Submission on Bill C-22, *Divorce Act* Reform

NATIONAL FAMILY LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 38,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Family Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Family Law Section of the Canadian Bar Association.

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I. INTRODUCTION

The National Family Law Section of the Canadian Bar Association (the CBA Section) is pleased to have the opportunity to comment on Bill C-22, amending the *Divorce Act, Family Orders and Agreements Enforcement Act*, and the *Garnishment, Attachment and Pension Diversion Act.* The CBA Section is comprised of over 2,200 lawyers from across the country.

The CBA Section has been very active in law reform initiatives relating to the *Divorce Act* over the past decade. In 1994, we prepared a submission on custody and access in response to the Department of Justice paper entitled *Custody and Access: Public Discussion Pape*r. In 1995, the Section opposed a private members' bill that would have given grandparents the same status as parents to apply for access to children. In 1998, we made submissions to the Special Joint Parliamentary Committee on Child Custody and Access (the "Joint Committee"), and the following year we wrote to the Department in response to the Joint Committee's Report and addressed the Minister of Justice's detailed response to that Report. Most recently, in 2001, we prepared a submission in response to the Department's consultation paper of April 2001 entitled *Custody, Access and Child Support in Canada: Putting Children's Interests First*. During the same period, we have made several submissions on the subject of child support guidelines. Our response to Bill C-22 relies significantly upon, and reiterates, many of our earlier statements on custody and access reform.

Family law is where most ordinary Canadians encounter the legal system. If that encounter is ineffective or negative, people lose faith not just in the family justice system, but also in the justice system as a whole. An effective, accessible and

affordable family law system is crucial because it affects a basic building block of our society — the family. This orientation guides our scrutiny of Bill C-22.

II. GENERAL COMMENTS

The CBA Section's 2001 submission regarding *Divorce Act* reform dealt with several proposals regarding custody and access reform. We stressed that:

(a) the term "custody" should be eliminated in favour of the term "parental responsibility" (we recommended a list of parental responsibilities to be allocated between parents);

(b) the "best interests test" should be continued, rather than adopting any legislated presumptions regarding the most appropriate form of sharing parental responsibilities or time with children after separation. The test should be augmented by the inclusion of a list of factors to be considered by judges in their determination of best interests of children (we proposed a list of factors); and

(c) any changes to family law must be accompanied by properly funded services available consistently in all regions of the country and to all families experiencing separation (whether or not a live court application exists). We specifically recommended improved legal aid and expanded use of unified family courts.

The CBA Section appreciates the extent to which Bill C-22, and the initiatives that surround it, accord with our 2001 recommendations. We commend the federal government for its efforts in family law reform and support the passage of Bill C-22. In this submission, we offer our comments on the Bill, and some suggestions for further improvements. As we have stressed in earlier submissions, appropriate services are absolutely essential for the success of this type of law reform initiative. Without those services, the potential benefit of amending the *Divorce Act* will certainly be dramatically undermined.

III. TERMINOLOGY CHANGES

For some time, we have considered potential merits and dangers in changing the terminology surrounding custody and access. In our 1994 submission, we cautioned that while gender neutral terminology, such as "parental responsibility" would ideally encourage more equal parental involvement in child rearing between parents,

> to assume that (equal involvement) exists when it does not does a disservice to the parent who has taken primary responsibility for childcare and disregards the best interests of the child. Further, although past performance does not conclusively demonstrate which parent will be the better future caregiver, neither do plans for taking on a different role in childcare than has been assumed in the past guarantee that those plans will become a reality.[1]

Clearly, orders on the basis of shared parental responsibilities should take these considerations into account in the same way as orders for custody and access. In our 1998 submission to the Joint Committee, the CBA Section acknowledged possible merit in replacing the words "custody" and "access" with language that focused on the needs of the children, but expressed concern that a change in language would risk added confusion and conflict without really changing attitudes. However, in our 2001 submission, we supported replacing the words "custody" and "access" with the term "parental responsibility", believing that such a change would be a step forward, provided it was accompanied by adequately funded support services to parents. We support the inclusion of history of the care of the child as a factor under best interests.

1 National Family Law Section, Submission on Custody and Access, Ottawa: Canadian Bar Association, 1994, at 8.

We have come to support new language on the basis of our combined experience that family law problems are easier to solve if we can avoid emotionally charged words like "custody". Bill C-22's proposal to change the terminology in the *Divorce Act* is likely to gradually change people's attitudes — particularly where the new language focuses on parental responsibilities, as opposed to parental rights. Indeed, it may be impossible to change people's perceptions without changing the language.

Hopefully, the change will move parents from the mentality of winner and loser that currently permeates custody disputes, and focus them instead on time with children. Judges can make orders describing and allocating various parental responsibilities to the parties, either separately or jointly. Parenting plans provide increased potential of focusing a dispute on the needs of their children, and permit a broader range of options. More options will provide more flexibility to negotiating parties, hopefully allowing them to enter a resolution satisfactory to both and serving the best interests of their children.

We appreciate that Bill C-22 would not preclude courts from awarding all of the parental responsibilities to one parent alone in appropriate circumstances. This might be the case, for example, where there is a history of violence or abuse. In addition, it is important that appropriate recognition and deference be available for situations where the responsibilities are very unlikely, based on demonstrated parental attitude or involvement, to be actually shared.

Certainly, a change in terminology will not immediately solve all current problems. It will take time to get used to the new way of thinking and to educate clients, lawyers, judges and the public about the new expectations. A public education campaign is essential, and should be focused on all participants in the family law system (lawyers, judges, police officers, therapists, counsellors,

mediators and so on), as well as the general public. The goal is to ensure that the new language truly transforms attitudes and that people do not simply attribute old meanings to new words.

IV. SPECIFIC COMMENTS

1. Duty of Legal Advisor

Clause 7 of Bill C-22 deals with legal advisors' responsibility in advising their clients. Section 9(2)(a) would say that legal advisors must:

> Discuss with the spouse or former spouse the advisability of negotiating the matters that may be subject of that order, and inform the spouse or former spouse of the mediation services and other family justice services known to the barrister, solicitor, lawyer or advocate that might be able to assist the spouses or former spouses in negotiating those matters.

While we support the requirement to inform clients of alternative dispute resolution processes, this section would be improved if it were clear that the phrase "family justice services" includes more than only court-connected services. Those services are invaluable, but families may wish to access other useful private services if aware of their existence. In particular, the past few years have seen tremendous growth in collaborative family law. Typically, lawyers practising collaborative family law have training not only in collaborative law techniques, but also in mediation and interest-based negotiation. Lawyers use that training to resolve family matters without going to court. In fact, parties using collaborative family law contract in advance not to go to court while negotiations are ongoing. Another option includes the increased use of arbitration in appropriate family law matters. These are only a few of the many dispute resolution processes that may benefit separating families.

Our concern is that the phrase "known to the barrister, solicitor, lawyer or advocate" would place the lowest possible burden on the least informed lawyer. The goal should be to encourage lawyers to be as informed as possible about

alternatives to litigation for their clients.

To address both of these concerns, we propose that section 9(2)(a) be amended to replace "of the mediation services and other family justice services known to the barrister, solicitor, lawyer or advocate" with the following:

> It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse or former spouse in an application for an order under this Act, whether or not that application is part of a divorce proceeding, to
>
> (a) discuss…the advisability of *resolving* the matters that may be the subject of that order, and inform the spouse or former spouse *of alternative dispute resolution processes and family justice services available in the community*...

Note that we have also recommended changing the word "negotiating" in this section with the broader term "resolving".

2. Parenting Orders

We support the concept of parenting orders, and have previously suggested the following as components of parental responsibility:

(a) Maintaining a loving, nurturing and supportive relationship with the child;

(b) Seeing to the daily needs of the child, which include housing, feeding, clothing, physical care and grooming, health care, daycare and supervision, and other activities appropriate to the developmental level of the child and the resources available to the parent;

(c) Making decisions concerning the daily needs of the child;

(d) Consulting with the other parent regarding major issues in the health, education, religion and welfare of the child;

(e) Encouraging the child to foster appropriate inter-personal relationships;

(f) Encouraging the child to respect the other parent;

(g) Making the child available to the other parent or spending time with the child as agreed by the parents or ordered by the court, so as not to cause

unnecessary upset to the child, or unnecessary cost and inconvenience to the other parent;

(h) Exercising appropriate judgment about the child's welfare, consistent with the child's developmental level and the resources available to the parent; and

(i) Providing financial support for the child.[2]

The CBA Section's list is broader and more specific than that in proposed section 16(5) of Bill C-22. For example, we stress that parents should respect arrangements made to allow both parents to spend time with the child, and that parents who have had that time allocated should not cause unnecessary upset to the child, or unnecessary cost and inconvenience to the other parent, by failing to adhere to those arrangements. As there are existing sanctions in place for parents who impede arrangements that allow the other parent to spend time with the child, so too there should be creative measures available to compensate parents who have prepared the child for such time only to find that the other parent did not respect the agreement.[3]

In spite of the more general language proposed in Bill C-22 for describing parental responsibility, the primary elements of parental responsibility are the obligation to make decisions on behalf of the child and the ability to share parenting time of the child. We appreciate that both of these components are included in section 16(5).

Section 16 does not include the same responsibility to encourage the children to continue or to develop a strong relationship with the other parent as that

2 National Family Law Section, Submission on *Divorce Act* Reform, Ottawa: Canadian Bar Association, 2001, at 12.

3 *Ibid.*, at 17.

previously found in the *Divorce Act* under section 16(10). That "maximum contact" provision stated:

> 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 consistent with the best interests of the child, and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

However, a similar concept is contained in proposed section 16.2(2)(b) as part of the "best interests test". In making a parenting order, judges are to consider ONLY the best interests of the child, and best interests of the child include:

> The benefit to the child of developing and maintaining meaningful relationships with both spouses, and each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse.

3. Best Interests Test

The CBA Section has earlier recommended factors for a best interests test very similar to those enumerated in section 16.2(2) of Bill C-22. While the list of factors under the best interests test is non-exhaustive, we know from experience that those items specifically enumerated will be given more weight.

Since our 1994 submission, the CBA Section, and indeed the courts, have stressed that recognition must be given to the history of care throughout the child's life and to the role played by the primary caregiver, if identifiable. It is important that courts look back before looking forward to an ideal of parental involvement. Bill C-22 somewhat addresses this concern with section 16.2(2)(c), which simply states, "the history of care for the child." However, we continue to suggest that clear emphasis be given to this factor, through the following language:

> the care giving role assumed by each person applying to define their parental responsibilities during the child's life[4]

4 *Ibid.*, at 12.

In our 2001 submission, we also recommended the following considerations:

(a) The length of time the child has lived in a stable home environment.

(b) The permanence and stability of the family unit with which it is proposed that the child will live.

These factors are related, although the first deals with physical environment as much as relationship, while the latter deals only with the child's potential family unit. While section 16.2(2)(h) mentions "the stability of the relationship between the child and each spouse" and 16.2(2)(i) the "stability of the relationship between the child and each sibling, grandparent and any other significant person in the child's life", neither focuses on the stability of the home environment or the family unit. For example, if a child has been living with one parent since the date of separation, and the other parent then asks to share responsibility equally, the lifestyle and home environment of that other parent, as well as the possible effect of disturbing the child's stability in their current home environment, should be assessed in considering the child's best interests.

We have previously advocated the inclusion of "any history of family violence, including physical or mental abuse" as a best interest factor, and support the inclusion of family violence in sections 16.2(2)(d), and 16.2(3) of Bill C-22. Although clearly a very important consideration in determining the best interests of children, Bill C-22 does not include a legislated presumption against perpetrators of family violence in determining custody and access. The CBA Section does not support the use of any legislated presumptions, but rather a determination of children's best interests in each particular case.[5] If it turns out that parents in high conflict cases are misusing the consideration of violence in Bill C-22 to gain a tactical advantage in the allocation of parent time, parental

5 *Ibid.,* at 13.

education may be in order. The increasing numbers of self-represented parties adds to this potential concern.

4. Interprovincial Proceedings

The existing procedure for variation of support orders has proven so cumbersome and slow that it has been nicknamed the "ping-pong procedure". We recognize that significant time and effort has been required to implement a new procedure, in consultation with the provinces and territories. However, we are not confident the new procedure will prove to be a significant improvement.

Under the current system, the applicant chooses jurisdiction. Under section 18, the respondent would have choice of jurisdiction, thus reversing, rather than solving, the problem. The proposed process would require the Attorney General's office in two jurisdictions and the court to take the steps necessary to ensure the matter is heard. Once the matter leaves the applicant's hands, that person would lose control over the process. On the other hand, the respondent would benefit from having the matter heard closest to home and being able to have counsel present. Although the original choice of forum would be up to the applicant, the respondent could have the matter transferred to the courts in his or her own jurisdiction simply by requesting the application be converted to the section 18 process, requiring mandatory conversion. The applicant would then have the choice of hiring new counsel in the respondent's jurisdiction or being unrepresented. Overall, this process would severely disadvantage the applicant, very often a single parent with limited resources.

Clause 6, amending section 6, uses the term "place a child in an intolerable situation" as a circumstance in which a court should not transfer a proceeding to another province. We are uncertain as to the meaning of that phrase, although presumably it is intended to leave appropriate room for judicial discretion. However, the proposed test does seem fairly onerous.

5. Hague Convention

In our 2001 submission, we stressed the necessity of identifying a parent with "custody" for the purpose of the Hague Convention. We said:

> Any new legislative phraseology will also have to account for the fact that the words "custody" and "access" have become terms of art, which are used in other legislation. Of particular concern, in our view, are the provisions of the Hague Convention governing the abduction of children to other countries. Orders must be enforceable under that Convention and we suggest that any amendments to the *Divorce Act* require a mandatory provision in an order that states who has "custody" for the purposes of the Hague Convention.

The provision in clause 16, section 22.1(2), deems "each person to whom parenting time is allocated" to have custody rights under the Convention, unless there is an order to the contrary. This seems to address the concern we raised, and is in keeping with the overall spirit of the legislative changes.

6. Interpreting Existing Orders

It is not apparent to us how Bill C-22 proposes that old orders will be interpreted in light of all the new definitions and rights. For example, Bill C-22 says that parents with parental responsibility are entitled to make inquiries, but how is that applied to an old access order? A transitional provision may be advisable to address this omission.

V. SERVICES

While we support the passage of Bill C-22, we continue to believe that the real problems in the custody and access system have little to do with the actual legislation. The real need, and that which will be even more pressingly needed if legislative changes are made, are properly funded services available throughout the country.

To ensure access to justice for all users, our system should encourage approaches that reduce conflict while also recognizing that there are times when the adversarial process is appropriate. As much as possible, it should amalgamate services for families and courts under one roof. Services should be available regardless of whether a person has commenced a court proceeding. Services should also be available to people after their dispute has been resolved, to ensure that solutions achieved are adequately implemented. Services should be available on a convenient, consistent and systematic basis.

The starting point for access to justice is access to competent, affordable legal representation. This means increased access to, and proper funding of legal aid. To make informed decisions, clients need to know their rights and obligations and how these apply in their particular circumstances. To help them negotiate the complicated terrain of family law, they need experts familiar with the legal system, the statutes, the services and the ever-changing case law. They need people who are experienced and know what works and what does not. They need lawyers.

As lawyers, we see all types of cases and are familiar with the services and options available to resolve those cases. By encouraging clients to pursue settlement as opposed to litigation, we play an important role in helping to divert people from the adversarial process. Ultimately, less demand on the court system to resolve family law disputes means less drain on public resources.

Adequate funding for civil legal aid increases clients' knowledge and enforcement of their rights. It makes access to justice a reality. It also reduces the huge number of unrepresented litigants in the system. Unrepresented litigants tend to clog up the court system, thus creating a significant long-term drain on public resources.

Legal aid funding is a necessary investment in the social support system and can

actually provide significant long-term savings for governments. This is especially true for family law. When a person obtains legal aid to establish an entitlement to child support, for example, the burden on social assistance is lessened and a child may avoid the detrimental effects associated with child poverty, often also with other social costs.

Also to improve access to justice and simplify the process for family law participants, the CBA Section supports the expanded use of unified family courts. Those types of courts have already been successful in several jurisdictions, for example in Nova Scotia and Ontario. Judges in these courts have specialized expertise in family law, understand the dynamics of family breakdown and have chosen to specialize in family law. Judges and court workers in these courts are often skilled in alternate methods of dispute resolution such as mediation. Services such as counselling and mediation are frequently available through the court process. Bill C-22 addresses the number of family court judges currently available, and we believe that this is a step in the right direction.

VI. CONCLUSION

As family lawyers, we are often the first contact point for people suffering the effects of family breakdown. We are almost always the ones helping people navigate the maze of services and procedures established to deal with these kinds of disputes. We see the system from all angles – we represent men, women and children, custodial and non-custodial parents, support payers and recipients of support, people who are wealthy, poor and middle class, victims and perpetrators of family violence, and those who suffer from alcohol or drug addiction and those who do not. As a result of this broad perspective, family lawyers have a unique insight into what works and what does not.

Family lawyers aim to reduce conflict and promote satisfactory resolutions. We urge the passage of Bill C-22 as a significant step toward achieving those goals,

with the minor amendments we have recommended.