
COMMENT

CHRONIQUE DE LÉGISLATION

The Proposed *Divorce Act* Reform — A Comment

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The author examines the proposed reforms of the *Divorce Act* with reference to both previous case law and the general purposes of divorce legislation. He views the proposals as an attempt to reconcile the tensions between conflicting aims and interests and as providing a moderate solution to difficult social questions. While the proposals are praised for the manner in which they streamline divorce procedure and permit the variation of awards, the author warns that the elimination of the notion of fault and the introduction of a mandatory one-year waiting period may create hardship and decrease individual liberty.

L'auteur présente les changements proposés à la *Loi sur le divorce* à la lumière de la jurisprudence et des objectifs fondamentaux qui motivent l'intervention législative en matière de divorce. Selon lui, ces changements furent conçus en tant que compromis au conflit de valeurs dans notre société et pourraient apporter une solution acceptable aux problèmes sociaux actuels. L'élargissement de la juridiction des tribunaux en cas de modification de décrets pécuniaires et la procédure plus expéditive sont accueillis avec enthousiasme. Toutefois, l'auteur croit que l'abandon de la notion de faute et l'adoption d'une période d'attente obligatoire de douze mois pourraient créer des injustices et porter atteinte à la liberté individuelle.

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Introduction

In almost all human societies, the provisions for divorce are never entirely satisfactory. If divorce is difficult to obtain, there are inevitably many permanently unhappy persons, and the society is forced to resort to coercion — either direct or social — in order to give effect to its law. If divorce is very easy to obtain, a certain degree of instability forms around the very notion of marriage, and it becomes extremely difficult to do economic justice to spouses and children or to give citizens the stability which more repressive societies provide. It is often tempting to adopt a moderate solution, but this, too, may prove illusory because the equilibrium is a naturally unstable one, and the society always evolves towards one or the other of the extremes.

In 1968, Canada enacted such a balanced proposal in the *Divorce Act*.¹ Less than two decades later, a drastic revision has been put before the House of Commons. Prior to the federal amendments, Quebec adopted but did not proclaim² divorce provisions far more liberal than the federal law in force. Clearly a major change has occurred in our society when even a relatively-recent *Divorce Act* has become an anachronism. What must now be attempted is an analysis of the purposes of any divorce legislation and an analysis of the present and the proposed legislation, to see if what we are offered constitutes an improvement.

I. Purposes of Divorce Law

A. General Purposes

In general, there are three types of goals in divorce Acts:

- 1) the complete and painless severance of the marriage tie;
- 2) the economic protection of spouses and children and the achievement of justice between them;
- 3) the discouragement of divorce and the strengthening of marriage.

It goes without saying that these purposes can contradict each other. For instance, the first and the third almost always conflict, because the usual way of discouraging divorce is to make it more difficult to obtain and therefore more painful to those who undergo it. The first and the second principles often conflict as well, because a just economic solution and generous access rights to children often make a "clean break" unfeasible. The parties are forced to remain a part of each other's lives for some time after the divorce.

Although in modern times conflicts between the second principle, the pursuit of justice between spouses, and third principle, the discouragement of divorce, are infrequent, they are theoretically possible, because one way to discourage divorce is to make it very unattractive both financially and otherwise.³

While the principles can push legislators in opposite directions, they can usually be reconciled to some extent and be made to fit into a reasonably coherent system. Each society creates its own solution, ranging from total

¹S.C. 1968, c. 24 [now R.S.C. 1970, c. D-8].

²This was due to constitutional reasons. For a brief historical note see the Preamble of *An Act to establish a new Civil Code and to reform family law*, S.Q. 1980, c.39.

³It must be admitted that it is already quite unattractive and most people experience considerable economic hardship as a result of it. See *infra*, note 75.

reliance on the third principle⁴ to almost complete freedom.⁵ The choice of system will depend, of course, on social and economic conditions and the culture and religion of each society. One question which remains open is whether the law is merely a reflection of the society, and therefore must be amended quickly so as to suit the evolving society as perfectly as possible, or whether it helps the social conditions and therefore can be used as an instrument for controlling the direction of change. This second view was well-expressed by the late Prof. Wolfgang Friedmann:

There is, indeed, considerable justification for the view that the availability of divorce by consent would tempt married couples to magnify temporary disagreement, discomfort or other difficulties into basic failure.⁶

The logical approach would be to put some obstacles in the way of divorce, not because this would reflect present morality, but as an attempt to influence future conduct.

While it is not the function of this essay to venture into complex fields of legal philosophy and to consider the relationship of law and social change, the author must at once state his agreement with Prof. Friedmann's view that, at least to some extent, the law can shape as well as be shaped. It is therefore extremely difficult to see law as a relatively value-free technique for expressing the views of any society. This adds a dimension to any proposed reform of divorce, but it does not tell us precisely how to direct divorce law in any country.

B. Modern Society

It is an obvious truth that, over the past century, western society has moved towards liberalism in family law and that there has been a very significant movement in that direction in the last twenty years. Claire L'Heureux-Dubé writes:

The most advanced Western Societies — the United States and Scandinavia, particularly Sweden — have tended to limit the conditions of entry into marriage to the essentials, while facilitating a free opting-out. It has reached the point where marriage itself tends to become...not dissimilar to *de facto* marriage.⁷

⁴An example would be Quebec law prior to 1968, since article 185 of the Civil Code used to read: "Marriage can only be dissolved by the natural death of one of the parties; while both live, it is indissoluble."

⁵For a description of such an experiment in Soviet law in the 1920's, see J. Hazard, W. Butler & P. Maggs, *The Soviet Legal System: Fundamental Principles and Historical Commentary*, 3rd ed. (1977).

⁶W. Friedmann, *Law in a Changing Society*, 2nd ed. (1972) 252.

⁷L'Heureux-Dubé, "Family Law in Transition: An Overview" in R. Abella & C. L'Heureux-Dubé, eds, *Family Law* [:] *Dimensions of Justice* (1983) 302.

Not all societies have moved at the same pace, but the trend is unmistakable. Professor Hahlo lists the changes in a number of western jurisdictions and then concludes:

The demystification of marriage, which began with its secularization after the Reformation, has finally reached its consummation.⁸

One of the main battles of the change has involved the transition from divorce given because of the fault of a "guilty" party to divorce without fault serving to remedy a situation. Once again, Professor Hahlo puts it aptly:

The pivotal point in the evolution of a new kind of marriage was the shift in the divorce laws of Western jurisdictions from fault to failure; from the matrimonial offence . . . to irretrievable breakdown. . . .⁹

The fault principle has been criticized because many felt that "fault" does not exist in the marriage context and that both partners are usually somewhat to blame for failure. That this view is rather simplistic cannot be doubted. In many, perhaps most marriages, it is impossible to determine with certainty who the guilty party is.¹⁰ However, there are surely many cases of brutality, callousness and child abuse where guilt can be more or less accurately attributed: in *Woniaczuk v. Zimny*,¹¹ Mr Justice Martin found a factual situation where conduct was so extreme that he could not ignore it. It is therefore misleading to argue against fault on the grounds that it never exists. Sometimes it *must* exist, as in all human relationships.

Another objection can be made on the grounds of relevance. It might be argued that fault, whether it exists or not, should not influence the outcome of any significant disputes: the granting of divorce, the assessment of maintenance or the awarding of custody and access to children. This position is eloquently expressed by Ryan, who suggests that needs "are not magically reduced or eliminated by fault".¹²

This position is in part embodied in the Supreme Court decision of *Talsky v. Talsky* where Mr Justice de Grandpré says:

I agree with the trial Judge that a wife who is "well nigh impossible" as a wife may nevertheless be a wonderful mother.¹³

⁸Hahlo, "The Changing Face of Marriage and Divorce", in Abella & L'Heureux-Dubé, *ibid.*, 271, 278.

⁹*Ibid.*, 273.

¹⁰See *Wachtel v. Wachtel* [1973] 1 All E.R. 829, 835-6 (C.A.).

¹¹C.S. (Quebec, 500-12-107815-817), 3 November 1983. See also *Kesner v. Kesner* [1973] 2 O.R. 101, (1973) 33 D.L.R. (3d) 57 (Ont. H.C.); and *Chorny v. Chorny* [1971] 5 W.W.R. 732 (Alta. C.A.).

¹²Ryan, *Maintenance Obligations in a New Legal Concept of Marriage* (1976) 21 R.F.L. 1, 10-1.

¹³[1976] 2 S.C.R. 292, 294; (1975) 62 D.L.R. (3d) 267, 278-9.

The suggestion is that "conduct", at least in the marital sense, is not important. However, relative unimportance is not the same thing as utter irrelevance. With respect to obtaining divorces and alimentary obligations, we have already seen the existence of "extreme" cases where it is unfair to ignore fault.¹⁴ With respect to custody, Mayrand has stated:

As a consideration for awarding custody, the conduct of the spouses is perhaps more relevant, but the importance is measured by its relation to the welfare of the child.¹⁵

All of this would point to a decline in the weight attached to "fault", but not to its total elimination. The real reason for the unpopularity of "fault", at least in granting divorce, is that it is an easy way of limiting the number of divorces. Fault is usually precise and clearly described in the legislation. It is therefore something that must be proved by ordinary legal means.¹⁶ On the other hand, marriage breakdown is a vague concept and therefore one which judges, wishing to meddle as little as possible with people's private lives, will interpret flexibly. It is also far less likely that a petition will be contested if it does not accuse the other spouse of acts to which opprobrium may attach. Thus, the evolution from fault to no-fault is in large measure the same thing as the evolution from difficult to easy divorce.

We can thus summarize the recent trends in divorce legislation by saying that the first principle, painless severance of the marriage tie, has gained considerably at the expense of the third, discouragement of divorce.¹⁷

The second principle, economic protection of the parties, has also been subordinated to other interests. In particular, it has become fashionable to view alimentary provisions as temporary until the children have grown up and the parties adjusted.¹⁸ Even with respect to children, there have been relatively "restrictive" decisions.¹⁹ One can explain this tendency by reference to the fact that a society with large numbers of divorced people necessarily becomes less generous in its awards, otherwise the economic effects of divorce become enormous. It is, however, necessary to point out that the subordination of the second principle to the first has been less consistent than that of the third. A considerable number of decisions have

¹⁴*Supra*, note 11.

¹⁵"The Influence of Spousal Conduct on the Custody of Children", in Abella & L'Heureux-Dubé, *supra*, note 7, 159, 173.

¹⁶See the Report of the Special Joint Committee of the Senate and the House of Commons on Divorce (1967) 103-4.

¹⁷However, formal support for it is occasionally voiced and is found in the proposed reform.

¹⁸*Shustack v. Rabinovitch* J.E. 81-942 (Que. S.C.); *Levesque-Apestiguy v. Apestiguy* J.E. 81-858 (Que. C.A.).

¹⁹*Dagenais v. Duceppe* J.E. 82-651 (Que. S.C.).

continued to aim for justice rather than for a clean break.²⁰ Moreover, the Supreme Court seems to have moved in the same direction.²¹

II. The 1968 *Divorce Act*

When the 1968 *Divorce Act* was adopted, there was a great divergence of opinion on the subject in Canada. Quebec and Newfoundland had no divorce; their inhabitants had to rely on Parliamentary divorce, which was not easy to obtain and which made no provisions for the parties' future. Other provinces had established divorce procedures and many commentators were seeking a liberalization.

Philosophically liberal, the late 1960's saw the "no-fault" ideology already firmly established. At the same time, however, there were more people than today who had strong objections to, or at least reservations about, divorce.

Many countries were amending their statutes and it was common to strive for a compromise between the avant-garde position of "no-fault" and the traditional concept of strictly-proved specific causes for divorce.²² This solution seemed ideal for Canada. The 1968 *Divorce Act* combined matrimonial offences as a ground for divorce (section 3) with no-fault provisions which were made somewhat unattractive by lengthy waiting periods (section 4). Prof. Ouellette found a common attitude in both cases:

Aussi, entre l'interdiction de divorce et le divorce sur consentement des parties, il lui [le législateur] a fallu choisir un système intermédiaire, à savoir: le divorce ne sera accordé que s'il existe une cause sérieuse rendant la poursuite de la vie conjugale sinon impossible, du moins fort difficile.²³

One can agree that both sections 3 and 4 of the *Divorce Act* defined "serious grounds". However, the 1968 *Act* appears to move from liberal to conservative positions in a somewhat giddy manner, creating some doubts as to the presence of a consistent philosophy. "Mental cruelty" is a rather liberal concept and almost anything might do; but then the legislator restricts the availability of divorce on these grounds by adding the condition that further cohabitation must be intolerable. Section 4 is intended to provide grounds for divorce without fault. It does so, and is quite progressive in including alcoholism and drug addiction as "no-fault" grounds. Then, fault

²⁰See *Pelletier v. L'Esperance*, C.S. (Quebec, 500-12-055982-759), 21 May 1980, aff'd C.A. (Quebec, 500-09-000624-809), 25 October 1980. See also *Delage v. Messier* J.E. 81-1008, *Paradis v. Blanchard*, C.A. (Quebec, 500-09-000807-776), 3 April 1978, and *Silverstein v. Silverstein* (1978) 20 O.R. (2d) 185, (1978) 87 D.L.R. (3d) 116 (Ont. H.C.).

²¹*Messier v. Delage* (1983) 50 N.R. 16 (S.C.C.).

²²See Friedmann, *supra*, note 5, 245, for a comparison of Canada and Australia in the 1960's.

²³M. Ouellette-Lauzon, *Droit des personnes et de la famille*, 3rd ed. (1980) 354.

re-appears in the notion of desertion. Section 9 imposes numerous duties upon the court which make divorce harder to obtain.²⁴ On the other hand, section 9 also contains provisions which facilitate divorce.²⁵ Thus, the chameleon side of the law reveals itself once more. Both liberal and conservative minded Canadians could take comfort in some of these provisions, although advocates of extreme positions would necessarily be disappointed.

The legislator clearly left much to be determined by jurisprudence. In retrospect, we can see that the jurisprudence has made the *Divorce Act* more liberal than the provisions might suggest. On almost all controversial issues, the courts have chosen a permissive solution.

Firstly, the provision requiring a trial, and forbidding divorce based on admission alone, was interpreted so as not to prevent divorce based on admission *before the court*.²⁶ This opened the way to quick divorces, not requiring much proof of offense and not obligating a petitioner who alleges adultery to produce the co-respondent or another witness.

Secondly, mental cruelty was given a reasonably liberal meaning. The early cases were at times rather strict.²⁷ Soon, however, courts became more permissive. For instance, neither the intention to be cruel nor bad faith were judged essential in a number of cases.²⁸ Cases treating "change of religion" as cruelty also had the same effect, since it was impossible to characterize sincere conversion as either intentional cruelty or bad faith.²⁹ The requirement that further co-habitation be intolerable was also wittled down by a somewhat vague interpretation of cruelty as subjective and dependent on all the facts of the case.³⁰ Refusal of sexual relations was deemed evidence of cruelty in some cases,³¹ despite the erudite arguments presented by the Court in *Webster v. McKay*.³²

On the other hand, not all courts or judges are liberal and the words of section 3 create limits even for liberal judges, with the result that some

²⁴For example, in s. 9(1) and (2), the duties of the court include holding a trial and checking whether there was collusion, connivance or condonation.

²⁵For example, s. 9(3)(a) introduces the problem of divorce because of a spouse's illness and is thus automatically controversial.

²⁶*Giroux v. Ouellette* [1972] C.S. 723.

²⁷See *Webster v. McKay* [1969] C.S. 132 and *Lacey v. Lacey* [1970] 1 O.R. 279, (1969) 8 D.L.R. (3d) 289 (Ont. H.C.).

²⁸See *Ashraff v. Ashraff* (1970) 73 W.W.R. 321 (Man. S.C.) and *Rodway v. Rodway* [1978] 3 R.F.L. (2d) 295 (Ont. H.C.).

²⁹See *Retzer v. Retzer* [1975] 2 S.C.R. 881, (1974) 52 D.L.R. (3d) 159.

³⁰See *Aucoin v. Aucoin* (1976) 15 N.S.R. (2d) 399, (1976) 72 D.L.R. (3d) 674 (N.S.C.A.).

³¹See *Genest v. Boutonnie* [1980] C.S. 679 and *Besner v. Brunet* [1975] C.S. 712.

³²*Supra*, note 27. See *Boivin v. Massicotte* [1977] C.S. 997 for the more conservative position.

petitions are still dismissed.³³ One may legitimately worry whether the success or failure of a debatable "cruelty" case is not to some degree the random result of the schedule of different judges. However, in general, it is not very difficult to get a divorce on this ground.³⁴

The existing no-fault grounds of divorce have also received a "liberal" treatment. For instance, the courts have been lenient in the calculation of time,³⁵ in the decision that one need not find a deserter and a deserted party in each case³⁶ and in tolerating numerous attempts at reconciliation.³⁷ Living separate and apart was held not to require separate domiciles,³⁸ and divorce because of a spouse's chronic illness was made relatively easy.³⁹ However, as with mental cruelty, there are occasional refusals of divorce⁴⁰ and perhaps a small degree of unpredictability in the result.

The liberal trend of interpretation affected other areas of divorce law not directly connected with availability of divorce. The rules of jurisdiction, presumably designed to facilitate access to the courts, but at the same time succeeding in discouraging forum-shopping, were interpreted in a fairly generous manner.⁴¹ Rules governing the extension of delays for appeal from accessory measures were likewise given a permissive interpretation.⁴² Moreover, some, but not all judges have agreed to shorten the waiting period for a decree absolute if there are very pressing reasons.⁴³

³³See *Gilbert v. Gilbert* (1980) 39 N.S.R. (2d) 241, (1980) 18 R.F.L. (2d) 240 (N.S. T.D.) and *Shumila v. Shumila* (1975) 60 D.L.R. (3d) 374 and especially *Morin v. Dumont* [1981] C.A. 394, 396 where Mr Justice Mayrand expresses some regret in having to dismiss the petition. See also *Ayotte v. Mireault* [1978] C.S. 67.

³⁴J. Pineau, *La famille* (1982) and the authorities mentioned there. See also Besner, *Condonation as a Bar to Divorce in Canada* (1979) 25 McGill L.J. 64 and McLeod, *Introduction to Family Law* (1983) 90-1.

³⁵See *Gushta v. Gushta* (1978) 2 R.F.L. (2d) 342 (Man. C.A.) and *Blackburn v. Blackburn* [1970] 2 O.R. 417, (1970) 11 D.L.R. (3d) 127 (C.A.).

³⁶See *Comeau v. Morrissette* [1980] C.S. 675 and *Baril v. Trudeau* [1977] C.A. 49.

³⁷See *Boisvert v. Marineau* [1974] C.A. 391 and *Crawford v. Crawford* (1976) 67 D.L.R. (3d) 557, [1976] 3 W.W.R. 767 (Man. C.A.).

³⁸See *Rousell v. Rousell* (1969) 6 D.L.R. (3d) 639, (1969) 69 W.W.R. 568 (Sask. Q.B.) and *Hébert v. Houle* [1973] C.S. 868.

³⁹See *Lachman v. Lachman* [1970] 3 O.R. 29, (1970) 12 D.L.R. (3d) 221 (C.A.). This decision has been almost universally accepted. However, the serious moral implications have occasioned some protest. See *Piette v. Therrien* [1976] C.S. 1634. But see also *Beaudry v. Chénier* [1976] C.S. 1028 where divorce under those conditions is almost turned into a virtue.

⁴⁰See *Provencal v. Leclerc* [1974] C.A. 27.

⁴¹See *MacPherson v. MacPherson* (1976) 13 O.R. (2d) 233, (1976) 70 D.L.R. (3d) 564 (C.A.).

⁴²*Magnusson v. Magnusson* (1975) 65 D.L.R. (3d) 699, [1976] 2 W.W.R. 277 (Alta. C.A.).

⁴³*Bitard v. Rizkallah* [1981] C.S. 355, [1981] R.P. 408. Mr Justice Reeves presented impartially the authorities both for a hard line and for a permissive attitude before opting for the latter.

The 1968 *Act* can thus be seen as a dynamic or evolving law. The new reform is not a revolution but rather an acceleration of a social movement already in progress.

The most convincing justification for an acceleration of social change is not any intrinsic virtue of divorce on demand, but the practical side of present divorce practice. The demand for divorce has shortened to five or ten minutes the time a judge can devote to the average uncontested case. Except in the most flagrant cases, this is not enough either to detect perjury or to prevent injustice in accessory measures. In some ways, the law has become a rubber stamp, and this has not enhanced its prestige or its potential to improve society.⁴⁴ In a system where most lies are not detected and most couples can be divorced on demand, the refusal of a few random petitions has a flavour of capriciousness or arbitrariness which we like to think is absent from our courthouses. On the other hand, one cannot entirely discount fears that liberalizing divorce further will simply make it even more popular and indeed turn it into the natural end of a marriage which death used to be. It is with this ambivalent starting position that the author proposes to begin analysing the new project.

III. The Proposed *Divorce Act*

A. *Explanatory Notes*

The proposed *Divorce Act* has been published with explanatory notes which, in paragraph 3, pay obeisance to the principle of the preservation of the family unit, but which make it quite clear that the purpose of the legislation is to achieve the first two of the purposes of divorce law described earlier in this essay — the painless severance of the marriage tie and the economic protection of the spouses. However, the Explanatory Notes emphatically distinguish between the reform and “divorce on demand”, by pointing out that Canada will still require a one-year waiting period before granting divorce. This insistence — more ideological than real — is proof of the controversy which still exists on this subject and of the fact that large segments of the Canadian public have not accepted the total dissolubility of marriage. However, the essence of the Explanatory Notes is found in the following sentence: “No useful purpose is served by requiring people to prolong a relationship that no longer works.”

⁴⁴See Hahlo in Abella & L'Heureux-Dubé, *supra*, note 7, 274-5.

B. Procedure

Divorce procedure under the proposed *Act* is very much simplified and accelerated. The new section 3 eliminates the need for adversarial confrontation by permitting joint applications for divorce, provided the Rules of Court allow.⁴⁵ The new section 9 eliminates the need for a trial, which many had held to be an unnecessarily and often humiliating intrusion into the private lives of the applicants.⁴⁶ Section 19(1) in effect delegates this power to the provinces.

Section 13 ends the two-tier proceeding of obtaining first a conditional and then a final decree of divorce. Instead, all divorce judgments will automatically take effect thirty days after their date unless there is an appeal or unless the court shortens the delay. This eliminates an unnecessary motion and is therefore unquestionably a welcome change.

C. Grounds for Divorce

Without a doubt, the most radical provision of the new law is the elimination of the old causes of divorce and their replacement by the single requirement of marriage breakdown. The notion of fault is eliminated. To emphasize this, section 12.1(2) forbids the consideration of misconduct in assessing maintenance.⁴⁷ These provisions appear to go too far, because they create categorical rules which may prove to be very inconvenient in an unusual case. Persons who consider themselves to have been wronged will not be content to be informed by a judge or a lawyer that this is juridically irrelevant and therefore inadmissible; a great deal of dissatisfaction will inevitably result from this.

The impression that the new *Act* permits "divorce on demand" is further strengthened by the definition of marriage breakdown which makes its assertion by both parties or one year of separation sufficient evidence of breakdown (section 2). This is a logical consequence of divorce without trial, but it makes it almost inconceivable for a petition to be refused on other than technical grounds.

The only restriction on divorce is the need for a one-year of delay either through separation prior to the petition or by a waiting period after its

⁴⁵In effect, this means delegating the decision to the provinces which control the Rules of Court. In Quebec, joint applications for separation already exist.

⁴⁶On the other hand, the trial constitutes the one opportunity, however remote, for an injustice to be detected.

⁴⁷Presumably, one can still look at it for determining disputes about children.

presentation (section 3(3)).⁴⁸ This requirement may not be very onerous if the earlier jurisprudence on living "separate and apart" under the same roof is deemed to apply.⁴⁹ However, the delay can prove to be very unfair if it is essential that one of the parties remarry at once. It is true that legitimacy of children is no longer a burning concern⁵⁰ and that this decreases the urgency with which most marriages must be contracted, but many difficulties can arise if a woman is still married to her previous spouse when her child is born.⁵¹ Moreover, other reasons can make a quick second marriage essential. Immigration is an obvious example, since immigration officials do not permit a Canadian still married to someone else to sponsor a future spouse.⁵² It seems, therefore, that requiring a delay of one year in every case can cause grave injustice in some instances.

We must note, in considering the new causes of divorce, that condonation and collusion disappear from our law. However, the right to a ninety-day trial reconciliation is preserved in section 3(4).⁵³ A new and striking feature is the imposition of an obligation to pursue a divorce with due diligence, imposed on parties by section 4. One can appreciate the need for diligence in any legal proceeding, but it is not easy to see its special function here. Presumably, what was intended was that the reform have the same effect as the earlier condonation provisions. That is, a year's separation should not serve as an "eternal" ground for divorce if the marriage should sour many years later. It is open to question whether this phrasing achieves a reasonable result.

D. Jurisdiction

The complicated rules of jurisdiction involving both domicile in Canada and residence in a province are to be repealed. Instead, one year's ordinary residence in a province is to suffice. Obviously, the spectre of forum-shopping and of Canada becoming a divorce haven has proved less compelling than the fear that some persons will, because of the quirks in the definition of domicile, be deprived of an opportunity to obtain a divorce.

⁴⁸The phrasing seems to preclude a divorce where six months of the separation take place before the presentation and six months afterwards. However, a liberal construction may cover this apparent oversight.

⁴⁹*Supra*, note 38.

⁵⁰Indeed, it is a matter of no legal importance.

⁵¹The need for disavowal arises.

⁵²Of course, given the general restrictive spirit of our immigration legislation, this effect may well be intentional.

⁵³The new provision is clearer than was the old in specifying that there can be as many attempts as the spouses wish so long as the aggregate does not exceed ninety days.

Quite clearly, this means that some persons who have no intention of remaining in Canada — foreign students⁵⁴ and foreign diplomats for instance — will benefit from these provisions. Inevitably, it also means that stricter foreign jurisdictions may deny recognition to a Canadian decree. These consequences are not shortcomings of the reform. It seems reasonable to extend the protection of our courts to persons residing here for considerable periods and not to worry about the laws or the moral ideologies of their homelands.

Depending upon the definition of “ordinary residence” adopted by the courts, there may be deserving persons still unable to get a divorce. Canadians residing abroad for a significant length of time, even on official business, may find themselves excluded. It would be irrational to allow Canadian citizenship alone to be sufficient connection for a Canadian divorce. However, some deemed Canadian residence for Canadian diplomats and servicemen could have been spelled out. It is very likely that the courts will do this without further instruction.

Section 6 extends recognition — whatever other Canadian rules for recognition may be⁵⁵ — to divorces granted abroad on the basis of one year’s residence. It is logical for us to accept divorces where the other country applied a rule identical to ours. Section 6 explicitly preserves all the existing rules of recognition and well tend to liberalize Canadian private international law.

E. Accessory Measures

The second principle of divorce legislation — that of creating justice between the parties — does not seem to be a major object of the reform. The existing rules are substantially reproduced. However, the provisions are clarified, both by textual improvements, that is removal of unfortunate differences between the French and English texts, and by section 12.1, which spells out the ideology of maintenance decrees. This section is so important that it is reproduced here:

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

⁵⁴In the past, foreign students were ineligible. See *Cohen v. Cohen* (1978) O.R. (2d) 738, (1978) 5 R.F.L. (2d) 189 (Ont. H.C.).

⁵⁵See *Bate v. Bate* (1977) 16 O.R. (2d) 763, [1978] 1 R.F.L. (2d) 298 (Ont. H.C.).

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

The legislator does not unequivocally side either with those for whom a clean break between ex-spouses is the ideal, in which case alimony is only a temporary solution and those who believe in a more active intervention in the affairs of ex-spouses in order to protect the weaker party. Both positions are reproduced and the courts are given the task of assigning relative weight to them.⁵⁶

The new section 12.1 also allows compensation for "advantages and disadvantages" of the marriage. This seems a departure from the previous view that the *Divorce Act* cannot redistribute property, for example through a lump sum payment, but serves only alimentary purposes.⁵⁷ The divorce law will now be in a position to prevent unjust enrichment between spouses, much as the Civil Code of Quebec purports to do through its "compensatory allowance".⁵⁸ In addition, compensation will be possible for such things as the loss of a widow's pension through subsequent marriage or the loss or gain of professional skills on account of the marriage.⁵⁹ It is possible that section 12.1(6) will palliate to some degree the fact that the courts can no longer punish misconduct through alimony or lump sums. Whether or not this is so, section 12.1(2) which forbids the consideration of conduct, seems

⁵⁶So far the courts have had no consistent approach. See especially *Marcus v. Marcus* (1977) 30 R.F.L. 240, [1977] 4 W.W.R. 458 (B.C. C.A.); *Goldstein v. Goldstein* (1976) 67 D.L.R. (3d) 624, [1976] 4 W.W.R. 646 (Alta. C.A.); *Rocheport v. Blanchard* [1978] C.A. 382; *Shustack v. Rabinovitch supra*, note 18. However, the new *Act* does propose to repeal *Messier v. Delage, supra*, note 21, by permitting a judge to determine a time beyond which no further pension will be possible (ss 11(3) and 12(6)). This is either a move towards the "clean break" theory designed to lessen court interference in the parties' future affairs, or merely the creation of another option, thus increasing the portfolio of discretionary powers possessed by the court. *Levesque-Apestiguy v. Apestiguy, supra*, note 18; *Dagenais v. Duceppe, supra*, note 19.

⁵⁷*McConnell v. McConnell* (1976) 57 D.L.R. (3d) 268 (N.B. C.A.); *Krause v. Krause* (1975) 64 D.L.R. (3d) 352, [1976] 2 W.W.R. 622 (Alta. C.A.); *Décarie v. Lefebvre* [1977] C.S. 703; *Lebrun v. Rodier* [1978] C.A. 380; *Hanna v. Lafaire* [1979] C.S. 998; *Laflamme v. Laplante* [1981] C.S. 1031. However, see *Spracklin v. Spracklin* (1978) 4 R.F.L. (2d) 304 (Nfld. T.D.).

⁵⁸See art. 559 C.C.Q. See also Connell-Thouez, "Matrimonial Property Regimes in Quebec before and after the Reform of 1981: Adapting Traditional Institutions to Modern Reality" in K. Connell-Thouez & B. Knoppers, eds, *Contemporary Trends in Family Law: A National Perspective* (1984) 27.

⁵⁹An example would be where one of the spouses has worked to put the other through medical school.

to be a surrender to dogmatic moral relativism which is most regrettable. Conduct should not be the predominant issue and it is completely incomprehensible that it should carry some weight in marginal questions.

Insofar as custody and support of children are concerned, section 12.1(3) consecrates the universally accepted principle that the interest of the children is the primary issue.⁶⁰ Nothing will change in this regard.

The principle of equality of parents (sections 12.1(1) and 12.1(3)(a)) is perhaps more novel, but here, too, no one is likely to dispute the result. The same can be said for the principle of giving siblings access to each other (section 12.1(3)(c)).

Where the *Act* departs radically from past law is in providing that a third person may, with leave of the court, apply for custody. Until now, the spouses were the only proper parties to a divorce petition and no power existed to grant custody or visiting rights to a third party.⁶¹ Although the law did not give rights to third parties, courts have often found ways of achieving the same effect in the interest of the child.⁶² It is therefore gratifying to see that the law will now provide a clear and simple procedure for a remedy which is so indispensable that means are found to provide it even when it does not exist in written law.

Section 12.1(3)(d) provides authority for the court to represent the children in cases where representation is needed. There are many difficulties with such representation. Who is to instruct counsel as to the position to take? What weight should be accorded to counsel's views? It is perhaps these problems that led some courts to conclude that separate representation should be the exception, not the rule.⁶³ Some of these objections were answered in *G. v. P.*⁶⁴ by Quebec's Tribunal de la Jeunesse. Nevertheless, it will not and probably should not be the result of the reformed *Divorce Act* that separate representation becomes standard procedure.

⁶⁰*Talsky v. Talsky*, *supra*, note 13, *MacDonald v. MacDonald* [1976] 2 S.C.R. 259, (1975) 62 D.L.R. (3d) 301, *Taillon v. Donaldson* [1953] 2 S.C.R. 257.

⁶¹The Civil Code of Quebec in article 659 now recognizes grandparents' access rights.

⁶²See *Taillon v. Donaldson*, *supra*, note 60; *Hubert v. Gêlinas* [1965] C.S. 35; *Goulet v. Chartier* [1977] R.P. 88 (Que. S.C.); *Gyore v. Gulyas* [1974] C.S. 146; *Perreault v. Demers* [1974] C.S. 530; *Pekrul v. Minister of Social Services* [1981] 7 Sask. R. 212, (1981) 17 R.F.L. (2d) 370 (Sask. Q.B.); *Haskell v. Pinsonneault* [1982] 34 O.R. (2d) 571, (1981) 127 D.L.R. (3d) 641 (Ont. H.C.); *Miliziane v. Vachon* C.S. (Montreal, 500-04-000347-832) 18 April 1983; *More v. Primeau* (1978) 2 R.F.L. (2d) 254 (Ont. C.A.).

⁶³*J. v. J.* [1978] 1 W.W.R. 8 (Man. C.A.).

⁶⁴*G. v. P.* [1979] T.J. 2001 (Que. Trib. de la jeunesse).

It is disappointing that no change in the definition of "child" or "child of the marriage" is contemplated. The very low cut-off age of sixteen⁶⁵ seems an obvious candidate for modification.

A striking improvement included in the proposed reform concerns the variation of awards. Under the 1968 *Act*, only the court which made the order could vary it, even if all the parties reside elsewhere at the time of the petition.⁶⁶ This was clearly unfortunate. Now, a court of the jurisdiction in which either party resides will be able to modify an order, subject to its discretionary right to apply the doctrine of *forum non conveniens* (section 11(4)).

We conclude that the fundamental philosophy of accessory measures has not changed, despite some stylistic improvements,⁶⁷ the partial repeal of *Messier v. Delage*,⁶⁸ the totally unjustifiable exclusion of all consideration of conduct from the fixing of alimentary pensions, the introduction of powers to redistribute capital and the creation of third party rights with respect to children. The legislator is not moving either in the direction of the "clean break" or of greater attention towards the socio-economic effects of divorce. Rather, the law will be left free to continue to evolve in the light of the experience of the courts and moral climate prevalent in the community.⁶⁹

Conclusion

In evaluating a new law, two types of consideration must be taken into account.

First, one must evaluate technically the language of the statute. Does it achieve its purposes? Apart from a few questions raised above, there are no evident errors of drafting. Of course, such errors usually come out only in practice. The legislator, therefore, can take small comfort in the fact that no manifest mistakes have come to light.

⁶⁵This is subject, of course, to some exceptions.

⁶⁶See *Rodness v. Rodness* [1976] 3 W.W.R. 414 (B.C. C.A.). The Quebec Court of Appeal tried to overcome this harsh rule in *Stein v. Phillips* [1976] C.A. 150, but this case had a formal election of domicile in Quebec.

⁶⁷Some of these improvements are questionable. Why replace the word "upon" in s. 11, which has been defined by the courts (*Zacks v. Zacks* [1973] S.C.R. 891, (1972) 29 D.L.R. (3d) 99; and *Vadeboncoeur v. Landry* [1977] 2 S.C.R. 179, (1976) 68 D.L.R. (3d) 165), and replace it with "on", which is an unknown quantity? (The French version remains unchanged.) Given the presumption that the legislator does not speak in vain, courts may have to strive to find a perfectly reasonable solution.

⁶⁸*Supra*, note 21.

⁶⁹It is important to remember that the *Divorce Act* is only part of the law on these questions. Each province has additional laws which are often of equal importance.

Second, we must evaluate the purposes and desirability of the law. Here, it is difficult to avoid mixed and indeed contradictory feelings about the proposed legislation.

The *Divorce Act* as it may read in 1984 is the final consecration of the dissolubility of marriage at the will of the parties or even one of them. Everyone seemed to recommend this;⁷⁰ it became reality even without reform because of the unwillingness of many judges to interfere and the impossibility of doing so in the short time allotted to each case. In a world of permissive sexual attitudes, equality of the sexes, and stress on the right of each person to the pursuit of his own happiness, who could possibly want the law to create serious obstacles to divorce?

It is true that the majority of Canadian, or at least sizable minorities, are not as "progressive" as the promoters of the present reform. There may well be a "moral majority" or "moral minority" living in a world unchanged from 1950 and reacting against the social changes around them. It is for them that the formal adherence to the principle of family unity continues and that the one-year delay will now be imposed on all persons seeking divorce. However, it is difficult to measure the strength of this "backlash"⁷¹ and even more difficult to sympathize with its illiberalism and its rigid moral dogmatism.⁷² The misgivings which this author feels about the proposed divorce law must be based on considerations other than some instinctive rebellion against the moral changes in the past twenty years.⁷³

Throughout the years during which the 1968 *Act* has been in operation, fears were voiced about its effects, especially on children. In *Hoyt v. Hoyt*, Mr Justice Barry wrote:

Contrary to the trend to making divorce easier, I have come to the conclusion, primarily in the interests of the children involved, not the adults, that if the parties had to wait five years. . . the children would be better protected and the tax-payers save much money.⁷⁴

⁷⁰The Law Reform Commission did, in its 1976 Report.

⁷¹See Hahlo in Abella & L'Heureux-Dubé, *supra*, note 7, 274-5.

⁷²Moral majority views often come in a package with capital punishment, narrow religious views, opposition to immigration, anti-feminism, and opposition to the welfare system — positions with which this author at least has no common ground.

⁷³Indeed, fear of the back-lash (as opposed to sympathy for it) can be a very good motive for caution.

⁷⁴*Hoyt v. Hoyt* (1978) 20 N.B.R. (2d) 430 (N.B. S.C.), (1978) 34 A.P.R. 430.

The Honourable Judge was referring to the notorious fact that most Canadians cannot afford two families and that the fact that they have them impoverishes both. In *Knight v. Heafy*, Mr Justice Frenette put it as follows:

la séparation des époux entraîne généralement une augmentation du coût et conséquemment une diminution du niveau de vie. . . .⁷⁵

It follows, firstly, that divorce without trial is likely to minimize the effect of divorce on the more selfish spouse.⁷⁶ Second, and more controversially, one may question whether the absolute availability of divorce without even the shadow of the possibility of denial will not encourage divorce and thus increase the disadvantages for children and spouses.⁷⁷

That impossible marriages should end and the parties be permitted to rebuild their lives is obvious. This author would go so far as to say that a society which has no divorce does not fully respect human liberty or dignity. But this does not mean that *in every case*, divorce must be granted, whatever its consequences or its causes or even without inquiry as to the causes.

Indeed, automatic divorce may decrease individual liberty by decreasing the choices available to individuals. In *Paré v. Bonin*,⁷⁸ Mr Justice Beetz writes about the need to retain a distinction between marriage and concubinage, not so as to stigmatize the latter, but rather to maintain the special place of marriage in our society. In a world which does not discriminate against persons living together, it is obvious that individuals have an option — a “free” cohabitation based on continuing and perpetually revocable consent with few longlasting effects⁷⁹ or a permanent union with far greater ramifications. By making marriage too easily dissoluble, the distinction may become obscure or be limited to property questions. The suggestion is not that marriage be indissoluble but that some cause be required for its termination and that the courts retain the right to deny a petition in appropriate cases. The one-year separation seems insufficient to maintain the notion of a union intended for life and different from cohabitation. The new law may therefore further weaken the hold that marriage and traditional monogamy have on our society and thus eliminate a significant choice that our citizens have. Liberty would be the less and not the more for the reform.⁸⁰

⁷⁵*Knight v. Heafy* J.E. 81-858 (Que. S.C.).

⁷⁶Presently, the court may still catch a few of these cases.

⁷⁷It must be remembered that what the opponents of divorce feared in 1968 — the opening of the floodgates — came to pass. The proponents of divorce now urge further liberalization to deal with the quantity of divorces. Of course, it is simplistic to believe that the increase in divorce was entirely, or even largely, caused by changes in the law.

⁷⁸[1977] 2 S.C.R. 343, (1976) 23 R.F.L. 231.

⁷⁹This does not include the one indisputable long-lasting effect — children.

⁸⁰The possibility that extreme liberal positions may diminish freedom while seeming to enhance it is not limited to divorce. The subject is too complex for this essay, but its critical importance in the philosophy of legislation cannot be ignored.

The proposed reform also provokes misgivings of another kind. The one-year waiting period may be unfair in some cases and may also work to limit human freedom and to increase suffering. In divorce law, categorical rules of this kind are too drastic and the injustice often affects the weakest and the most innocent persons. One can understand the hesitation to grant a judicial discretion to dispense with the waiting period. Given past trends, this would, within a few years, mean divorce on demand without any barrier at all. The solution was surely to preserve certain specified causes which would justify immediate divorce.⁸¹ This, however, would have seemed too close to the 1968 law for the advocates of reform to be satisfied.

Finally, the strident amorahism of section 12.1(2) is totally unacceptable. To say that misconduct of spouses is irrelevant is not liberal. It is rather the imposition of a particular morality associated at times with liberalism.⁸² The result is once again the diminution of our liberty. It would make far more sense to give courts discretion in this regard.

However, it is impossible to condemn unequivocally the proposed reform. It has the attraction of honesty. It would do away with meaningless and often contrived trials which dishonour justice. It would allow that which really exists to be applied by the courts. If Victorian marriage is no longer a way of life for most of us, why keep it on the statute books? No divorce law forces those who wish to stay together to go apart. Why not make the other free and put the stress on freedom and continuing consent as the basis of true marriage?

No human society has developed a completely satisfactory family law. Doubtless, in several years, we shall be reforming the 1984 *Act*. All the positions and all the ambivalence of this essay will still be with us. It is to be hoped that in the interval, we devote some attention to certain theoretical questions which are rarely aired in full. In particular, the relationship between the law and society (how do they influence each other?), and between family law and individual liberty should be studied and debated so that the future reformers are fully equipped to deal with this delicate subject.

⁸¹The causes would either refer to conduct (for example, adultery) or to circumstances of a human nature rendering a delay manifestly unfair.

⁸²That John Stuart Mill did not intend anything like this is clear from a reading of *On Liberty*. The liberal intolerance on this type of subject is cleverly satirized in Tom Stoppard's play *Jumpers* (New York: Grove Press, 1974).