factors of condonation and connivance, and is equivalent to section 9(1)(c) of the Act. Clause 11(2), in relation to condonation, abolishes the doctrine of revival, and is the counterpart of section 9(2) of the Act.

While the Bill does not contain a definition of condonation, clause 11(3) sets out certain circumstances that do not amount to condonation. Clause 11(3) provides as follows:

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16. See, generally, Mendes da Costa, Studies in Canadian Family Law (1972), Chapter 7, Divorce, at pp. 383-420.

> "11.(3) For the purposes of this section, a continuation or resumption of cohabitation during a period of, or periods totalling, not more than ninety days with reconciliation as its primary purpose shall not be considered to constitute condonation."

This provision is equivalent to that contained in section 2 of the Divorce Act. However, section 2 of the Act refers to "any single period" of not more than ninety days. These words have raised the issue whether section 2 envisages a continuation or resumption of cohabitation on more than one occasion, if, on each occasion, the period of cohabitation does not exceed ninety days, or, alternatively, whether the section authorizes only the one, as opposed to several, attempts at reconciliation, even though all the periods are less than ninety days. Clause 11(3) contains its own solution to this issue. The words "during a period of, or periods totalling, not more than ninety days" make it clear that multiple periods are permitted, provided that, in their totality, they do not exceed ninety days.

(xv) In this context, reference may be made to the decision of Re Morris and Morris[17], where a civil divorce had earlier been obtained. While this decree was recognized by the Jewish religion as a valid exercise of the civil power, it was nevertheless ineffective as a divorce in the eyes of the orthodox Jewish community. The parties had entered into a

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17. (1973), 42 D.L.R.(3d) 550 (Man.C.A.). Leave to appeal to the Supreme Court of Canada granted on terms: see, Re Morris and Morris, (1974) 51 D.L.R.(3d) 77 (Man.C.A.). Notice of Discontinuance filed, April 27, 1977.

"Kethubah", or covenant of marriage. At trial, the court granted a declaration and made an order that the respondent-husband present himself before the Beth Din to institute inquiry whether a bill of divorcement was necessary as between the parties, and to institute proceedings for the same should the Beth Din so determine. An appeal was allowed by the Manitoba Court of Appeal and the declaration and order obtained at trial were set aside.

This is a difficult and sensitive issue. Should divorce legislation speak to this matter? For example, should the legislation authorize the courts to preclude relief, unless and until the applicant spouse has taken all necessary steps to dissolve the marriage according to the religious law of the spouses?

(xvi) Clause 12(1) of the Bill provides as follows:

> "12.(1) Subject to this section, a divorce takes effect thirty days after the day on which the judgment granting the divorce is rendered."

The Divorce Act, in section 13, continues the tradition of the grant of a decree nisi, to be followed by a decree absolute. This tradition has been ended by the Bill. As noted, clause 12(1) provides that a divorce "takes effect" thirty days after judgment. By clause 14, on taking effect, a divorce granted under the Bill "dissolves the marriage of the spouses". Clause 12(1) opens with the words "Subject to this section". Clause 12(2), which is the counterpart of section 13(2) of the Act, authorizes the court, where the court is of the opinion that by reason of special circumstances it would be in the

public interest for the divorce to take effect earlier than the prescribed thirty days, to order that a divorce take effect "at such earlier time as it considers appropriate". Clause 12(3), (4), (5) and (6), contain provisions dealing with appeals.

(xvii) Similar to section 14 of the Divorce Act, clause 13 provides that, on taking effect, a divorce granted under the Bill "has legal effect throughout Canada".

PART II

PROVISIONS THAT RELATE TO COROLLARY RELIEF

(A) Corollary Relief: The Initial Grant

1. The Divorce Act

Sections 10, 11(1) and 12 of the Divorce Act contain provisions that relate to the initial grant of corollary relief[18]. Authority to grant such orders is contained in section 11(1), which reads as follows:

> "11.(1) Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:
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> (a) an order requiring the husband to secure or to 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 to 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
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> (c) an order providing for the custody, care and upbringing of the children of the marriage."

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18. See, generally, Mendes da Costa, Studies in Canadian Family Law, (1972), Chapter 6, MacDougall, Alimony and Maintenance, pp. 283-357.

Under section 11(1) the court may, if it thinks it "fit and just" to do so, make one or more of the orders specified in paragraphs (a), (b) or (c). It will be noted that section 11(1)(a) and (b) deal with maintenance, and that section 11(1)(c) is concerned with custody and related issues. Section 11(1)(a) and (b) impose mutual support obligations upon the spouses: that is, each spouse is under an obligation to support the other spouse, and each spouse is under an obligation to support the children of the marriage.

Provisions relating to interim orders are contained in section 10. Section 12 contains provisions relating to payments and conditions, where an order is made under section 10 or 11. By section 12(a), a court may direct that payment be made either to the husband or wife, as the case may be, or to a trustee or administrator approved by the court. Under section 12(b), a court may impose such terms, conditions or restrictions as the court thinks fit and just.

2. Bill C-47

The provisions of Bill C-47 that relate to the initial grant of corollary relief are contained in clauses 15 and 16 of the Bill. The provisions are expressed in a manner more comprehensive than that contained in the Divorce Act, and the reliefs of support and of custody have been allocated to different clauses. Before commenting upon these clauses, it may be mentioned that the phrase "corollary relief proceeding" is defined in clause 2(1) to mean "a proceeding in a court in which either or both former spouses seek a support order or a

custody order or both such orders".

(a) Support

Clause 15 deals with support, and clause 15(2) and (5) contain provisions that are equivalent to those set out in section 11(1) of the Divorce Act. Clause 15(2) and (5) provide as follows:

> "15.(2) A court of competent jurisdiction may, on application by a spouse, make an order requiring the other spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of
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> (a) the spouse;
> (b) any or all children of the marriage; or
> (c) the spouse and any or all children of the marriage."
>
> "(5) In making an order under this section, the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including the length of time the spouses cohabited and the functions performed by each spouse during cohabitation, and of any child of the marriage for whom support is sought but shall not take into consideration any misconduct of a spouse in relation to the marriage."

As will be seen, the principle of mutuality of support obligations, contained in section 11(1) of the Divorce Act, has been continued in clause 15(2). Moreover, whereas under the Divorce Act the support obligation imposed upon a husband and the obligation imposed upon a wife are located in independent paragraphs of section 11(1), these obligations have been combined and placed in clause 15(2) of the Bill.

b) Custody

Clause 16 of the Bill contains provisions that relate to custody. Clause 16(1) provides:

> "16.(1) A court of competent jurisdiction may, on application by a spouse, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage."

This provision empowers the court to make custody and access orders. From the wording of clause 16(1), the court may make one of three orders: an order respecting custody, an order respecting access, or, an order respecting custody and access. Under clause 2(1) of the Bill, the word "custody" is defined to include "care, upbringing and any other incident of custody". Unlike section 11(1)(c), clause 16(1) refers, also, to "access", although the absence of this word from section 11(1)(c) has not impeded the courts in making access orders under the Divorce Act.

3. Summary

It will be noted that clauses 15 and 16 each contain the words "spouse" and "children of the marriage". The word "spouse" is defined in clause 2(1) to mean "either of a man or woman who are married to each other". Further, clause 15(1) provides that in clauses 15 and 16, "spouse" has the meaning assigned by subclause 2(1) and "includes a former spouse". The expression "child of the marriage" is defined in clause 2(1) in terms similar to the definition of "children of the marriage" in section 2 of the Divorce Act. The definition in clause 2(1) contains the phrase "a child of two spouses or former spouses".

Clause 2(2) refers to the meaning of this phrase in a non self-inclusive manner. The counterpart of this provision of clause 2(2) is the definition of "child" in section 2 of the Divorce Act.

(a) Support

Upon a reading of clause 15, relating to support, points of interest would appear to include the following:

(i) Clause 15(2) opens with the words, a "court of competent jurisdiction". These words refer to clause 4, which controls jurisdiction in corollary proceedings.

(ii) There are differences between the opening flush of section 11(1) and clause 15(5). The words "condition", "means" and "other circumstances" are common to each provision. However, clause 15(5), but not section 11(1), contains also the word "needs". Further, clause 15(5) embellishes the criterion of "other circumstances" of each spouse, by the addition of the words "including the length of time the spouses cohabited and the functions performed by each spouse during cohabitation, and of any child of the marriage for whom support is sought".

(iii) By section 11(1) of the Divorce Act, the court is directed to have regard to the "conduct of the parties". By way of contrast, clause 15(5) provides that the court shall not take into consideration any "misconduct of a spouse in relation to the marriage". Much has been written on the significance,

if any, that should be accorded to conduct in proceedings for spousal support, and sharply differing views have been expressed[19]. Clause 15(5) would appear to totally exclude from judicial consideration any misconduct of a spouse "in relation to the marriage". However, section 18(6) of the Family Law Reform Act of Ontario reads as follows[20]:

> "18.(6) The obligation to provide support for a spouse exists without regard to the conduct of either spouse, but the court may in determining the amount of suport have regard to a course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the relationship."

It will be noted that this subsection adopts, to some extent, a compromise approach. While conduct does not affect the support obligation, it is a factor that the court may consider in assessing quantum. However, even in relation to quantum, conduct, to be relevant, must comprise a "course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the relationship". On balance, it is suggested that the approach of the Ontario Act is to be preferred to that contained in clause 15(5).

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19. Ontario Law Reform Commission, Report on Family Law, Part VI, Support Obligations, (1975), at pp. 13-23. Compare, Law Reform Commission of Canada, Working Paper 12, Maintenance on Divorce, (1975), at pp. 31-34.

20. R.S.O., 1980, c.152, as amended.

(iv) Under clause 15(2), relief may be granted on application by a "spouse". As mentioned, by clause 15(1) the word "spouse" in clause 15(2) includes a "former spouse".

Section 11(1) of the Divorce Act enables a court to make an order for corollary relief "Upon" granting a decree nisi of divorce. In Zacks v Zacks[21], the Supreme Court of Canada made it clear that the meaning of the word "Upon", as used in this section, must be determined in light of constitutional considerations. The grant of a decree nisi may be said to have the effect of opening a constitutional door and of thereby permitting an infusion of federal power. Accordingly, when a decree nisi is granted - that is, "Upon" this event occurring - the court acquires jurisdiction to deal with matters of corollary relief. As the law has developed, it appears, further, that even where a divorce decree is silent as to spousal maintenance, support may nevertheless be awarded upon an application made subsequent to decree absolute[22].

Having regard to the meaning of "spouse" in clause 15(2), it seems apparent that the Bill envisages that an application for corollary relief may be made after divorce proceedings are completed. This reading of the Bill is supported by the definition of corollary relief proceeding", which, as also

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21. (1973), 35 D.L.R.(3d) 420 (S.C.C.). See, generally, Four O'Clock Series, (1975), Studies in Current Law, Mendes da Costa, Family Law,, at pp. 37-48.
22. Farquar v Farquar (1983), 35 R.F.L. (2d) 287 (Ont.C.A.).

mentioned, refers to a proceeding in which either or both "former spouses" seek relief. Further, no time limitation within which an application may be brought is expressed in the Bill. Accordingly, it is suggested that the principle of the Zacks case should have application to corollary proceedings brought under clause 15.

(v) Under clause 15(2), the court may make an order requiring a spouse "to secure or pay, or to secure and pay" such "lump sum or periodic sums", or such "lump sum and periodic sums", as the court thinks reasonable. Section 11(1)(a) and (b) of the Divorce Act contain a different wording: namely, "to secure or to pay such lump sum or periodic sums". In Nash v Nash[23], the Supreme Court of Canada held that section 11(1) was 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. It would seem that the additional language in clause 15(2) was intended as a statutory reversal of this aspect of the Nash case.

(vi) In Messier v Delage[24], the Supreme Court of Canada appears to have viewed with disfavour the grant of short-term support orders. The Court opined that a decision as to maintenance must be arrived at having regard to the actual circumstances.

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23. (1974), 47 D.L.R.(3d) 558 (S.C.C.).
24. (1983), 35 R.F.L.(2d) 337 (S.C.C.).

and not in accordance with events which may or may not occur. While the precise ambit of this decision cannot be stated with certainty, the comments of the Court should be viewed in the light of clause 15(4) of the Bill, which provides as follows:

> "15.(4) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in conection therewith as it thinks fit and just."

As will be noted, clause 15(4) authorizes the court to make a support order for a "definite" period, or "until the happening of a specified event". The court, in addition, may impose such other "terms, conditions or restrictions" in connection therewith as it thinks fit and just.

(vii) In Messier v Delage, reference was made to the absence, in section 11 of the Divorce Act, of criteria to guide the court in awarding maintenance. Perhaps in response to these comments, specific objectives of an order for support are contianed in clause 15. Clause 15(6) provides as follows:

> "15.(6) An order made under this section that provides for the support of a spouse should
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (7);
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time."

These provisions relate to spousal support. Analogous provisions, dealing with child support, are contained in clause 15(7), which reads as follows:

> "15.(7) An order made under this section that provides for the support of a child of the marriage should
> (a) recognize that the spouses have a joint financial obligation to maintain the child; and
> (b) apportion that obligation between the spouses according to their relative abilities to contribute to the performance of the obligation."

There is, perhaps, no more difficult and invidious issue in divorce law than the assessment of the quantum of support, and it is not easy to assert the extent to which the principles enshrined in clause 15(6) and (7) reflect the existing practice of the courts.

The provisions of clause 15(7), relating to child support, contemplate the apportionment of a joint obligation, based upon ability to pay. This approach sems eminently fair and reasonable. As to spousal support, the provisions of clause 15(6) emphasize factors that relate to the economic relationship of the spouses. Possibly, views may differ on

this policy. However this may be, there is no doubt that the presence, in statutory form, of criteria to guide a court in assessing the quantum of support, will fill a much debated gap in divorce law.

(viii) Authority to grant interim orders is contained in clause 15(3), and provisions as to assignment of orders are located in clause 15(8).

(b) Custody

Upon a reading of clause 16, relating to custody, points of interest would appear to include the following:

(i) Clause 16(1) opens with the words, a "court of competent jurisdiction". These words refer to clause 4, which controls jurisdiction in corollary proceedings.

(ii) Clause 16(3) provides as follows:

> "16.(3) The court may make an order under this section granting custody of any or all children of the marriage to any one or more persons."

Under the subclause, custody may be granted to any one or more "persons". Accordingly, while, under clause 16(1), a "spouse" must be the applicant, custody may, it appears, be granted to a person who is not a spouse. The words "any one or more" appear to authorize, in appropriate cases, the grant of a joint custody order. However, the subclause refers only to "custody" orders. Presumably, the subclause

was intended to include "access" orders, and, if this is so, an appropriate amendment would appear desirable.

(iii) Clause 16(4) authorizes the grant of an order for a "definite" period, and is a matching provision to clause 15(4).

(iv) Clause 16(5) provides as follows:

> "16.(5) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child."

Curiously, the test of "best interests" is not expressed in section 11(1) of the Divorce Act. However, this omission has been remedied by the courts as a matter of judicial interpretation. Not only does clause 16(5) make it clear that the test of "best interests" is to be applied, but the subclause, in addition, requires that it be the "only" consideration. Under clause 16(5), these interests are to be determined by reference to "the condition, means, needs and other circumstances of the child".

(v) Clause 16(6) provides as follows:

> "16(6) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is appropriate in the circumstances."

As noted, by clause 16(5) a court "shall" take into consideration "only" the best interests of the child. Yet, by clause 16(6), a court "shall" give effect to the principle of parental contact. The logical relationship between these subclauses is not easy to state. Apparently, there is a legislative presumption that the best interests of a child require the child to have as much contact with each spouse "as is appropriate in the circumstances".

(vi) Interim orders are authorized by clause 16(2).

B. Corollary Relief: Variation

1. The Divorce Act

Section 11(2) of the Act contains provisions relating to the variation of orders for corollary relief[25]. Section 11(2) provides as follows:

> "11(2) An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them."

As will be mentioned below, by this provision, an order made under section 11(1) may be varied "by the court that made the order". Variation may be ordered by the court if it

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25. Generally, see, Mendes da Costa, Studies in Canadian Family Law, (1972), Chapter 6, MacDougall, Alimony and Maintenance, pp. 333-341.

thinks it "fit and just" to do so. In making this determination, the court is directed to have regard to the "conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them".

2. Bill C-47

The variation provisions of the Bill are contained in clauses 17 - 19. Clause 17 deals with the principles that apply in variation proceedings, and, by clause 2(1), a "variation order" is defined to mean "an order made under subsection 17(1)". Clause 2(1) defines, also, "variation proceeding" to mean a "proceeding in a court in which either or both former spouses seek a variation order". Clauses 18 and 19 propose the introduction of the concept of the provisional order, a concept that is novel in the context of divorce legislation.

Clause 17(1) and (2) provide as follows:

> "17.(1) A court of competent jurisdiction may, on application by a former spouse, make an order varying, rescinding or suspending, prospectively or retroactively, a support order or a custody order or any provision thereof.
>
> (2) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought."

As will be noted, under clause 17(1) the range of orders that a court may make is stated in broad terms: namely, an order "varying, rescinding or suspending, prospectively or

retroactively" an existing order. This authority is stated to apply to a "support order or a custody order or any provision thereof". Further, by clause 17(2), a court may include in a variation order "any provision" that, under the Bill, could have been included in the existing order.

3. Summary

Upon a reading of clauses 17 - 19, points of interest would appear to include the following:

(i) Clause 17(1) opens with the words, a "court of competent jurisdiction". These words refer to clause 5, which controls jurisdiction in variation proceedings.

(ii) Clause 17(3) contains the factors that a court must consider in proceedings to vary a support order. Clause 17(3) provides as follows:

> "17.(3) In making a variation order in respect of a support order, the court shall take into consideration any material change in the condition, means, needs and other circumstances of each former spouse and of any child of the marriage for whom support is or was sought occurring since the making of the support order or the last variation order made in respect of that order, as the case may be."

There are differences between the wording of section 11(2) and clause 17(3). Section 11(2) speaks of any "change", whereas clause 17(3) refers to any "material change... occurring since the making of the support order or the last

variation order made in respect of that order, as the case may be". The words "condition", "means", and "other circumstances" are common to each provision. However, clause 17(3), but not section 11(2), contains also the word "needs". Further, section 11(2), in relation to "change", refers to "either of them" - that is, the parties. Clause 17(3), on the other hand, when speaking of "material change", refers to "each former spouse and of any child of the marriage for whom support is or was sought". It may also be pointed out that there is, in clause 17(3), no counterpart to the reference in section 11(2) to the "conduct of the parties since the making of the order".

(iii) Clause 17(1) is qualified by clause 17(8). This latter subclause provides as follows:

> "17.(8) Notwithstanding subsection (1), where a support order provides for support for a definite period or until the happening of a specified event, a court may not, on an application made after the expiration of that period or the happening of that event, make a variation order for the purpose of resuming that support unless the court is satisfied that
> (a) a variation order is necessary to relieve economic hardship rising from a material change described in subsection (3) that is related to the marriage; and
> (b) the changed circumstances, had they existed at the time of the making of the support order or the last variation order made in respect of that order, as the case may be, would likely have resulted in a different order."

It will be recalled that clause 15(4) authorizes the court to make a support order for a "definite" period or "until the happening of a specified event". Assume that such an order is made, and that, after the expiration of that period, or, after the happening of that event, as the case may be, an application is made by the former spouse, the beneficiary under the order, seeking a resumption of support. What principles should guide a court in determining the application?. This issue is not an easy one to resolve, for, while the philosophy of limited-term orders should not be undermined, nor should the court be left powerless to remedy an obvious injustice.

The word "may" in clause 17(8), presumably, bears the meaning of "shall". If this is correct, a court is precluded from making a variation order for the purpose of resuming support, unless the court is satisfied as to the circumstances described in paragraphs (a) and (b).

When it is recalled that the onus of proof would appear to rest on the spouse seeking a resumption of support, it is suggested that the scheme of the subclause is basically sound. However, one point may be raised. Clause 17(8)(a) refers to an economic hardship arising from a material change that is "related to the marriage". Assume that a divorce proceeding is heard on July 1, and that it is established that the wife has entered into a contract of employment, her employment to commence the following January 1. Assume that, on this basis, a support order is made, in her favour, for a period ending on December 31, the day

prior to the anticipated commencement of her employment. However, assume that the prospective employer becomes insolvent, and that the wife, despite all reasonable efforts, is unable to obtain other employment. On the assumption that the provisions of clause 17(8) have applicaton, would these circumstances satisfy the requirement, "related to the marriage"? If this is not so, an amendment to the subclause would appear desirable.

(iv) Clause 17(4) deals with the variation of custody orders, and provides as follows:

> "17.(4) In making a variation order in respect of a custody order, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to any material change in the condition, means, needs and other circumstances of the child occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be."

The subclause, it may be noted, is phrased in terms that, mutatis mutandis, match those of clause 16(5).

(v) Clause 17(5) and (6) contain the specific objectives of an order varying, respectively, an order for spousal support and an order for child support. These subclauses contain provisions that, mutatis mutandis, match those of clause 15(6) and (7).

(vii) By clause 17(9), where a court makes a variation order in respect of a support order or a custody order made by another court, it shall send a copy of the variation order, certified by a judge or officer of the court, to that other court.

(viii) Clause 18 proposes the introduction into divorce law of the concept of the provisional order. This concept is not incorporated in the Divorce Act, although it is well known in the law of the provinces under the Reciprocal Enforcement of Maintenance Orders legislation[26]. This legislation appears to have been enacted to remove maintenance orders, as such, from the limitations of the common law requirement that a foreign money judgment, to be enforceable, must be final and conclusive. A Model Statute was adopted in 1946 by the Commissioners on Uniformity of Legislation in Canada[27], and similar, though not necessarily identical,

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26. Generally, see, Canadian Bar Association Continuing Education Seminars, No. 2, Family Law, (1974), Mendes da Costa, Enforcement of Judgments and Orders Across Canada, pp. 93-182. See, also, Mendes da Costa, Studies in Canadian Family Law, (1972), Chapter 15, J. Swan, Reciprocal Enforcement of Maintenance Orders in Canada, pp. 875-898.
27. Proceedings of the 28th Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1946), 23. It was there resolved that the Maintenance Orders (Facilities for Enforcement) Act, passed in British Columbia in 1946, be recommended to the legislatures of the other provinces for enactment. As to the extent to which this Model Act has been adopted in the various Canadian jurisdictions, see Table of Model Statutes, Proceedings of the 54 Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada (1972), 15-17.

legislation now exists in all Canadian jurisdictions. This legislation provides machinery to facilitate the enforcement of maintenance orders between reciprocating states. In relation to provisional orders, it embraces a "shuttlecock procedure", whereby the remitting of the case and the transmission of the transcripts of evidence and documents, between the originating court (that is, the court that made the provisional order) and the court before which confirmation is sought, is authorized.

Clause 18(2) provides as follows:

> "18.(2) Notwithstanding subsection 17(1), where an application is made to a court in a province for a variation order in respect of a support order and
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> (a) the respondent in the application is habitually resident in another province, and
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> (b) in the circumstances of the case, the court is satisfied that the issues can be adequately determined by proceeding under this section and section 19,
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> the court may make a variation order without notice to and in the absence of the respondent, but such order is provisional only and has no legal effect until it is confirmed in a proceeding under section 19 and where so confirmed it has legal effect in accordance with the terms of the order confirming it."

Clause 18(2) refers to an application made to "a court in a province for a variation order". Jurisdiction to entertain a variation proceeding is controlled by clause 5(1), which prescribes the connecting factors required to invest a

"court in a province" with variation jurisdiction. A court of competent jurisdiction, so ascertained, may act under clause 17(1) and make a variation order. However, clause 18(2) applies "Notwithstanding subsection 17(1)". It appears therefore, that a court that is jurisdictionally competent to entertain a variation proceeding under clause 5, has the authority to proceed either under clause 17(1), or, in appropriate circumstances, under clause 18(2).
Under clause 18(2), a provisional order may be granted where an application is made for a "variation order in respect of a support order".

(ix) Clause 18(1), (3), (4), (5) and (6) contain various provisions relating to the transmission of a provisional order and the taking of further evidence.

(x) Clause 19 contains a scheme for the confirmation of provisional orders and related matters.

C. Corollary Relief: Effect

1. The Divorce Act

The effect of an order of corollary relief, granted under the Divorce Act, is contained in sections 14 and 15 of the Act, which provide as follows:

> "14. A decree of divorce granted under this Act or an order made under section 10 or 11 has legal effect throughout Canada.

> 15. An order made under section 10 or 11 by any court may be registered in any other superior court in Canada and may be enforced in like manner as an order of that superior court or in such other manner as is provided for by any rules of court or regulations made under section 19."

As will be seen, section 14 provides that an order of corollary relief has "legal effect" throughout Canada, and section 15 provides for the registration and enforcement of such an order[28].

2. Bill C-47

It will be recalled that clause 13 provides that, on taking effect, a divorce granted under the Bill has legal effect throughout Canada. Clause 20 is the provision that, in respect of an order of corollary relief, is the equivalent of clause 13. Like sections 14 and 15 of the Act, clause 20(2) and (3) deal with the effect of an order of corollary relief and its registration and enforcement. Clause 20(2) and (3) provide as follows:

> "20.(2) Subject to subsection 18(2), an order made under section 15, 16 or 17 or subsection 19(9) has legal effect throughout Canada.
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> (3) An order that has legal effect throughout Canada pursuant to subsection (2) may be

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28. Generally, see, Canadian Bar Association, Continuing Education Seminars, No. 2, Family Law, (1974), Mendes da Costa, Enforcement of Judgments and Orders Across Canada, pp. 138-156. See, also, Four O'Clock Series, (1975), Studies in Current Law, Mendes da Costa, Family Law, at pp. 15-36.

(a) registered in any court in a province and enforced in like manner as an order of that court; or

(b) enforced in a province in any other manner provided for by the laws of that province."

An order specified in clause 20(2) has "legal effect" throughout Canada. It will be noted that clause 20(2) opens with the words, "Subject to subsection 18(2)". As will be recalled, clause 18 proposes the introduction of provisional orders, and this qualification is necessary due to the nature of such orders. By clause 20(3), such an order may be registered in any "court" in a province and enforced in like manner as an order of that court, or, enforced in a province in any other manner provided for by the laws of that province.

The word "court", in respect of a province, is defined in clause 2(1). By clause 20(1), in clause 20, "court", in respect of a province, has the meaning assigned by subclause 2(1) and includes such other court having jurisdiction in the province as is designated by the Lieutenant Governor in Council of the province as a court for the purposes of clause 20.

PART III

PROVISIONS THAT RELATE TO JURISDICTION

Provisions that relate to jurisdiction are contained in clauses 3-7 of the Bill. By clause 7, the jurisdiction conferred on a court by the Bill to grant a divorce shall be exercised only by a judge of the court without a jury.

A. Jurisdiction: Divorce

Bill C-47 continues the pattern established by the Divorce Act of prescribing jurisdictional requirements. However, as will be seen, the requirements adopted by the two pieces of legislation are dissimilar.

1. The Divorce Act

Under the Divorce Act, section 5 is the repository of the jurisdictional requirements of the Act[29]. This subsection provides as follows:

> "5. (1) The court for any province has jurisdiction to entertain a petition for divorce and to grant relief in respect thereof if,
>
> (a) the petition is presented by a person domiciled in Canada; and
> (b) either the petitioner or the respondent has been ordinarily resident in that province for a period of at least one year immediately preceding the presentation of the petition and has actually resided in that province for at least ten months of that period."

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29. See, generally, Mendes da Costa, Studies in Canadian Family Law, (1972), Chapter 16, Divorce and the Conflict of Laws, pp. 901-955.

Prior to the enactment of the Divorce Act, jurisdiction was, in general, determined as a matter of common law. Jurisdictional rules were not contained in the English Matrimonial Causes Act 1857[30], and there existed in Canada no general statutory provisions prescribing divorce jurisdiction. At common law, jurisdiction in divorce proceedings depended upon the domicile of the parties within the jurisdiction of the forum. Accordingly, as divorce law was in its application limited by provincial - not federal - boundaries, it became established that, within Canada, divorce jurisdiction was grounded upon provincial - not federal - domicle. No specific period of domicile was so required. Nor was there any requirement other than that of domicile: that is, the residence requirements introduced by s. 5(1)(b) did not exist at common law.

Section 5(1) prescribes two jurisdictional requirements, one relating to domicile and the other to residence. At common law, the domicile of the petitioner served to clothe a court with divorce jurisdiction. Insofar as the Divorce Act grounds jurisdiction upon the connecting factor of domicile, it remains true to this principle. By section 5(1)(a), the petition must be "presented by a person" domiciled in Canada. It is, therefore, the domicile of the petitioner that must support a petition brought under the Act.

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30. 20 & 21 Vict., c. 85.

In this context, it should be noted that, departing from the common law rule of unity of domicile, section 6(1) of the Divorce Act confers upon a married woman the capacity to acquire a domicile separate from that of her husband. Further, the words of section 5(1), "domiciled in Canada", reflect the fact that the Divorce Act, as a federal statute, has enlarged the law area over which domicile operates, with the result that, by the application of common law principles, a domicile of choice, for the purposes of the Act, may now be acquired in the national unit of Canada. The word "and", which joins the two paragraphs of section 5(1), make it clear that jurisdiction depends not only upon a showing of domicile, as described above, but also upon the establishment of the combination of ordinary residence and actual residence as stipulated in section 5(1)(b).

2. Bill C-47

The counterpart of section 5(1) of the Divorce Act is clause 3(1) of Bill C-47, which provides as follows:

> "3.(1) A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been habitually resident in the province for at least one year immediately preceding the commencement of the proceeding."

In recent times, relatively little attention has been focused upon the function and purpose of a jurisdictional requirement in divorce proceedings. For the purposes of discussion, three different approaches may be mentioned.

(i) Mechanical Approach

The divorce process may be regarded simply as a commercial enterprise. As a result, the formulation of jurisdictional rules may be approached in a mechanical fashion.

It may be contended that our courts should be open to all parties who wish to utilize the Canadian divorce process. Why should we seek to restrict in some way access to our divorce courts? Are we concerned with a question of funding? If so, then why not solve this problem by the levy of an appropriate fee as compensation for the cost of providing the divorce service? Are we concerned with the heavy volume of cases that we consider would result should jurisdictional rules be removed? If this is our concern, then why not solve this problem in a direct manner by the imposition of a system of priorities that we consider appropriate: why not, for example, give preference to our domestic consumers? Are we concerned with recognition, or lack of recognition, that might be afforded Canadian decrees so granted? If this is our concern, would we not discharge our responsibilities by informing all applicants for divorce of this potential hazard? Alternatively, are we concerned that we would encourage forum shopping: that is, that we would encourage spouses to seek relief in Canadian courts rather than to proceed in their home jurisdictions, because our laws enabled "easy" divorces, more palatable to them than their home laws? But should this be our concern? We have confidence in our own divorce laws. Is it not for other

jurisdictions to take such action as they deem necessary to inhibit forum shopping? This they could do by changing their own divorce law; that is, by providing a home product that could successfully compete with the Canadian product. Alternatively, such jurisdictions could deny recognition to Canadian divorces; that is, impose import restrictions of a drastic nature.

This approach, it should be noted, views the remedy of divorce simply as a commercial service, similar in nature to the provision of utilities. It is a service available, upon payment, to any proposed consumer.

(ii) Choice of Law Approach

This approach concentrates on choice of law. It radically de-emphasizes the question of choice of jurisdiction.

It may be pointed out that, initially, choice of jurisdiction predetermined choice of law: that is, if a court took jurisdiction, it would automatically apply its own domestic law. Gradually, as the law developed, these concepts diverged and, in many areas, choice of law assumed an existence independent of that of choice of jurisdiction. But in the administration of the law of divorce, this separation did not occur. Indeed, at common law divorce jurisdiction was, it seems, vested in the courts of the domicile for the very reason that these courts would, in fact, apply their own law, the lex domicilii.

It may, accordingly, be asserted that jurisdictional rules should be de-emphasized and that attention should, rather, be focused upon appropriate choice of law provisions. On this basis, there could be a complete absence of jurisdictional rules provided that our law selected, as a matter of choice of law, an appropriate lex causae: for example, that divorce proceedings instituted by non-Canadian domiciliaries should be determined in accordance with the lex domicilii of the spouses. Such a solution, it may be noted, would be a check to forum shopping.

(iii) Policy Approach

This approach assumes that jurisdictional rules should inter-relate with the rules of substantive divorce law, and that, together, such rules should reflect a coherent divorce policy.

In this context, it is suggested that the function of the remedy of divorce should be to grant relief in relation to those marriages that may be said to form, from time to time, part of the fabric of Canadian society. So too, the view is expressed that the purpose of this remedy should be to stabilize Canadian society and to further this society's way of life. Accordingly, if this view is accepted, it seems to follow that some test must be formulated to connect a marriage with the society of Canada. It is considered that the connecting factor so selected should possess the following characteristics: it should be simple and uncomplicated; it should produce a just result and, moreover, a result that is reasonably predictable. And further, once so selected, care

should be taken to avoid, in the application of this connecting factor, all unnecessary refinements and complexities.

When these approaches are evaluated, it is suggested that the policy approach is to be preferred. On this basis, the solution adopted by clause 3(1) is to be welcomed.

3. Summary

From a reading of clause 3(1), points of interest would appear to include the following:

(i) The provisions of section 5(1) of the Divorce Act are unnecessarily complex. Much more attractive is the simple scheme adopted by clause 3(1).

(ii) Under clause 3(1), jurisdiction is conferred upon a "court" in a "province", where there has been the required habitual residence "in the province". In other words, habitual residence within the province where an application under the Bill is commenced must be established: residence in some other part of Canada will not suffice.

(iii) Where spouses reside in different provinces, proceedings may be commenced either in the province where the applicant resides, or, in the province of the respondent's residence. This result follows from the words "either spouse" in clause 3(1).

(iv) Clause 3(1) provides that either spouse must have been habitually resident in the province "for at least one year immediately preceding the commencement of the proceeding". This provision may delay the grant of relief. For example, assume that H and W have at all material times habitually resided in Ontario. Assume that H commits adultery. Assume further that, thereafter, H becomes habitually resident in British Columbia, while W makes her home in Nova Scotia. It would seem that, under clause 3(1), no court in Canada would be competent, at this stage, to entertain an application for divorce. H and W have ceased their habitual residence in Ontario, and neither spouse has yet habitually resided in their respective provinces for "at least one year immediately preceding the commencement of the proceeding".

(v) "Habitual residence" is a concept that is utilized by civil law jurisdictions and it is one that has become accepted at the international level. Moreover, it is a concept that has already been introduced into provincial law[31].

(vi) Although the words "habitually resident" are not defined in the Bill, their interpretation should not cause undue difficulty to the courts. The expression "ordinarily resident" in section 5(1)(b) has been construed, in general,

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31. See, for example, the Children's Law Reform Act, R.S.O., 1980, c.68, as amended, section 22. See also, The Convention on the Civil Aspects of International Child Abduction, set out in the Schedule to section 47 of the Act.

as describing the location of a spouse's "real home" or "home base".

It is considered that the concept of "habitual residence" carries with it a substantially similar - if not identical - meaning, and that the decisions interpreting section 5(1)(b) should provide useful guidelines.

(vii) A decree of divorce puts an end to the status of marriage; divorce dissolves the marriage status, not the status only of the wife or of the husband. It seems logical, therefore, to ground jursidiction upon the habitual residence of "either spouse", as does clause 3(1).

(viii) Bill C-47 is federal legislation, and the belief is expressed that jurisdictional grounds should be exclusively comprised of federal concepts. Accordingly, it is suggested that divorce jurisdiction should be grounded upon habitual residence in Canada of either spouse. The purpose of Bill C-47, as is the case with the Divorce Act, is to provide a Canada-wide law of divorce. This being so, while there may be no such concept as a completely neutral forum, the uniformity of divorce law that flows from this federal Bill should surely reduce, in a real way, the occasions that render the process of "forum shopping" meaningful. And, so far as is known, statistics do not seem to indicate that divorce may be obtained substantially more easily in one province rather than in another. It may be considered that one province may find attracted to itself more than its fair share of divorce

because of features of a provincial nature: for example, the availability of legal aid. Such a consequence could, however, be countered by provincial action: for example, amendment to the provincial legal aid plan.

Convenience of forum is, of course, a matter of real concern. But choice of a provincial connecting factor cannot be satisfactorily bottomed on this concern alone. A better approach, it is suggested, would be to confer upon a court the power to transfer proceedings on the basis of forum conveniens.

Having regard to the meaning of "habitual residence", it seems unnecessary to insert any requirement of duration. If a spouse's "real home" is in Canada, albeit recently acquired, should not the relief of divorce be available from the Canadian courts?

(ix) Clause 3(2) and (3) contain provisions that apply where divorce proceedings are pending in two courts, a situation covered in the Divorce Act by section 5(2).

(x) Clause 22 deals with the recognition of foreign divorces, and is the counterpart of section 6(2) of the Divorce Act. However, as is appropriate, the recognition provisions have been re-phrased to reflect the change in domestic jurisdiction proposed by clause 3.

B. Jurisdiction: Corollary Relief

Reference has already been made to section 11(1) of the Divorce Act[32]. Apart therefrom, the Act contains no specific provision that deals with jurisdiction to entertain proceedings for corollary relief.

This matter is dealt with by clause 4 of Bill C-47, which provides as follows:

> "4. A court has jurisdiction to hear and determine a corollary relief proceeding if the court has granted a divorce to either or both former spouses."

By this clause, a court has jurisdiction to hear and determine a corollary relief claim if "the" court has "granted" a divorce. Jurisdiction, therefore, appears to depend on two factors. First, the court must be the court in which the divorce proceeding was commenced, and, secondly, this court must have granted the divorce.

C. Jurisdiction: Corollary Proceeding: Variation

1. The Divorce Act

Section 11(2) of the Divorce Act, to which reference has earlier been made, deals with the variation and rescission of orders of corollary relief, and provides as follows:

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32. See, generally, Four O'Clock Series, (1975), Studies in Current Law, Mendes da Costa, Family Law, at pp. 37-48.

> "11.(2) An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them."

The subsection provides that an order of corollary relief may be varied from time to time or rescinded "by the court that made the order". Section 11(2) has given rise to a considerable body of case law,[33] and the intention of Parliament in writing into the Divorce Act a power of variation and rescission so jurisdictionally limited and narrow, cannot be stated with any certainty.

2. Bill C-47

Clause 5 of the Bill contains provisions that control jurisdiction in variation proceedings. Clause 5(1) provides as follows:

> "5.(1) A court in a province has jurisdiction to hear and determine a variation proceeding if
> (a) either former spouse is habitually resident in the province at the commencement of the proceeding; or
> (b) both former spouses accept the jurisdiction of the court."

Section 11(2) of the Divorce Act is a provision that cries out for legislative change. Accordingly, the decision of the drafters of Bill C-47 to deal with this issue of jurisdiction in a meaningful way is to be warmly welcomed.

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33. Generally, see, Four O'Clock Series, (1975), Studies in Current Law, Mendes da Costa, Family Law, at pp. 15-36.

3. Summary

From a reading of clause 5, points of interest would appear to include the following:

(i) Under clause 5(1), jurisdiction to hear and determine a variation proceeding is grounded upon two alternative bases. First, jurisdiction will exist if "either" former spouse is "habitually resident" in the province "at the commencement of the proceeding". Alternatively, there will be jurisdiction if "both" former spouses "accept the jurisdiction" of the court.

(ii) The mere fact that a court is the court that granted the initial order of corollary relief, does not, of itself, seem to be jurisdictionally significant: that is, absent either base prescribed in clause 5(1).

(iii) As noted earlier, it appears that a court that is jurisdictionally competent to entertain a variation proceeding under clause 5(1), may proceed either under clause 17(1), or may make a provisional order under clause 18(2), if the requirements of the latter subclause are satisfied.

(iv) Clause 5(2) and (3) contain provisions that apply where variation proceedings are pending in two courts, and these subclauses are phrased in terms that, mutatis mutandis, match those of clause 3(2) and (3).

D. Jurisdiction: Transfer of Proceedings

Unlike the Divorce Act, clause 6 of Bill C-47 contains specific provisions that deal with the transfer of proceedings. Clause 6(1) provides as follows:

> "6.(1) Where an application for an order under section 16 is made in a divorce proceeding to a court in a province and is opposed and the child of the marriage in respect of whom the order is sought is most closely associated with another province, the court may, on application by a spouse or on its own motion, transfer the proceeding to a court in that other province."

Clause 6(1) applies where an application under clause 16 is made in a "divorce proceeding", and, should the requirements of clause 6(1) be satisfied, the result may be the transfer of "the proceeding". For a transfer to occur, two factors must exist in combination. First, the application must be "opposed". Secondly, the child must be "most closely associated with another province". If both these factors are present, the court "may", either "on application by a spouse", or, "on its own motion", transfer the proceeding to a court "in that other province".

Clause 6(2) contains provisions that apply where the proceeding is a corollary relief proceeding, and contains provisions that are phrased in terms that, mutatis mutandis, match those of clause 6(1).

Clause 6(1) and (2) apply where there is an application for an order under clause 16. Under clause 16, as noted, a court may make an order respecting custody

and/or access. By way of contrast, clause 6(3) applies only where an application for a variation order "in respect of a custody order" is made in a variation proceeding. Subject to this difference, clause 6(3) contains provisions that are phrased in terms that, mutatis mutandis, match those of clause 6(1) and (2).

PART IV

CONCLUSION

As a general comment, it may be asserted that, since its enactment in 1968, the Divorce Act has worked reasonably well. After the flurry of cases decided shortly after the commencement of the Act, the law seems to have settled down. A review of the law reports indicates that, in more recent years, the pace of cases reported under the Act has decidedly slackened. Further, the profession - and the public - appear to have become accustomed to its provisions.

The policy of the Bill appears to be to retain those features of the Divorce Act that have proved functional, and to propose change where experience has shown that change is desirable. While unanimity cannot be expected, and while views will, no doubt, differ in the assessment of the Bill's provisions, this policy surely has merit.

As stated earlier, the purpose of this paper has been to comment on some of the major provisions of Bill C-47. It must be appreciated that a comprehensive coverage of the Bill has not been attempted. For example, no reference has been made to clause 21 or to clauses 23-37. Rather, a selective approach has been adopted and an endeavour has been made to provide, for the purposes of discussion, a general overview of various aspects of the topics of "Divorce", "Corollary" and "Jurisdiction".