

10-1-1968

Divorce Reform in Canada

Julien D. Payne

University of Manchester (England)

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Comparative and Foreign Law Commons](#), and the [Family Law Commons](#)

Recommended Citation

Julien D. Payne, *Divorce Reform in Canada*, 18 Buff. L. Rev. 119 (1968).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol18/iss1/5>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

DIVORCE REFORM IN CANADA

JULIEN D. PAYNE*

INTRODUCTION

EXCLUSIVE authority over "marriage and divorce" is assigned to the Federal Parliament of Canada by section 91 (26) of the British North America Act, 1867, but jurisdiction over "the solemnization of marriage in the provinces" is exclusively reserved to the provincial legislatures by section 92 (12) of the Act. In interpreting these seemingly conflicting provisions, the Judicial Committee of the Privy Council, applying the rule that "the two sections must be read together, and the language of the one interpreted, and, where necessary, modified by that of the other," has held that the exclusive power conferred on the provincial legislatures to make laws relating to the solemnization of marriage in the province operates by way of exception to the powers conferred on the Federal Parliament as regards marriage.¹ The powers conferred by section 91 (26) have been sparingly and seldom exercised² by the Federal Parliament and the first major excursion into the field of divorce law reform occurred only last year.

The Divorce Act (Canada), 1968³ introduces an exclusive divorce law operating throughout the Dominion of Canada. The principal changes effected by the Act relate to the extension of grounds for divorce, which are now premised in part on the concept of the matrimonial offence and in part on the concept of permanent breakdown of marriage; revision of the law of collusion, connivance and condonation; elimination of the traditional discretionary bars to divorce; the introduction of new bars applying to the divorce grounds requiring proof of permanent marriage breakdown; the formulation of revised rules governing jurisdiction in divorce proceedings and recognition of foreign decrees; the definition of obligations whereby counsel and the courts must examine the prospect of reconciliation being achieved between the parties to divorce proceedings; and the imposition of mutual support obligations upon the spouses.

The Divorce Act seeks to achieve two basic objectives. Certain provisions are designed to forestall family disorganization and seek to promote reconciliation between spouses who encounter disharmony in their marital relationship. Other provisions have the function of promoting relief through judicial dissolu-

* Simon Senior Research Fellow, University of Manchester, (England) 1968-1969.

1. *In re Marriage Legislation in Canada* [1912] A.C. 880, 81 L.J.P.C. 237, 7 D.L.R. 629.

2. See Marriage and Divorce Act, Can. Rev. Stat. c. 176, (1952); Divorce Act (Ontario), Rev. Can. Stat. c. 85 (1952); Divorce Jurisdiction Act, Rev. Can. Stat. c. 84 (1952); British Columbia Divorce Appeals Act, Can. Stat. c. 24, §§ 24 and 26(1) (1968).

3. Can. Stat. c. 24 (1968). The text of this statute is presented in the appendix which follows.

tion of marriage where the spouses are irreconcilably estranged and the marriage has irreparably broken down.⁴

I. REVISED RULES GOVERNING JURISDICTION AND RECOGNITION OF
FOREIGN DECREES

A. *Jurisdiction in Divorce*⁵

Section 5 (1) of the Divorce Act provides that the court of any province has jurisdiction in divorce if the petitioner is domiciled in Canada and either the petitioner or the respondent has been ordinarily resident⁶ in the province for a period of at least one year immediately preceding the presentation of the petition and has actually resided in the province for at least ten months of that period. This provision represents a fundamental change from the previous basis of jurisdiction which required that the parties be domiciled in the province wherein the divorce proceedings were instituted. The reasons for introducing a bilateral qualification for jurisdiction in divorce, namely, a national domicile and a provincial residence, are explained in the Report of The Special Joint Committee of The Senate and House of Commons on Divorce (Canada), 1968, wherein it is observed:

To rely on residence alone . . . might present complications in international law and lead to difficulties in the recognition abroad of Canadian divorce.

The requirement of domicile would restrict the use of Canadian courts to those of residence in this country who intended to remain permanently and a one year residence requirement would prevent "shopping" from province to province or the choice of a province on the basis of its inconvenience to the respondent or co-respondent.⁷

The significance of section 5 (1) becomes greater when it is read together with section 6 (1) which, for purposes of divorce jurisdiction, recognizes the capacity of a married woman to acquire a domicile independent of that of her husband. To avoid possible difficulties arising from the joint operation of these sections, which might result in the spouses presenting competing petitions for divorce in two provinces, section 5 (2) provides that where petitions are pending before two courts that would otherwise have jurisdiction under the Act, the court to which a petition is first presented has exclusive jurisdiction to grant relief between the parties, and, if the petitions are presented on the same day, the Divorce Division of the Exchequer Court has exclusive jurisdiction. It is submitted that this subsection inadequately solves the problem of competing

4. 112 H.C. Debates (Dec. 5, 1967), 5083-5084.

5. See Mendes Da Costa, *Some Comments On The Conflict Of Laws Provisions Of The Divorce Act*, 1968, 46 Can. B. Rev. 252 (1968).

6. See *Stransky v. Stransky* [1954] P. 428, [1954] 3 W.L.R. 123, [1954] 2 All E.R. 536; *Thompson v. Minister of National Revenue* [1946] S.C.R. 209, 224.

7. Report of The Special Joint Committee of The Senate and House of Commons on Divorce (Canada, 1968), 31.

DIVORCE REFORM

petitions and that it would be wiser to confer a general power on the courts to determine the most convenient forum.⁸

B. Recognition of Foreign Decrees

Section 6 (2) of the Divorce Act expressly preserves the common law rules governing the recognition of foreign divorce decrees and further provides that recognition shall be given to a decree of divorce granted by a foreign court or tribunal that exercised jurisdiction on the basis of the wife's separate domicile in that foreign country. This statutory extension of the common law rules is a corollary to the above-mentioned provisions which empower a Canadian court to exercise jurisdiction in divorce on the basis of the wife's separate domicile. It may, however, prove superfluous if the Canadian courts adopt the reasoning of the House of Lords in *Indyka v. Indyka*,⁹ wherein it was suggested that the criterion for recognition of foreign divorce decrees is the existence of a substantial connection between the petitioner and the foreign country or territory exercising jurisdiction.¹⁰

II. ATTEMPTED RECONCILIATION & THE EFFECT OF ADMISSIONS PROCURED THEREIN

A. Reconciliation

The Divorce Act vests jurisdiction over divorce proceedings in the Supreme Court of the respective Provinces and Territories¹¹ and preserves the traditional adversary procedure. However, in an attempt to promote and facilitate reconciliation between spouses, certain amendments have been made in substantive law¹² and statutory obligations are now imposed upon counsel and the court to examine the possibility of reconciliation between parties contemplating or instituting divorce proceedings. Thus, section 7 imposes a duty on barristers and solicitors to advise every divorce client of the reconciliation provisions of the Divorce Act, to inform the client of known marriage counselling or guidance facilities available, and to discuss with the client the possibility of reconciliation. It is also the duty of the barrister or solicitor to certify on any petition that he or she has duly discharged the above obligations. Further, section 8 (1) requires the court, before proceeding to the hearing of evidence, to direct such inquiries to the petitioner, and, where the respondent is present, to the respondent as the court deems necessary in order to ascertain whether a possibility exists of matrimonial reconciliation. If at that time or any later time in the proceedings it appears to the court that there is a possibility of such reconciliation, the court shall adjourn the proceedings to afford the parties an opportunity of becoming

8. Compare Matrimonial Causes Act, (Australia) 1959, § 26.

9. [1967] 3 W.L.R. 510 (H.L.), [1967] 2 All E.R. 689, (H.L.).

10. See Mendes Da Costa, *supra* note 5, 281-291.

11. Divorce Act, Can. Stat. c. 24, § 2(e) (1968).

12. See subheadings *Collusion* and *Condonation*; *Connivance*, under subsections A and B of section IV *infra*.

reconciled, and, with the consent of the parties or in the discretion of the court, nominate a person to endeavour to assist the parties with a view to their possible reconciliation. Section 8 (2) provides that when fourteen days have elapsed from the date of any adjournment so ordered and either of the parties applies to the court to have the proceedings resumed, the court shall resume the proceedings. Reflecting upon the prospective efficacy of sections 7 and 8 in promoting reconciliation between spouses, it may be relevant to advert to the conclusions of D.M. Selby, who, commenting upon corresponding provisions in Australia, observed:

Experience suggests that the provisions of [section 14 of the Matrimonial Causes Act, (Australia), 1959] remain in the realm of pious hope. By the time a matrimonial cause reaches a hearing the parties are too far apart, one of them, at least, is too anxious for a final determination of the suit and too much bitterness has been engendered to allow any reasonable prospect of reconciliation. It is only on the rarest occasions that attempts are made, pursuant to [section 14], to effect a reconciliation after the hearing has begun, and it is doubtful if any such attempt has been successful.

More likely to be effective is the requirement of rule 15 that the solicitor . . . shall certify on the petition or answer that he has brought to his client's attention the provisions of [the Matrimonial Causes Act (Australia), 1959] relating to reconciliation and the existence of the appropriate marriage guidance organizations and has discussed with his client the possibility of reconciliation.¹³

It would appear somewhat misleading, however, to evaluate the potential benefits of the aforementioned statutory provisions merely by reference to their limited implementation by the courts and the small number of matrimonial reconciliations likely to be achieved thereunder. Indeed, the primary benefit possibly resulting from a more extensive use of the statutory conciliation procedures might be that counselling of the spouses will assist them in mutually and consensually resolving issues incidental to the divorce proceedings, such as custody of children, visitation rights, disposition of matrimonial assets and obligations of support, since these matters might well be resolved as a by-product of an unsuccessful reconciliation conference without the bitterness and rancour ordinarily associated with the more traditional adversary procedure.

B. ADMISSIONS AND COMMUNICATIONS IN COURSE OF ATTEMPTED RECONCILIATION

Section 21 (1) of the Divorce Act provides that a person nominated by the court under section 8 to assist the parties to a marriage with a view to their possible reconciliation is not competent or compellable in any legal proceedings

13. Selby, *The Development Of Divorce Law in Australia* (1966) 29 Mod. L. Rev. 473, 487. Compare The Law Commission, (England), "Reform Of The Grounds Of Divorce: The Field Of Choice" (1966) Cmnd. 3123, ¶¶ 30-32.

to disclose any admission or communication made to him in his capacity as the nominee of the court.¹⁴ Subsection (2) further provides that evidence of anything said or of an admission or communication made in the course of an endeavour to assist the parties to a marriage with a view to their possible reconciliation is not admissible in any legal proceedings. Subsection (1) specifically protects the interests of the nominated marriage counsellor by imposing upon him personally a statutory prohibition against disclosure,¹⁵ whereas subsection (2) is of more general application and imposes a statutory prohibition against disclosure upon all persons, including the parties and their counsellor. The language of subsection (2) is wide enough to exclude evidence of statements, admissions or communications made to persons other than counsellors nominated under section 8, but the wisdom of extending the prohibition to a more general and undefined class of counsellors may well be questioned.¹⁶

III. GROUNDS FOR DIVORCE

The adoption of the concept of marriage breakdown as the sole criterion for relief in divorce proceedings has been rejected by the Federal Parliament on the ground that it presupposes an inquisitorial procedure which would be extremely costly and, at the present time, impractical by reason of the dearth of qualified social workers in Canada.¹⁷ The grounds for relief established by the Divorce Act are, however, no longer exclusively based upon the fault concept. Thus, section 3 introduces additional matrimonial offences as grounds for divorce but section 4 introduces certain non-fault grounds premised on the concept of marriage breakdown.

A. Section 3—*Matrimonial Offences*

Section 3 of the Divorce Act provides that "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 been guilty of sodomy, bestiality or rape, 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."

14. *Compare* Matrimonial Causes Act (Australia), 1959, §§ 5(1) and 12(1).

15. As to the need for such protection, see Report of The Royal Commission on Marriage and Divorce (England), 1951-1953, Cmnd. 9678 (1956), ¶¶ 357-358.

16. *Compare* Matrimonial Causes Act (Australia), 1959, § 16; Matrimonial Proceedings Act (New Zealand), 1963, § 5.

17. See Report of The Special Joint Committee of The Senate and House of Commons on Divorce (Canada, 1967), 19.

1. Sexual Offences

The traditional ground for divorce in Canada, namely adultery, has been retained without modification. Sodomy, bestiality and rape now constitute additional grounds for divorce on the petition of an innocent husband or wife¹⁸ even though no prior criminal conviction in respect of such offences has been secured. Inter-spousal sodomy constitutes a ground for divorce subject to the bar of connivance.¹⁹ Since adultery is a ground for divorce, the offence of rape is of substantive importance only in the event of a person committing rape on his or her spouse or aiding and abetting another person in the commission of rape.²⁰ The statutory clause "engaged in a homosexual act" is exceedingly vague but apparently refers to conduct other than sodomy, which constitutes an independent ground for divorce. It is probable that the courts will interpret the clause restrictively by confining it to acts between members of the same sex which involve the surrender of the sexual organs. Since either a husband or wife is statutorily empowered to petition on the ground that the respondent has engaged in a homosexual act, it appears that this ground is broad enough to include acts of lesbianism.²¹

2. Bigamy; Polygamy

Section 3 (c) of the Divorce Act reflects an intention on the part of the Federal Parliament to introduce bigamy as a ground for divorce.²² The language of the section is, however, sufficiently broad to permit the party to a monogamous marriage to obtain a divorce where his or her spouse has entered into a subsequent polygamous marriage. Such a conclusion is not inconsistent with the decision in *Hyde v. Hyde and Woodmansee*²³ wherein it was held that recognition could not be afforded to a first polygamous marriage for the purpose of granting matrimonial relief to the parties thereto.

18. Formerly, sodomy, bestiality and rape were grounds for divorce in Ontario, and the western provinces but relief was available only on the petition of an innocent wife.

19. See *T. v. T.* [1964] P. 85, [1963] 3 W.L.R. 261, [1963] 2 All E.R. 746; *Bampton v. Bampton* [1959] 1 W.L.R. 842, [1959] 2 All E.R. 766; *Fast v. Fast* [1945] 3 W.W.R. 66, 61 B.C.R. 503; *Statham v. Statham* [1929] P. 131, 98 L.J.P. 113; *C. v. C.* (1905) 22 T.L.R. 26; and see Divorce Act, Can. Stat., c. 24, § 9(1)(c) (1968).

20. See *R. v. Harder* [1956] S.C.R. 489, 114 C.C.C. 129, (1956) 4 D.L.R. (2d) 150; *R. v. Miller* [1954] 1 Q.B. 282, [1954] 2 All E.R. 529; *R. v. Clarke* (1949) 33 Cr. App. R. 216; *R. v. Audley* (1631) 3 St. Tr. 401, Hut. 115, 1 Hale P. C. 629, 123 E.R. 1140.

Quaere, however, whether the Federal Parliament envisaged the possibility of inter-spousal rape. *Quaere* also whether a woman may be guilty of rape for the purposes of the Divorce Act.

21. Unnatural or perverted sexual practices by either spouse with a third party may also constitute matrimonial cruelty under section 3 (d) of the Divorce Act: see e.g., *Countway v. Countway* (1968) 70 D.L.R. (2d) 73 (N.S.); *Spicer v. Spicer* [1954] 1 W.L.R. 1051, [1954] 3 All E.R. 208; *Gardner v. Gardner* [1947] W.N. 128, 63 T.L.R. 417, [1947] 1 All E.R. 630.

22. 112 H. C. Debates (Dec. 18, 1967), 5580.

23. L.R. 1 P. & D. 130 (1866), 35 L.J.P. 57, 14 L.T. 188. See also *Lim v. Lim* [1948] 1 W.W.R. 298, [1947] 2 D.L.R. 353 (B.C.).

3. *Matrimonial Cruelty*

It is uncertain whether section 3 (d) of the Divorce Act implements the test of matrimonial cruelty established in *Russell v. Russell*²⁴ wherein it was held that cruelty requires proof of conduct that caused "danger to life, limb or health, bodily or mental, or a reasonable apprehension thereof." The language of the section and the philosophy underlying the Divorce Act may well indicate that danger to life, limb or health is no longer a prerequisite to a finding of matrimonial cruelty if the conduct complained of is such as to render continued cohabitation intolerable.²⁵

A culpable intention on the part of the respondent to render cohabitation intolerable, though relevant, is not a condition precedent to a finding of matrimonial cruelty.²⁶ Paramount importance is attached to the character and consequences of the conduct complained of rather than to the culpable intention, if any, of the respondent.²⁷

B. *Section 4—Permanent Breakdown of Marriage*

Section 4 (1), paragraphs (a) to (d) of the Divorce Act provide grounds for divorce where the husband and wife are living separate and apart and there has been a permanent breakdown of their marriage by reason of the respondent's imprisonment, gross addiction to alcohol or narcotics, disappearance, or incapacity or refusal to consummate the marriage.

1. *Imprisonment*

Section 4 (1) (a) permits divorce on proof of a permanent breakdown of marriage resulting from (i) the respondent's imprisonment, 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) the respondent's imprisonment 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. Sub-paragraph (i), does not spe-

24. [1897] A.C. 395, 66 L.J.P. 122 (H.L.). See also *Countway v. Countway*, supra; *White v. White* (1968) 69 D.L.R. (2d) 60 (N.S.); *Diamond v. Diamond* (1962) 38 W.W.R. (N.S.) 153 (Man.); *McLennan v. McLennan* [1940] S.R.C. 335, [1940] 2 D.L.R. 81 (N.B.).

25. Compare Domestic Relations Act, Rev. Stat. Alta. c. 89, § 7 (2) (1955); Queen's Bench Act, Rev. Stat. Sask. c. 73, § 25 (3) (1965); and see *Chrusch v. Chrusch* (1968) 62 W.W.R. (N.S.) 471 (Sask.); *Herring v. Herring* (1963) 41 W.W.R. (N.S.) 400 (Sask.); *Olsen v. Olsen* [1946] 3 W.W.R. 389 (Alta.); *Bell v. Bell* [1945] 2 W.W.R. 614 (Alta.). See also *Zalesky v. Zalesky* (1969) 1 D.L.R. 471, 472 (Man.); Compare *Delaney v. Delaney* (1969) 1 D.L.R. (3d) 303, 307 (B.C.).

26. *White v. White* (1968) 69 D.L.R. (2d) 60 (N.S.); *Gollins v. Gollins* [1964] A.C. 644, [1963] 3 W.L.R. 176, [1963] 2 All E.R. 966 (H.L.). See also *Williams v. Williams* [1964] A.C. 698, [1963] 3 W.L.R. 215, [1963] 2 All E.R. 994 (H.L.), wherein it was held that insanity is not necessarily an answer to a charge of matrimonial cruelty, although the mental derangement of the respondent cannot be wholly disregarded.

27. See sources cited supra note 26.

cifically require that divorce be sought while the respondent is in prison and presumably extends a remedy where the respondent has been imprisoned for the designated period but has been released from prison before presentation of the petition for divorce.²⁸ Sub-paragraph (ii), however, specifically requires that the respondent be imprisoned for not less than two years immediately preceding the presentation of the petition and accordingly applies only to cases involving current imprisonment at the time of presentation of the petition.

Since divorce on the above grounds is not available to either spouse but only to the petitioner whose spouse has been imprisoned, it might be concluded that the policy underlying these provisions is based upon an affirmation of the fault concept in that the criminal behaviour of one spouse is itself to be regarded as an offence against the marriage partner. It has been asserted, however, that the policy underlying the provisions is premised upon recognition of the concept of marriage breakdown as a criterion for divorce. Thus, in the Report of The Special Joint Committee of The Senate and House of Commons on Divorce (Canada), 1967, it is stated:

. . . The incarceration of one partner for an extended period of time terminates matrimonial cohabitation as effectively as if the imprisoned partner had deserted. The economic effects can be as serious and the need to re-establish a stable family environment for the partner and children as imperative. Long or repeated imprisonment makes impossible the fulfillment of the role of husband, wife and parent. . . . The marriage breakdown caused by imprisonment should therefore be ground for divorce. . . .²⁹

2. *Gross Addiction to Alcohol or Narcotics*

A petition for divorce may be presented pursuant to section 4 (1) (b) on the ground that there has been a permanent breakdown of marriage by reason that 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 to a narcotic and there is no reasonable expectation of the respondent's rehabilitation within a reasonably foreseeable period. There is no definition of the statutory phrases "grossly addicted to alcohol or a narcotic" or "rehabilitation within a reasonably foreseeable period" and they will accordingly require judicial interpretation. It is anticipated that the courts will encounter difficulty in postulating criteria as to the significance of these phrases and that their application must substantially depend upon the circumstances of the particular case.

As with the other grounds for divorce provided under section 4 (1) of the Divorce Act, the parties must be living separate and apart when the petition is presented. It will be observed, however, that the statutory period of three years

28. The parties must, however, be living separate and apart. See Divorce Act, Can. Stat. c. 24, § 4(1) (1968).

29. Report of The Special Joint Committee of The Senate and House of Commons On Divorce (Canada, 1967) 22.

designated in section 4 (1) (b) refers to the state of gross addiction and not to the fact of separation.

3. *Disappearance*

Pursuant to section 4 (1) (c) of the Divorce Act, a spouse may petition for divorce on the ground that there has been a permanent breakdown of marriage by reason of the respondent's disappearance for a period of not less than three years immediately preceding the presentation of the petition. This provision is broad enough to include the circumstance of presumed death but is not confined in its operation to such cases. It would appear that the petitioner must undertake reasonable inquiries and searches to ascertain the whereabouts of the respondent and that a remedy will be available under the section only if all reasonable steps to trace the respondent have been exhausted.

4. *Non-Consummation of Marriage*

Section 4 (1) (d) empowers a spouse to obtain a divorce on proof of a permanent breakdown of marriage resulting from non-consummation of the marriage where 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. The right to obtain an annulment of marriage in the Canadian provinces on proof of non-consummation of the marriage by reason of impotence is preserved by section 26 of the Divorce Act. Accordingly, a choice of remedies, either divorce or annulment, may, in certain circumstances now be available where a marriage has broken down by reason of non-consummation of the marriage resulting from impotence. The provisions of section 4 (1) (d) of the Divorce Act do not, however, fully encompass the circumstances wherein the remedy of annulment may be obtained. For example, no remedy is extended under the section to the spouse under the disability but such spouse may have recourse to proceedings for annulment of the marriage. Conversely, the requirement under the law of annulment whereby the impotence must be incurable would appear irrelevant to the operation of section 4 (1) (d).³⁰

5. *Living Separate and Apart; Petitioner's Desertion*

The grounds for divorce above considered are supplemented by a broader basis for relief under section 4 (1) (e) of the Divorce Act, which provides as follows:

"4.—(1) . . . 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

30. As to impotence as ground for annulment of marriage, see W. Power, *The Law and Practice Relating to Divorce and Other Matrimonial Causes in Canada*, 195-202 (2d ed., 1964).

by reason on one . . . of the following circumstances as specified in the petition, namely:

- (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, immediately preceding the presentation of the petition."

A broad interpretation of the provisions of subparagraph (i) of section 4 (1) (e) would suggest that where there has been a permanent breakdown of the marriage by reason of the spouses having lived separately for three years immediately preceding the presentation of the petition, the circumstances or causes leading to the separation are irrelevant provided that they are not such as fall within the ambit of subparagraph (ii) of section 4 (1) (e) and do not give rise to the operation of the bar to relief set out in section 9 (1) (f) of the Divorce Act.³¹ It would appear, therefore, that subparagraph (i) may provide the right to divorce where the petitioner has been deserted by the respondent, or where separation occurred by consent of the parties, or pursuant to an order for judicial separation, or as a consequence of an illness, whether physical or mental, which resulted in the incarceration of the disabled spouse.³²

It is probable that section 4 (1) (e) presupposes the combination of an *animus separandi* and the factum of separation. It is not irrelevant to observe that both of these factors have been regarded as essential by Australian courts in their application of similar but not identical statutory provisions.³³ The conclusion that the words "living separate and apart" import the negation of the matrimonial relationship and therefore require an *animus separandi* and the factum of separation is also supported by the language of section 9 (1) (d) of the Divorce Act which provides that no decree shall be issued pursuant to section 4 if there is a reasonable expectation that "cohabitation will occur or be resumed" within a reasonably foreseeable period.³⁴

It is not necessary to establish that the factum of separation occurred by mutual volition of the spouses. Thus, where separation occurs by force of circumstance, as, for example by confinement of a spouse in a hospital or assignment of a spouse on military service abroad, such spouse is entitled to proceed for divorce pursuant to section 4 (1) (e), subparagraph (i), if his or her spouse has abandoned the matrimonial relationship during such enforced separation

31. See text accompanying *infra* notes 77-85.

32. But with respect to separation brought about independently of the parties volition, as, for example, by incurable disease, see *Collins v. Collins* (1961) 3 F.L.R. 17 (Aust.); compare *Koufalakis v. Koufalakis* [1964] A.L.R. 196, (1963) 4 F.L.R. 310 (Aust.). See also Divorce Act, Can. Stat., c. 24, § 9(3)(a) (1968).

33. See *Macrae v. Macrae* (1967) 9 F.L.R. 441, 86 W.N. (Pt. 2) 121, interpreting Matrimonial Causes Act (Australia), 1959, § 28(m). See note 82, *infra*.

34. See also Divorce Act, Can. Stat. c. 24, § 9(3) (1968).

and thus caused the permanent breakdown of the marriage.³⁵ A more difficult question to resolve is whether the spouse who voluntarily abandons his or her matrimonial obligations in the above circumstances may also seek relief under the same subparagraph on the basis that his or her withdrawal from the matrimonial consortium was a justifiable consequence of the enforced separation such as would negate any finding of desertion, which would require recourse under section 4 (1) (e), subparagraph (ii). It is submitted that the granting of relief under subparagraph (i) in the latter case would not be inconsistent with the language of or the policy underlying the subparagraph.³⁶

Subparagraph (ii) of section 4 (1) (e) represents a striking innovation since it specifically recognizes the right of a spouse to petition for divorce where a permanent breakdown of marriage has occurred by reason of his or her own culpable conduct. The provisions of this subparagraph will presumably have the effect of reducing the bargaining power of the "innocent" spouse in negotiating the settlement of matters incidental to divorce. It is generally conceded that in jurisdictions wherein matrimonial offences constitute the exclusive basis for dissolution of marriage, the "innocent" spouse may utilize his or her privileged position to secure an unduly advantageous property, maintenance or custody settlement. Clearly, section 4 (1) (e), subparagraph (ii) promotes a greater equality of bargaining power between the spouses and this, it is submitted, is desirable. The possibility of abuse of such power by the "guilty" spouse is eliminated by section 9 (1), paragraphs (e) and (f), of the Divorce Act,³⁷ which presuppose that the court shall be fully informed of any settlement negotiated between the spouses.

It has already been observed that a spouse may petition for divorce under section 4 (1), paragraphs (a), (b) and (d) where a permanent breakdown of marriage has occurred by reason of the *respondent's* imprisonment, gross addiction to alcohol or narcotic, or non-consummation of the marriage. Although these paragraphs do not themselves provide relief to the spouse thus incapable of discharging his or her matrimonial obligations, such spouse may presumably petition for divorce pursuant to the provisions of section 4 (1) (e), subparagraph (ii).

The three or five years period of separation stipulated in section 4 (1) (e), subparagraphs (i) and (ii), must be continuous and must immediately precede the presentation of the petition for divorce. If matrimonial cohabitation is resumed during the designated statutory period, it will, subject to section 9 (3), preclude reliance on section 4 (1) (e), notwithstanding that the bar of condo-

35. The designated period during which the spouses must have been living separate and apart will begin to run, however, only from the date when the factum of separation and the *animus separandi* co-exist: see *Collins v. Collins*, (1961) 3 F.L.R. 17 (Aust.).

36. See Proceedings of The Standing Committee on Banking and Commerce (The Senate of Canada), Jan. 31, 1968, Feb. 1, 1968, at 196, 201. See also *Koufalakakis v. Koufalakakis*, [1964] A.L.R. 196, (1963) 4 F.L.R. 310 (Aust.).

37. See text, accompanying *infra* notes 63-85.

nation is inapplicable to petitions for divorce founded upon this section. By virtue of section 9 (3), the right to petition for divorce under section 4 (1) (e) is not forfeited by reason of a resumption of cohabitation if such cohabitation occurred "during a single period of not more than ninety days with reconciliation as its primary purpose."

It is uncertain whether destruction of the matrimonial consortium is sufficient to justify a finding that the spouses are "living separate and apart" where they have continued to reside under the same roof. It is probable, however, that the phrase will not be interpreted so as to require physical separation of the spouses to such a degree as is manifest to the local community and that the essential issue to be determined is not whether the spouses are living under separate roofs but whether they are living separate lives.³⁸

6. *Presumption of Marriage Breakdown*

To satisfy the requirements of section 4⁹ (1) of the Divorce Act, it is necessary to establish (i) that there has been a permanent breakdown of the marriage, and (ii) that such breakdown occurred by reason of one or more of the circumstances designated in paragraphs (a) to (e).³⁹ By virtue of section 4 (2) of the Divorce Act, proof of any of the circumstances designated in the aforementioned paragraphs requires the court to presume a permanent breakdown of the marriage.⁴⁰ Such presumption, however, would appear to be provisional and not conclusive since the imposition of a conclusive presumption under section 4 (2) would have the effect of negating all reference to permanent breakdown of marriage in section 4 (1) and render the circumstances designated in paragraphs (a) to (e) of this subsection grounds for divorce in their own right, and it is reasonable to infer that this was not the intention of the Federal Parliament.⁴¹

38. *Macrae v. Macrae*, (1967) 9 F.L.R. 441, 86 W.N. (Pt. 2) 121; *Crabtree v. Crabtree* (1963) 5 F.L.R. 307; *Murphy v. Murphy* (1961) 2 F.L.R. 363; *J.B. v. A.W.B.* [1958] O.R. 281, 13 D.L.R. (2d) 218; *Bell v. Bell* (1953) 55 W.A.L.R. 87. *Compare* *Main v. Main* (1949) 78 C.L.R. 636; *Flindell v. Flindell* (1948) 50 W.A.L.R. 9. *See also* *Schiach v. Schiach and Poulter* (No. 2) [1940] 3 W.W.R. 57, [1941] 1 D.L.R. 263 (Sask.).

39. *See* text accompanying *supra* notes 28-38 and note 40, *infra*.

40. The Divorce Act, Can. Stat., c. 24, § 4(2) (1968) provides as follows:

4(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.

* The circumstances designated in section 4(1) include (a) the respondent's imprisonment; (b) the respondent's gross addiction to alcohol or narcotic; (c) the respondent's disappearance; (d) the respondent's inability or refusal to consummate the marriage; and (e) the spouses having lived separate and apart for a specified number of years.

41. *See* *Gray v. Kerslake* (1957) 11 D.L.R. (2d) 225, 239-240, wherein Cartwright, J. stated:

The word ['deemed'] may mean "deemed conclusively," or "deemed until the contrary is proved" . . . [It] is the duty of the Court, in seeking the true legislative intention of an Act . . . , to regard the possible consequences of alternative constructions of ambiguous expressions

DIVORCE REFORM

IV. DUTIES OF THE COURT; BARS TO DIVORCE

The Divorce Act includes no provision requiring the court to grant a divorce decree on proof of the specified grounds and the absence of the designated statutory bars to relief.⁴² Notwithstanding the omission of such provision, it would appear that no general discretion vests in the court to refuse divorce and that the only circumstances that justify refusal of the decree are the absolute and discretionary bars to relief defined in section 9 of the Act. The traditional discretionary bars to divorce, namely, the petitioner's adultery, cruelty, desertion, culpable delay, and conduct conducing to the respondent's offence, would appear no longer applicable even in respect of the matrimonial offences which constitute grounds for divorce under section 3 of the Divorce Act.⁴³

A. Bars to Relief under Section 3 and Section 4 of the Divorce Act

1. Consent; Admissions; Default

A statutory duty is imposed upon the court by section 9 (1) (a) "to refuse a decree based solely upon the consent, admissions or default of the parties or either of them, and not to grant a decree except after a trial which shall be by a judge, without a jury." The object of this section is merely to secure a trial of the issues in the divorce court and it does not preclude divorce being granted in uncontested proceedings solely on the basis of admissions made under oath during the course of the proceedings.⁴⁴

2. Collusion

Section 9 (1) (b) requires the court to satisfy itself that there has been no collusion in relation to a petition for divorce and to dismiss the petition if it finds that there has been collusion in presenting or prosecuting it. Collusion thus constitutes an absolute bar to divorce in respect of all grounds specified under sections 3 and 4 of the Divorce Act. The onus now falls upon the petitioner to prove the absence of collusion and this constitutes a reversal of the previous rule of law.⁴⁵ It is probable, however, that Canadian courts will follow the decision in *Emanuel v. Emanuel*,⁴⁶ wherein it was held that there is a presumption against collusion which is provisional and counterbalanced by circumstances raising a reasonable suspicion thereof, whereupon it falls on the petitioner to negate collusion.

42. Compare Marriage and Divorce Act, Can. Rev. Stat. c. 176, § 5 (1952).

43. But see *Williams v. Williams and Des Roches* (1967) 52 M.P.R. 368.

44. *Ewasiuk v. Ewasiuk* (1968) 70 D.L.R. (2d) 525 (N.W.T.). See also *Elliott v. Elliott and Cook* [1933] O.R. 206, [1933] 2 D.L.R. 40, wherein the word "admissions" was held to refer to admissions made in the pleadings or by counsel at trial and not to admissions made upon examination for discovery.

45. See *Rhodenizer v. Rhodenizer* 31 M.P.R. 127, [1955] 2 D.L.R. 99 (N.S.); *Riley v. Riley* [1950] 1 W.W.R. 548, 57 Man. R. 527, [1950] 2 D.L.R. 694; *Dutko v. Dutko* [1946] 3 W.W.R. 295, 54 Man. R. 329, [1947] 4 D.L.R. 471.

46. [1946] P. 115, 114 L.J.P. 60, [1945] 2 All E.R. 494.

The concept of collusion is specifically defined in section 2 (c) of the Divorce Act, which provides as follows:

"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.

The above definition could be regarded as declaratory of the law enunciated by the courts in such cases as *Johnson v. Johnson*⁴⁷ and *Emanuel v. Emanuel*.⁴⁸ It is possible, however, that the Canadian courts will conclude that the above definition amends the law relating to collusion and that conduct which would formerly have been regarded as collusive, will not now, in the absence of a mutual intention to subvert the administration of justice, be so regarded. Such a restrictive interpretation of section 2 (c) would conform to the current judicial trend in Australia and New Zealand.⁴⁹

B. Bar to Relief under Section 3 of the Divorce Act

1. Condonation; Connivance

Section 9 (1) (c) provides that, where a decree of divorce is sought under section 3, the court must satisfy itself that there has been no condonation or connivance on the part of the petitioner and must dismiss the petition if the petitioner 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 decree. The former doctrine whereby condoned offences could be subsequently revived so as to render divorce available as of right is expressly abrogated by section 9 (2) of the Divorce Act.

Condonation and connivance, unlike collusion, apply only in respect of the grounds for divorce specified in section 3 of the Act. As is the case with collusion, the onus of proof falls on the petitioner to negate any suspicion of condonation or connivance.⁵⁰ In determining whether the public interest would be better served by granting a decree notwithstanding the petitioner's condonation

47. (1960) 31 W.W.R. (N.S.) 403, 23 D.L.R. (2d) 740 (B.C.).

48. [1946] P. 115, 114 L.J.P. 60, [1945] 2 All E.R. 494.

49. See Matrimonial Causes Act (Australia), 1959, § 40; Matrimonial Proceedings Act (New Zealand), 1963, § 31; Shaw v. Shaw (1966) 7 F.L.R. 337 (Aust.); Grose v. Grose [1965] A.L.R. 1151, [1965] N.S.W.R. 429; Bell v. Bell [1964] A.L.R. 29, (1963) 4 F.L.R. 274 (Aust.); Barrott v. Barrott [1964] N.Z.L.R. 968.

50. See text accompanying note 46, *supra*. See also Maddock v. Maddock [1958] O.R. 810 (connivance); Tilley v. Tilley [1949] P. 240, [1949] L.J.R. 929, [1948] 2 All E.R. 1113 (condonation); Clark v. Clark and Holt [1947] 1 W.W.R. 1101 (B.C.) (condonation); Churchman v. Churchman [1945] P. 44, 114 L.J.P. 17 (connivance); Craig v. Craig and Robinson [1943] O.W.N. 651 (condonation). Compare Plummer v. Plummer (1962) 38 W.W.R. (N.S.) 193, 31 D.L.R. (2d) 723 (B.C.) (condonation); Mogen v. Mogen [1948] 2 W.W.R. 1151, [1949] 1 D.L.R. 388 (Alta.) (condonation); Kawala v. Kawala and Mason [1951] O.W.N. 244 (connivance).

DIVORCE REFORM

or connivance, the courts may well have regard to the criteria defined in *Blunt v. Blunt*,⁵¹ wherein the former discretionary bar of the petitioner's adultery was in issue. In that case, the House of Lords held that the following circumstances ought to be considered in determining whether the statutory discretion should be exercised "in favour of the petitioner":

- (i) the position and interest of any children of the marriage;
- (ii) the interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage;
- (iii) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between the husband and wife;
- (iv) the interest of the petitioner, and in particular the interest that the petitioner should be able to remarry and live respectably; and
- (v) the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.

Following the pattern of legislation in England, Australia, and New Zealand,⁵² the concept of condonation has been revised so as to enable spouses to continue or resume cohabitation with the object of achieving reconciliation without thereby prejudicing the right to institute divorce proceedings if reconciliation does not result. Thus, section 2 (d) of the Divorce Act provides that condonation "does not include the continuation or resumption of cohabitation during any single period of not more than ninety days, where such cohabitation is continued or resumed with reconciliation as its primary purpose."⁵³ The efficacy of this provision in promoting reconciliation may well depend upon whether the Canadian courts adopt the reasoning in *Brown v. Brown*⁵⁴ and *Herridge v. Herridge*,⁵⁵ wherein it was held that corresponding English provisions apply only to cases where the continuation or resumption of cohabitation is with a view to reconciliation and not to cases where the continuation or resumption of cohabitation is the consequence of reconciliation. Accordingly, the provisions do not create a probationary period during which a wronged spouse who has been reconciled to the wrongdoer can recall his or her decision. Although such interpretation of the English provisions threatens to negate their purpose of facilitating reconciliation between spouses, the significance of the above judicial rulings

51. [1943] A.C. 517, 112 L.J.P. 58, [1943] 2 All E.R. 76 (H.L.).

52. Matrimonial Causes Act (England), 1965, §§ 1(2) and 42 (2); Matrimonial Causes Act (Australia), 1965 § 10; Matrimonial Proceedings Act (New Zealand), 1963, §§ 26, 29(5) and 34(2).

53. Divorce Act, Can. Stat. c. 24 (1968), § 2(d). Analogous provisions apply in respect of separation as a ground for divorce to preclude termination or interruption of the designated statutory period. See Divorce Act Can. Stat., c. 24, § 9(3) (1968).

54. [1967] P. 105, [1964] 3 W.L.R. 899, [1964] 2 All E.R. 828.

55. [1965] 1 W.L.R. 1506, [1966] 1 All E.R. 93.

may prove less substantial in Canada where a decree of divorce may be granted notwithstanding condonation, if the public interest would be thereby better served.

The bar of connivance is now extended beyond the context of adultery to all matrimonial offences which constitute grounds for divorce under section 3 of the Divorce Act.⁵⁶ It is presumably applicable, therefore, whenever such a matrimonial offence of the respondent has been caused by or knowingly, willfully or recklessly permitted by the petitioner as an accessory.⁵⁷ It is probable that the court will more readily exercise the statutory power to grant a decree of divorce notwithstanding the petitioner's connivance where the petitioner has passively acquiesced in the respondent's misconduct and that in cases of active connivance the court will be somewhat reluctant to find that the public interest would be better served by granting the decree.

C. Bars to Relief under Section 4⁵⁸

1. Anticipated Future Cohabitation

Where a decree of divorce is sought pursuant to section 4 of the Divorce Act, it is the duty of the court under section 9 (1) (d) to refuse the decree if there is a reasonable expectation that cohabitation will occur or be resumed within a reasonably foreseeable period.⁵⁹ Whether there is a reasonable basis for assuming that the spouses will establish or resume cohabitation is a question of fact to be determined upon the particular circumstances of the case. The duration of the separation, the cause and circumstances of the separation, the fact that either spouse is cohabiting with a third party or contemplates remarriage may all shed light upon the prospect of the spouses establishing or resuming cohabitation.⁶⁰ If the court is in doubt as to the possibility of such cohabitation being established or resumed, it would seem appropriate for the court to order an adjournment pursuant to the provisions of section 8 (1) in order that the opportunity of reconciliation between the spouses may be duly considered.⁶¹

The operation of section 9 (1) (d) is expressly confined to the circumstance where a decree of divorce is sought under section 4 and it has no relevance in respect of a decree sought under section 3. It is anticipated that the section will rarely preclude the granting of a divorce because, where a permanent breakdown of marriage is established by reason of the circumstances designated

56. Divorce Act, Can. Stat., c. 24, § 9(1)(c) (1968).

57. See *Maddock v. Maddock*, *supra*; *Woodbury v. Woodbury* [1949] P. 154, 64 T.L.R. 549, [1948] 2 All E.R. 68; *Churchman v. Churchman*, *supra*.

58. See text accompanying notes 77-85 *infra*.

59. Compare Matrimonial Causes Act (Australia), 1959, § 28(m); Matrimonial Proceedings Act (New Zealand), 1963, § 21(o).

60. See *Koufalakis v. Koufalakis*, [1964] A.L.R. 196, (1963) 4 F.L.R. 310 (Aust.); *Painter v. Painter* (1962) 3 F.L.R. 370, (1963) 4 F.L.R. 216 (Aust.); *Lamrock v. Lamrock* (1963) 4 F.L.R. 81 (Aust.); *Bailey v. Bailey* (1962) 3 F.L.R. 476 (Aust.); *Grosser v. Grosser* (1961) 2 F.L.R. 152 (Aust.); *Main v. Main* (1949) 78 C.L.R. 636.

61. See text accompanying *supra* notes 11-13.

in section 4 (1), paragraphs (a) to (e), the inference to be drawn is that there is no reasonable prospect that matrimonial cohabitation will occur or be resumed. Moreover, the courts cannot refuse a decree unless there is reason to believe that both spouses would be willing to establish or resume cohabitation. The fact that one spouse is so willing is insufficient since matrimonial cohabitation necessarily implies a bilateral intention in the spouses to assume or resume the matrimonial relationship.⁶²

2. Protection of Children

Section 9 (1) (e) provides that where a decree of divorce is sought under section 4 of the Divorce Act, the court must refuse the decree if there are children of the marriage⁶³ and the granting of the decree would prejudicially affect the making of reasonable arrangements for their maintenance.⁶⁴ The bar to divorce arising under this section is absolute but applies only where divorce is sought on the grounds established by section 4.⁶⁵ There is, however, no compelling reason for denying corresponding protection to children of the marriage where divorce is sought under section 3 and there appears to be no justification for subordinating the rights of the children to those of the spouses merely by reason of the nature of the complaint in the petition for divorce.

It is relevant to consider the effect of section 9 (1) (e) in the not uncommon circumstance that arises when the party to divorce proceedings contemplates an early remarriage. Such remarriage would frequently tend to prejudice the provision of reasonable maintenance for the children of the dissolved marriage since the divorcee would rarely be financially capable of supporting two families and would be inclined to favour the competing claims of his second wife and of their children. The observations of Hart, J., *Kearns v. Kearns*⁶⁶ might suggest that the children's right to financial security must be subordinated to the parent's right to a second chance at marital happiness but such a conclusion would render the protection afforded by section 9 (1) (e) largely illusory.

An onus may fall on the petitioner to satisfy the court that the granting of a decree of divorce would not prejudicially affect the making of reasonable arrangements for the maintenance of the children. It is uncertain whether the court discharges its statutory duty merely by acting upon a *prima facie* case established by the petitioner's uncontradicted sworn evidence since the section might be interpreted as imposing an inquisitorial role upon the court. With respect to a similar provision of the Matrimonial Causes Acts (Australia), 1959 and

62. *Mummery v. Mummery* [1942] P. 107, 111 L.J.P. 58, [1942] 1 All E.R. 553.

63. For definition of "child" and "children of the marriage," see Divorce Act, Can. Stat. c. 24 (1968), §§ 2(a) and (b).

64. Compare Matrimonial Causes Act (England), 1965, § 33; Matrimonial Causes Act (Australia), 1959, § 71, as amended by Matrimonial Causes Act (Australia), 1965, § 12; Matrimonial Proceedings Act (New Zealand), 1963, § 49.

65. Compare statutory provisions cited in *supra* note 64, which are of general application.

66. See text to and contents of *infra* note 84.

1965,⁶⁷ the opinion has been extra-judicially expressed by the Chief Justice of Tasmania that the role of the court remains judicial and not inquisitorial and accordingly there is no independent duty imposed on the court to take active steps itself to inquire into the effect of a decree upon the provision of reasonable maintenance for the children of the marriage.⁶⁸

The efficacy of section 9 (1) (e) in ensuring financial security for children of the marriage may also be questioned in light of the criticisms directed at similar but more comprehensive provisions in section 33 of the Matrimonial Causes Act (England), 1965. Thus, Dr. Olive Stone has observed:

Unfortunately, however, [these provisions] do not seem to have fulfilled the expectations of those who enacted them. In its recent report on Reform of the Grounds for Divorce, The Field of Choice, the Law Commission states that the provisions have been widely criticised as inadequate, both in their scope and in the way that they are working in practice.⁶⁹ . . . Uneasiness appears to exist particularly in regard to two aspects of the provisions. In the first place, there seems to be some evidence that the divorce judges rarely probe deeply into the arrangements proposed by the parties for the children, and if these arrangements seem *prima facie* reasonable they are usually approved. The Law Commission points out that, even in respect of the alleged facts on which the petition is based, "In ten minutes, the average time of a hearing in an undefended case, the Judge obviously cannot carry out a thorough inquisition."⁷⁰ This would seem to apply *a fortiori* to the arrangements for the children. Secondly, there is no adequate follow-up machinery to ensure that the arrangements approved for the children work satisfactorily, or even that they are adhered to.⁷¹

The above criticisms were re-iterated in a recent research project on the operation of section 33 of the Matrimonial Causes Act (England), 1965, wherein the opinions of judges and registrars of the divorce courts were analysed.⁷² It was therein conceded that the present system in England suffers from serious shortcomings by reason of insufficient time and facilities to undertake a full inquiry into arrangements proposed for children of the marriage, the considerable disparity between judges in the use made of their existing powers, and the absence of adequate follow-up machinery.⁷³ It was nevertheless concluded that section 33 serves a useful purpose and that in the nature of things there are severe limits to what can be achieved by society for children of broken marriages.⁷⁴

If section 9(1) (e) of the Divorce Act (Canada), 1968 is to provide any

67. See *supra* note 64.

68. Burbury, *Some Extra-Judicial Reflections Upon Two Years' Judicial Experience Of The Commonwealth Matrimonial Causes Act*, 1959, 36 Aust. L.J. 283, 294 (1963).

69. Cmnd. 3123 (1966), ¶ 47.

70. Cmnd. 3123 (1966), ¶ 60.

71. Stone, *The Importance of Children in Family Law*, 6 Western L. Rev. 51, 53 (1967).

72. The Law Commission (England), Working Paper No. 15, "Arrangements For The Care And Upbringing Of Children" (February, 1968).

73. *Id.* at 13.

74. *Id.* at 12.

real protection for children of the marriage, adequate auxiliary aids must be available to the divorce court. The court should be accorded a statutory discretion to appoint a guardian ad litem to represent the interests of the children in the divorce proceedings⁷⁵ and should be statutorily empowered to receive reports and recommendations from qualified welfare officers or social workers appointed to or by the court to inquire into arrangements for the custody, care and upbringing of children of the marriage.⁷⁶

C. Bars to Relief under Section 4 (1) (e)

Where a decree is sought under section 4 (1) (e) of the Divorce Act, section 9 (1) (f) requires the court to refuse the decree if the granting of it would be unduly harsh or unjust to either spouse or would prejudicially affect the making of reasonable arrangements for the maintenance of either spouse. This provision is similar though not identical to section 37, subsections (1) and (2) of the Matrimonial Causes Act (Australia), 1959, and accordingly some guidance as to its operation may be found in decisions of the Australian courts. It would appear that the phrase "harsh or unjust" presupposes a substantial detriment resulting from the granting of a decree and that generalities such as the real or imagined stigma of divorce or the loss of the marriage status by an innocent spouse are not embraced by the phrase.⁷⁷ There must be something in the particular case which goes beyond the normal, and indeed inevitable, consequences of the granting of a decree.⁷⁸ It would further appear that the granting of a decree would not ordinarily be regarded as "harsh or unjust" merely by reason of the respondent's conscientious or religious objections to divorce.⁷⁹ It is probable that the phrase will be narrowly construed and that its application will be found primarily in the context where financial hardship would ensue as a consequence of the granting of a divorce decree.⁸⁰ Although section 9 (1) (f) expressly provides that a decree shall be refused "if the granting of the decree would . . . prejudicially affect the making of reasonable arrangements for the maintenance of either spouse", this clause does not protect a dependent spouse where the petitioner's financial condition is such as to preclude the provision of maintenance or other financial benefits for the respondent.⁸¹ In these circumstances, it might be concluded that the granting of a divorce decree would be "harsh or

75. See Cmnd. 3123 (1966), ¶ 62.

76. Compare Matrimonial Proceedings Act (New Zealand), 1963, § 50; Matrimonial Causes Act (Australia), 1959, § 85(2). See also Matrimonial Causes Act, Ont. Rev. Stat. c. 232, § 6 (1960); Matrimonial Causes Rules (Ontario, 1968), R. 796.

77. McDonald v. McDonald (1964) 64 S.R. (N.S.W.) 435, 81 W.N. (Pt. 2) 336 (per Herrin, C.J., interpreting the phrase "harsh and oppressive" in Matrimonial Causes Act (Australia), 1959, § 37(1)). See also Macrae v. Macrae, (1967) 1 F.L.R. 441, 86 W.N. (Pt. 2) 121; Kearns v. Kearns (1963) 4 F.L.R. 394 (Aust.).

78. Macrae v. Macrae (1967) 9 F.L.R. 441, 465, 86 W.N. (Pt. 2) 121.

79. *Id.* at 460-61, and cases cited therein.

80. *Id.* at 461.

81. In such a case "the making of reasonable arrangements for the maintenance of [the respondent]" would be prejudiced not by "the granting of the decree" but by reason of the impecunious condition of the petitioner.

unjust" if the respondent would be thereby deprived of pension or insurance benefits, dower, or rights that might otherwise accrue under family inheritance legislation.⁸² A more difficult question to resolve is whether section 9 (1) (f) precludes relief where the petitioner contemplates remarriage and such remarriage would reduce the petitioner's capacity to support the respondent. In *Kearns v. Kearns*,⁸³ Justice Hart, stated:

In nearly all cases, except where the petitioner is very wealthy, if a decree under section 28(m)⁸⁴ is made and there is provision for maintenance, there will be a risk that the respondent will suffer some diminution of security. It could not possibly be the intention of Parliament in introducing [the Matrimonial Causes Act, 1959] that only wealthy people should get divorces under section 28.

But in *Penny v. Penny (No. 2)*⁸⁵ it was held that a husband, who was unable to discharge his obligations under maintenance orders made in favour of the respondent and a former wife, should be denied a decree of divorce sought under section 28(m) with a view to entering a third marriage, since the granting of the decree would result in further reducing his ability to discharge such obligations and would therefore be harsh and oppressive to the respondent.

V. COROLLARY RELIEF

Sections 10 and 11(1) of the Divorce Act empower the court to make interim and permanent orders for the maintenance of either spouse and for the maintenance of and the custody, care and upbringing of children of the marriage. The most significant change arising under these sections is the legislative recognition of mutual obligations of support between the spouses. It is probable that such recognition will not result in any significant demand for maintenance by husbands and that the courts will ordinarily order a wife to pay maintenance to her husband only where he is unable to support himself by reason of disability of mind or body or by reason of his incapacity to secure gainful employment. There are further substantial changes arising by virtue of section 11 (1) in that the court is empowered to order either the husband or wife to pay a lump sum to his or her divorced spouse and/or the children of the marriage,⁸⁶ and the power to grant an order to secure maintenance is no longer subject to express restriction and now falls within the general discretion of the court.⁸⁷

82. See *Ferguson v. Ferguson* [1965] A.L.R. 310, (1964) 6 F.L.R. 31 (Aust.).

83. (1963) 4 F.L.R. 394, 402 (Aust.).

84. Section 28(m) of the Matrimonial Causes Act (Australia), 1959, empowers either spouse to petition for dissolution of the marriage on the ground that "the parties to the marriage have separated and thereafter lived separately and apart for a continuous period of not less than five years immediately preceding the date of the petition, and there is no reasonable likelihood of cohabitation being resumed."

85. (1966) 8 F.L.R. 128 (Aust.).

86. Formerly, the court lacked jurisdiction to order the payment of a lump sum unless the parties consented thereto: *Maynard v. Maynard* [1951] S.C.R. 346, [1951] 1 D.L.R. 241.

87. Compare *McColl v. McColl and Likou* [1953] O.R. 1017, [1954] 1 D.L.R. 604, wherein it was held that the court cannot order that the payment of monthly or weekly sums be secured. See Matrimonial Causes Act, Ont. Rev. Stat. c. 232, §§ 1 and 2 (1960).

DIVORCE REFORM

The granting or withholding of an order to secure or to pay a lump sum or periodic sums for the maintenance of a spouse is within the discretion of the court which is to be exercised having regard to "the conduct of the parties and the condition, means and other circumstances of each of them."⁸⁸ There is nothing to prevent the court awarding maintenance to a spouse against whom a decree of divorce has been obtained and the adultery of a spouse does not, of itself, preclude an award of maintenance in his or her favour, though it may be relevant to the exercise of the court's discretion.⁸⁹

The duration of orders for secured and unsecured maintenance and the amount of the award fall within the discretion of the court to be exercised having regard to the aforementioned considerations, namely, the conduct, condition, means and other circumstances of each of the parties.⁹⁰ It would appear, therefore, that the claimant's earning capacity or potential, though not realized, is relevant to the amount of maintenance that may be properly awarded.⁹¹

The powers of the court to discharge or modify a corollary order are defined in section 11 (2) which provides as follows:

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

It will be observed that the discretionary powers of variation and rescission are not specifically confined to orders for unsecured periodic sums and may presumably therefore be exercised also in respect of orders to secure maintenance⁹² and orders for the payment of a lump sum.⁹³ It would appear that variation may be ordered to operate retrospectively even though this has the effect of remitting payments already due,⁹⁴ and it may also be permissible for the court, in exceptional circumstances, to order the repayment of any periodic sums or lump sum already paid.⁹⁵ There is no explicit requirement that the court must

88. Divorce Act, Can. Stat., c. 24, § 11(1) (1968).

89. *Id.* Compare Matrimonial Causes Act, Ont. Rev. Stat. c., 232, §§ 1 and 2 (1960).

90. *Id.*

91. Although the claimant's independent income has always been regarded as relevant to a determination of the amount of maintenance that may properly be awarded, there has hitherto been a difference of judicial opinion as to whether or not the court should take into account the earning capacity of a claimant who declines the opportunity of seeking gainful employment: see *Dixon v. Dixon* [1950] 2 W.W.R. 49, 58 Man. R. 48. See also *Attwood v. Attwood* [1968] 3 W.L.R. 338, [1968] 3 All E.R. 385; compare *Le Roy-Lewis v. Le Roy-Lewis* [1955] P. 1, [1954] 3 W.L.R. 549, [1954] 3 All E.R. 57.

92. Orders to secure maintenance were formerly regarded as final and irrevocable: *Cotton v. Cotton* (1967) 58 W.W.R. (N.S.) 65 (B.C.); *MacDonald v. MacDonald* [1952] O.R. 754, [1952] 4 D.L.R. 457.

93. Compare *Maynard v. Maynard*, [1951] S.C.R. 346, [1951] 1 D.L.R. 241, wherein it was held that the court lacks jurisdiction to vary a consent order for payment of a lump sum. But see *Yates v. Yates* (1967) 60 D.L.R. (2d) 202 (Ont.).

94. See *MacDonald v. MacDonald* [1964] P. 1, [1963] 3 W.L.R. 350, [1963] 2 All E.R. 857.

95. But see *contra* *Young v. Young* (No. 2) [1962] P. 218, [1961] 3 W.L.R. 1041, [1961] 3 All E.R. 793. See also *The Law Commission (England)*, Working Paper No. 9:

vary or discharge a corollary order in the event of the subsequent remarriage of either party or the subsequent sexual misconduct of the recipient and these circumstances must now be regarded only as relevant and not decisive to a determination of the right to variation or rescission of the order.⁹⁶

In an attempt to more effectively secure the discharge of obligations arising under corollary orders, section 12 of the Divorce Act provides that the court may direct that payments under a corollary order shall be made to a trustee or administrator approved by the court and may impose such terms, conditions or restrictions on the order as the court thinks fit and just. Section 14 stipulates that a decree of divorce or corollary order made under the Divorce Act shall have legal effect throughout Canada and section 15 provides that a corollary order may be registered in any superior court in Canada and enforced as an order of the registering court.

VI. GENERAL CONCLUSIONS

It is premature to forecast whether the Divorce Act will effectively fulfill its dual purpose of preserving marriages which have a chance of survival whilst terminating those which are irretrievably broken down.

It is anticipated that the courts will encounter difficulty insofar as the Divorce Act requires them to assume an inquisitorial role and that the provisions of section 9 which are designed to protect the interests of the children of the marriage and of the dependent spouse are likely to be subject to practical limitations by reason of the incapacity of the average person to provide adequately for the maintenance of two families. The efficacy of the provisions aimed at promoting matrimonial reconciliation may also be questionable in light of the retention of the traditional adversary procedure.

The Divorce Act nevertheless constitutes a progressive step in the field of social legislation. It eliminates many of the abuses associated with the former provincial systems, wherein adultery was essentially the only ground for divorce, by providing an exclusive divorce law for the Dominion of Canada premised on a blending of the concept of the matrimonial offence with that of marriage breakdown. It removes the inequality between husband and wife which previously existed with respect to the grounds for divorce and the right to corollary relief and confers a more liberal discretion on the court to order financial relief.

It is inevitable that the extension of the grounds for divorce will cause an increase in the divorce rate and that initially the increase will be quite substantial by virtue of the dissolution of broken marriages that have hitherto been denied relief. An increase in the divorce rate is not, however, a cause for

"Matrimonial and Related Proceedings—Financial Relief" (April, 1967), ¶¶95-97, wherein it is recommended that the English courts should be expressly empowered to remit arrears, to backdate variations, and, where the payee has failed to disclose a material change of circumstances, to order repayment of sums paid.

96. Compare Matrimonial Causes Act, Ont. Rev. Stat. c. 232, § 2 (1960).

DIVORCE REFORM

alarm in so far as it reflects the legal dissolution of marriages that have utterly broken down.

The Divorce Act provides relief on the basis of a number of specific enumerated grounds but sections 3(d) and 4(1) (e) could be interpreted so as to jointly provide comprehensive grounds for relief which would accommodate all justifiable petitions for divorce other than those founded on the commission of adultery. If this development should occur, it would facilitate the revision and simplification of the present grounds for divorce.

Although the Divorce Act has closed the gap between legal theory and social reality, it is a matter for speculation whether its provisions best serve the needs of contemporary society in Canada. It will accordingly be necessary for the Federal Parliament to ensure that a continuing study is undertaken of the provisions and of their effect upon the institution of marriage.

APPENDIX

CHAP. 24

An Act respecting Divorce

[Assented to 1st February, 1968]

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE

1. This Act may be cited as the *Divorce Act*.

INTERPRETATION

2. In this Act,
 - (a) "child" of a husband and wife includes any person to whom the husband and wife stand *in loco parentis* and any person of whom either of the husband or the wife is a parent and to whom the other of them stands *in loco parentis*;
 - (b) "children of the marriage" means each child of a husband and wife who at the material time is
 - (i) under the age of sixteen years, or
 - (ii) sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw himself from their charge or to provide himself with necessities of life;
 - (c) "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;

- (d) "condonation" does not include the continuation or resumption of cohabitation during any single period of not more than ninety days, where such cohabitation is continued or resumed with reconciliation as its primary purpose;
- (e) "court" for any province means,
 - (i) for the Province of Ontario, Nova Scotia, New Brunswick or Alberta, the trial division or branch of the Supreme Court of the Province,
 - (ii) for the Province of Quebec,
 - (A) where no proclamation has been issued under subsection (1) of section 22, the Divorce Division of the Exchequer Court, or
 - (B) where a proclamation has been issued under subsection (1) of section 22, the Superior Court of the Province,
 - (iii) for the Province of Newfoundland,
 - (A) where no proclamation has been issued under subsection (2) of section 22, the Divorce Division of the Exchequer Court, or
 - (B) where a proclamation has been issued under subsection (2) of section 22, the Supreme Court of the Province,
 - (iv) for the Province of British Columbia or Prince Edward Island, the Supreme Court of the Province,
 - (v) for the Province of Manitoba or Saskatchewan, the Court of Queen's Bench for the Province, and
 - (vi) for the Yukon Territory or the Northwest Territories, the Territorial Court thereof;
- (f) "court of appeal" means
 - (i) with respect to an appeal from a court other than the Divorce Division of the Exchequer Court, the court exercising general appellate jurisdiction with respect to appeals from that court, and
 - (ii) with respect to an appeal from the Divorce Division of the Exchequer Court, the Exchequer Court of Canada; and
- (g) "petition" for divorce means a petition or motion for a decree of divorce, either with or without corollary relief by way of an order under section 10 or 11.

GROUND FOR DIVORCE

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 been guilty of sodomy, bestiality or rape, 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.

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

DIVORCE REFORM

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, immediately preceding the presentation of the petition.
- (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.

JURISDICTION OF COURT

5. (1) The court for any province has jurisdiction to entertain a petition for divorce and to grant relief in respect thereof if,

- (a) the petition is presented by a person domiciled in Canada; and
- (b) either the petitioner or the respondent has been ordinarily resident in that province for a period of at least one year immediately preceding the presentation of the petition and has actually resided in that province for at least ten months of that period.

(2) Where petitions for divorce are pending between a husband and wife before each of two courts that would otherwise have jurisdiction under this Act respectively to entertain them and to grant relief in respect thereof,

- (a) if the petitions were presented on different days and the petition that was presented first is not discontinued within thirty days after the

day it was presented, the court to which a petition was first presented has exclusive jurisdiction to grant relief between the parties and the other petition shall be deemed to be discontinued; and

- (b) if the petitions were presented on the same day and neither of them is discontinued within thirty days after that day, the Divorce Division of the Exchequer Court has exclusive jurisdiction to grant relief between the parties and the petition or petitions pending before the other court or courts shall be removed, by direction of the Divorce Division of the Exchequer Court, into that Court for adjudication.

(3) Where a husband or wife opposes a petition for divorce, the court may grant to such spouse the relief that might have been granted to him or to her if he or she had presented a petition to the court seeking that relief and the court had had jurisdiction to entertain the petition under this Act.

DOMICILE

6. (1) For all purposes of establishing the jurisdiction of a court to grant a decree of divorce under this Act, the domicile of a married woman shall be determined as if she were unmarried and, if she is a minor, as if she had attained her majority.

(2) For all purposes of determining the marital status in Canada of any person and without limiting or restricting any existing rule of law applicable to the recognition of decrees of divorce granted otherwise than under this Act, recognition shall be given to a decree of divorce, granted after the coming into force of this Act under a law of a country or subdivision of a country other than Canada by a tribunal or other competent authority that had jurisdiction under that law to grant the decree, on the basis of the domicile of the wife in that country or subdivision determined as if she were unmarried and, if she was a minor, as if she had attained her majority.

PRESENTATION AND HEARING OF PETITIONS: SPECIAL DUTIES

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

- (a) to draw to the attention of his client those provisions of this Act that have as their object the effecting where possible of the reconciliation of the parties to a marriage;
- (b) to inform his client of the marriage counselling or guidance facilities known to him that might endeavour to assist the client and his or her spouse with a view to their possible reconciliation; and
- (c) to discuss with his client the possibility of the client's reconciliation with his or her spouse.

(2) Every petition for divorce that is presented to a court by a barrister, solicitor, lawyer or advocate on behalf of a petitioner shall have endorsed thereon a statement by such barrister, solicitor, lawyer or advocate certifying that he has complied with the requirements of this section.

8. (1) On a petition for divorce it shall be the duty of the court, before proceeding to the hearing of the evidence, to direct such inquiries to the petitioner and, where the respondent is present, to the respondent as the court deems necessary in order to ascertain whether a possibility exists of their reconciliation, unless the circumstances of the case are of such a nature that it

DIVORCE REFORM

would clearly not be appropriate to do so, and if at that or any later stage in the proceedings it appears to the court from the nature of the case, the evidence or the attitude of the parties or either of them that there is a possibility of such a reconciliation, the court shall

- (a) adjourn the proceedings to afford the parties an opportunity of becoming reconciled; and
- (b) with the consent of the parties or in the discretion of the court, nominate
 - (i) a person with experience or training in marriage counselling or guidance, or
 - (ii) in special circumstances, some other suitable person, to endeavour to assist the parties with a view to their possible reconciliation.

(2) Where fourteen days have elapsed from the date of any adjournment under subsection (1) and either of the parties applies to the court to have the proceedings resumed, the court shall resume the proceedings.

ADDITIONAL DUTIES OF COURT

9. (1) On a petition for divorce it shall be the duty of the court
- (a) to refuse a decree based solely upon the consent, admissions or default of the parties or either of them, and not to grant a decree except after a trial which shall be by a judge, without a jury;
 - (b) 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;
 - (c) where a decree is sought under section 3, to satisfy itself that there has been no condonation or connivance on the part of the petitioner, and to dismiss the petition if the petitioner 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 decree;
 - (d) where a decree is sought under section 4, to refuse the decree if there is a reasonable expectation that cohabitation will occur or be resumed within a reasonably foreseeable period;
 - (e) where a decree is sought under section 4, to refuse the decree if there are children of the marriage and the granting of the decree would prejudicially affect the making of reasonable arrangements for their maintenance; and
 - (f) where a decree is sought under section 4 by reason of circumstances described in paragraph (e) of subsection (1) of that section, to refuse the decree if the granting of the decree would be unduly harsh or unjust to either spouse or would prejudicially affect the making of such reasonable arrangements for the maintenance of either spouse as are necessary in the circumstances.

(2) Any act or conduct that has been condoned is not capable of being revived so as to constitute a ground for divorce described in section 3.

(3) For the purposes of paragraph (e) of subsection (1) of section 4, a period during which a husband and wife have been living separate and apart shall not be considered to have been interrupted or terminated

- (a) by reason only that either spouse has become incapable of forming or having an intention to continue to live so separate and apart or of continuing to live so separate and apart of his or her own volition, if

it appears to the court that the separation would probably have continued if such spouse had not become so incapable; or

- (b) by reason only that there has been a resumption of cohabitation by the spouses during a single period of not more than ninety days with reconciliation as its primary purpose.

COROLLARY RELIEF

10. Where a petition for divorce has been presented, the court having jurisdiction to grant relief in respect thereof may make such interim orders as it thinks fit and just

- (a) for the payment of alimony or an alimentary pension by either spouse for the maintenance of the other pending the hearing and determination of the petition, accordingly as the court thinks reasonable having regard to the means and needs of each of them;
- (b) for the maintenance of and the custody, care and upbringing of the children of the marriage pending the hearing and determination of the petition; or
- (c) for relieving either spouse of any subsisting obligation to cohabit with the other.

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 both or either
 - (i) the wife, and
 - (ii) 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 both or either
 - (i) the husband, and
 - (ii) the children of the marriage; and
- (c) an order providing for the custody, care and upbringing of the children of the marriage.

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

12. Where a court makes an order pursuant to section 10 or 11, it may

- (a) direct that any alimony, alimentary pension or maintenance be paid either to the husband or wife, as the case may be, or to a trustee or administrator approved by the court; and
- (b) impose such terms, conditions or restrictions as the court thinks fit and just.

DECREES AND ORDERS

13. (1) Every decree of divorce shall in the first instance be a decree nisi and no such decree shall be made absolute until three months have elapsed from

DIVORCE REFORM

the granting of the decree and the court is satisfied that every right to appeal from the judgment granting the decree has been exhausted.

(2) Notwithstanding subsection (1), where, upon or after the granting of a decree nisi of divorce,

(a) the court is of opinion that by reason of special circumstances it would be in the public interest for the decree to be made absolute before the time when it could be made absolute under subsection (1), and

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

the court may fix a shorter time after which the decree may be made absolute or, in its discretion, may then make the decree absolute.

(3) Where a decree nisi of divorce has been granted but not made absolute, any person may show cause to the court why the decree should not be made absolute, by reason of its having been obtained by collusion, by reason of the reconciliation of the parties or by reason of any other material facts, and in any such case the court may by order,

(a) rescind the decree nisi;

(b) require further inquiry to be made; or

(c) make such further order as the court thinks fit.

(4) Where a decree nisi of divorce has been granted by a court and no application has been made by the party to whom the decree was granted to have it made absolute, then, at any time after the expiration of one month from the earliest date on which that party could have made such an application, the party against whom it was granted may apply to the court to have the decree made absolute and, subject to any order made under subsection (3), the court may then make the decree absolute.

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

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

16. Where a decree of divorce has been made absolute under this Act, either party to the former marriage may marry again.

APPEALS

17. (1) Subject to subsection (3), an appeal lies to the court of appeal from a judgment or order, whether final or interlocutory, other than a decree absolute, pronounced by a court under this Act.

(2) The court of appeal may

(a) dismiss the appeal; or

(b) allow the appeal and

(i) pronounce the judgment that ought to have been pronounced including such order or such further or other order as it deems just, or

(ii) order a new trial where it deems it necessary to do so to correct a substantial wrong or miscarriage of justice.

(3) An appeal under subsection (1) shall be brought by filing a notice of appeal in the court of appeal not later than fifteen days after the pronouncing of the judgment or the making of the order being appealed from.

(4) Except where a decree of divorce has been made absolute, the court of appeal or a judge thereof may, on special grounds, either before or after the expiration of the time fixed by subsection (3) for bringing an appeal, by order extend that time.

18. (1) An appeal lies on a question of law to the Supreme Court of Canada with leave of that court from a decision of the court of appeal under section 17.

(2) Leave to appeal under this section may be granted within thirty days from the pronouncing of the judgment or order being appealed from or within such extended time as the Supreme Court of Canada or a judge thereof may, before the expiration of those thirty days, fix or allow.

RULES OF COURT

19. (1) A court or court of appeal may make rules of court applicable to any proceedings under this Act within the jurisdiction of that court, including, without restricting the generality of the foregoing, rules of court

- (a) regulating the pleading, practice and procedure in the court, including the addition of persons as parties to the proceedings;
- (b) regulating the sittings of the court;
- (c) respecting the fixing and awarding of costs;
- (d) providing for the registration and enforcement of orders made under this Act including their enforcement after death; and
- (e) prescribing and regulating the duties of officers of the court and any other matter considered expedient to attain the ends of justice and carry into effect the purposes and provisions of this Act.

(2) Notwithstanding subsection (1), the Governor in Council may make such regulations as he considers proper to assure uniformity in the rules of court made under this Act, and any regulations made under this subsection prevail over rules of court made under subsection (1).

(3) The provisions of any law or of any rule of court, regulation or other instrument made thereunder respecting any matter in relation to which rules of court may be made under subsection (1), that were in force in Canada or any province immediately before the coming into force of this Act and that are not inconsistent with this Act, continue in force as though enacted or made by or under this Act until such time as they are altered by rules of court or regulations made under this section or are, by virtue of the making of any rules of court or regulations under this section, rendered inconsistent with those rules or regulations.

EVIDENCE

20. (1) Subject to this or any other Act of the Parliament of Canada, the laws of evidence of the province in which any proceedings under this Act are taken, including the laws of proof of service of any petition or other document, apply to such proceedings.

(2) For the purposes of this section,

- (a) where any proceedings under this Act are taken before the Divorce Division of the Exchequer Court as the court for any province, the proceedings shall be deemed to be taken in that province; and
- (b) where any petitions for divorce pending between a husband and wife are removed under subsection (2) of section 5 by direction of the Divorce Division of the Exchequer Court into that Court for adjudication, the proceedings shall be deemed to be taken in the province

DIVORCE REFORM

specified in such direction to be the province with which the husband and wife are or have been most closely associated according to the facts appearing from the petitions.

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

(2) Evidence of anything said or of any admission or communication made in the course of an endeavour to assist the parties to a marriage with a view to their possible reconciliation is not admissible in any legal proceedings.

QUEBEC AND NEWFOUNDLAND COURTS

22. (1) The Governor in Council may, on the recommendation of the Lieutenant Governor in Council of Quebec, issue a proclamation declaring the Superior Court of Quebec to be the court for that Province for the purposes of this Act, and on or after the issue of such proclamation any petition for divorce presented under section 3 or 4 that would, if it had been presented after the coming into force of this Act but before the issue of the proclamation, have been presented to the Divorce Division of the Exchequer Court as the court for that Province, shall be presented to the Superior Court of Quebec.

(2) The Governor in Council may, on the recommendation of the Lieutenant Governor in Council of Newfoundland, issue a proclamation declaring the Supreme Court of Newfoundland to be the court for that Province for the purposes of this Act, and on or after the issue of such proclamation any petition for divorce presented under section 3 or 4 that would, if it had been presented after the coming into force of this Act but before the issue of the proclamation, have been presented to the Divorce Division of the Exchequer Court as the court for that Province, shall be presented to the Supreme Court of Newfoundland.

(3) Subject to subsection (4) but notwithstanding any other provision of this Act, where a proclamation has been issued under subsection (1) or (2) a petition for divorce presented to the Divorce Division of the Exchequer Court before the proclamation was issued shall be dealt with and disposed of as if the proclamation had not been issued.

(4) Where a decree of divorce has been granted by the Divorce Division of the Exchequer Court

(a) after the coming into force of this Act but before the issue of a proclamation referred to in subsection (3), or

(b) pursuant to subsection (3),
any order made pursuant to subsection (1) of section 11 may be varied from time to time or rescinded pursuant to subsection (2) of that section by the court that would have had jurisdiction to grant the decree of divorce corollary to which the order was made if the proclamation had been issued at the time when the petition for the decree was presented and that court had made the order by way of corollary relief in respect of a petition presented to it.

CONSEQUENTIAL AMENDMENTS

23. (1) The *Exchequer Court Act* is amended by adding thereto, immediately after section 4 thereof, the following sections:

"4A. (1) A division of the Exchequer Court called the Divorce Division is hereby established.

(2) The Divorce Division shall consist of the following regular judges:

(a) the judge of the Court who was designated under section 6A to exercise and perform the powers, duties and functions of the officer of the Senate referred to in section 3 of the *Dissolution and Annulment of Marriages Act*, and

(b) such other judges of the Court as may, in the instruments authorizing their appointment, be designated as judges of the Divorce Division.

(3) Notwithstanding subsection (2), the President of the Court is *ex officio* President of the Divorce Division and each of the puisne judges is *ex officio* a judge of the Divorce Division, and as such have and may exercise in all respects the same jurisdiction as regular judges of the Divorce Division.

(4) The Registrar of the Court is *ex officio* the Registrar of the Divorce Division.

4B. Subject to the rules of court and except as otherwise provided by any order made by the Governor in Council, any judge of the Divorce Division may sit and act at any time and at any place in Canada for the transaction of the business of the Divorce Division or any part thereof."

(2) Section 8 of the said Act is repealed and the following substituted therefor:

"8. (1) Subject to subsection (3), any judge of a superior court or county court in Canada, and any person who has held office as a judge of a superior court or county court in Canada, may, at the request of the President made with the approval of the Governor in Council, sit and act as a judge of the Exchequer Court and as a judge of the Divorce Division.

(2) No request may be made under subsection (1) to a judge of a provincial court without the consent of the Attorney General of that province.

(3) The Governor in Council may approve the making of requests pursuant to subsection (1) either specifically or in general terms, and for particular periods or purposes, and in approving in general terms any such request may limit the number of persons who may sit and act pursuant to any request.

(4) A person who sits and acts as a judge pursuant to subsection (1) shall be paid a salary for the period he so sits and acts at the rate fixed by the *Judges Act* for puisne judges of the Exchequer Court less any amount otherwise payable to him under that Act in respect of that period."

(3) Section 33 of the said Act is amended by adding thereto the following subsection:

"(2) Notwithstanding subsection (1), not less than three judges of the Exchequer Court shall sit and act on the hearing and determination of any appeal to the Exchequer Court under section 17 of the *Divorce Act*, but in no case shall a judge who has heard a petition for divorce sit and act on the hearing and determination of any appeal under that section from a judgment or order made in respect of that petition."

24. (1) The long title to the *Marriage and Divorce Act* is repealed and the following substituted therefor:

"An Act respecting Marriage"

(2) Section 1 of the said Act is repealed and the following substituted therefor:

"1. This Act may be cited as the *Marriage Act*."

DIVORCE REFORM

(3) The heading preceding section 4 and sections 4 to 6 of the said Act are repealed.

TRANSITIONAL AND REPEAL

25. (1) A petition for divorce presented in Canada after the coming into force of this Act shall be governed and regulated by this Act, whether or not the material facts or circumstances giving rise to the petition occurred wholly or partly before the coming into force of this Act.

(2) Notwithstanding the repeal by section 26 of the Acts and laws referred to in that section but subject to subsection (3) of this section,

(a) any proceedings for divorce commenced in any court in Canada of competent jurisdiction before the coming into force of this Act and not finally disposed of when this Act comes into force, shall be dealt with and disposed of in accordance with the law as it was immediately before the coming into force of this Act, as though that law had not been repealed; and

(b) any petition for the dissolution or annulment of a marriage filed under the *Dissolution and Annulment of Marriages Act* before the coming into force of this Act and not finally disposed of when this Act comes into force, shall be dealt with and disposed of in accordance with that Act, as though that Act had not been repealed.

(3) Where a decree of divorce has been granted before the coming into force of this Act or pursuant to subsection (2), any order to the effect described in subsection (1) of section 11 may be varied from time to time or rescinded in accordance with subsection (2) of that section by the court that would have had jurisdiction to grant the decree of divorce corollary to which the order was made if this Act had been in force at the time when the petition for the decree was presented and that court had made the order by way of corollary relief in respect of a petition presented to it.

26. (1) The *Dissolution and Annulment of Marriages Act*, the *Divorce Jurisdiction Act*, the *Divorce Act (Ontario)* in so far as it relates to the dissolution of marriage, and the *British Columbia Divorce Appeals Act* are repealed.

(2) Subject to subsection (3) of section 19, all other laws respecting divorce that were in force in Canada or any province immediately before the coming into force of this Act are repealed, but nothing in this Act shall be construed as repealing any such law to the extent that it constitutes authority for any other matrimonial cause.

COMMENCEMENT

27. This Act shall come into force on such day not earlier than three months after the date this Act is assented to as may be fixed by proclamation.