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:
>
> (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
>
> (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.