Submission on

Divorce Act Reform

NATIONAL FAMILY LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

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

Submission on *Divorce Act* Reform

I. INTRODUCTION

A. General

The National Family Law Section of the Canadian Bar Association (the Section) is pleased to have the opportunity to comment on reform of the *Divorce Act*. The Section is comprised of over 2,200 lawyers from across the country and is governed by 27 members of our national executive committee, which includes both national representatives and representatives from each of the CBA's 12 provincial and territorial branches.

Over the past decade, the Section has been active in law reform initiatives relating to the *Divorce Act*. We prepared a submission on custody and access in January 1994, in response to the March 1993 Department of Justice paper entitled *Custody and Access: Public Discussion Paper*. In 1995, we wrote a letter to the government opposing a proposed private members' bill which would have given grandparents greater rights to apply for access. In 1998, we made oral and written submissions to the Special Joint Parliamentary Committee on Child Custody and Access (the "Joint Committee"). In 1999, we sent letters to the Department responding to the Joint Committee's Report and addressing the Minister of Justice's detailed response to the Report.

The Section was also involved throughout the Department's extensive review of child support under the *Divorce Act*, which ultimately led to the introduction of the Child Support Guidelines. We prepared a submission in 1992 on the initial proposal to implement the Guidelines and responded to the Federal-Provincial-

Territorial Family Law Committee's *Report and Recommendations on Child Support* in 1995. In 1996, we prepared a submission responding to Bill C-41 and the *Working Draft of the Federal Child Support Guidelines*. We appeared before both the Commons and Senate Committees studying Bill C-41. Since then, we have prepared submissions on the implementation of the Guidelines (1998) and on technical issues arising from the Guidelines (1999).

B. Role of family lawyers

Family lawyers[1] are frequently the first contact point for people who are suffering the effects of family breakdown. They are almost always the ones helping people navigate the maze of services and procedures established to deal with these kinds of disputes. Family lawyers see the system from all angles – representing men, women and children, custodial and non-custodial parents, support payors and payees, people who are wealthy, poor and middle class, victims and perpetrators of family violence, those who suffer from alcohol or drug addiction and those who do not. They don't just see one aspect of a dispute between particular parties – whether it's about children, support, property or a combination of these. They see the whole picture. As a result, family lawyers have a unique insight into what works and what does not. They should play a prominent role in design and implementation of the system because they are the *best* placed to judge how it works.

Family lawyers are in the trenches of the system, providing a variety of dispute resolution services for people facing the dire emotional and financial consequences of family breakdown. Contrary to common misconceptions, family lawyers in reality try their utmost to reduce conflict and promote resolutions between the parties. They encourage their clients to use the support services of counsellors, psychologists and mediators. They negotiate separation agreements

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1 When we refer to "lawyers" in this submission, we include (where applicable) Québec notaries.

for their clients and work to settle cases. They promote parent education programs and new approaches to dispute resolution such as "collaborative family law". As is evident in the discussion which follows, lawyers advocate for a family law system which is simpler and which contains avenues for resolving disputes that are less conflictual.

II. CUSTODY AND ACCESS

A. Terminology

In our May 1998 submission to the Joint Committee, the Section acknowledged that there may be some merit in replacing the words "custody" and "access" with language which focuses on the needs of the children. We noted, however, that changing the language could create further confusion and conflict without changing attitudes.

Since that time, more Section members have moved toward the view that changing the language would be a step forward. The majority of the Section would therefore support Option 4 in the government's April 2001 consultation paper *Custody, Access and Child Support in Canada: Putting Children's Interests First*. This provides that the words "custody" and "access" would be replaced with the term "parental responsibility". Judges could make orders describing and allocating various parental responsibilities to the parties, either separately or jointly. However, the change in language *must* be accompanied by adequately funded support services to parents.

Before examining why we support Option 4, we will set out the arguments of those who are opposed to changing the terminology.

i) Arguments Against Option 4

Some believe that a terminology change will simply create a new euphemism for "custody" and will have no impact. Reasonable parents now are able to agree to and abide by orders which use "custody" language. By contrast, the small percentage of parties who are intent on fighting will fight whether the label is "custody" or something else. Indeed, many struggles over custody have their roots in monetary issues – particularly arising from the 40 per cent rule in the Child Support Guidelines. In these circumstances, a terminology change will not make any difference. The experience in Australia and some U.S. states demonstrates that terminology changes make no difference. Those opposed to a change in terminology therefore ask whether legislation should be designed based on a small percentage of problem parents who may not respond to the changes.

There is also concern that an approach like Option 4 will lead to increased conflict. First, under a regime which allocates a number of different parental responsibilities, there will be more things for parties to fight about. Custody trials will become a good deal more complex and lengthy if they have to be argued on the basis of a number of parental responsibilities. Second, changing terminology will create uncertainty about its meaning and will therefore increase litigation, at least at the outset. It will presumably take several years before courts develop a consensus on what the new terms mean and how they will be applied.

There is also the concern that Option 4 will result in problems in enforcement of custody orders. Frequently, such orders have to be read and understood by school principals, teachers, health professionals and police officers, to name a few. Couching orders in the language of "parental responsibility" may create uncertainty and may therefore lead to further conflict between the parents – especially where, for example, a school principal is unsure of its meaning.

ii) Arguments for Option 4

Changing the terminology can change people's attitudes – particularly where the new language focuses on parental responsibilities, as opposed to parental rights. Indeed, it may not be possible to change people's perceptions without changing the words. Our experience as lawyers and lawyer-mediators is that problems are easier to solve if we get away from the hot-button words like "custody". Moving away from the word "custody" will help to push parents away from the mentality of winner and loser which currently permeates custody disputes. Many lawyers already try to get away from using the word "custody" in their agreements, focusing instead on time with the children.

For a long time the Quebec *Civil Code* has used the concept of "joint parental authority" over the major decisions in a child's life, with the question of residence being decided separately. Joint parental authority means parents together exercise certain decision-making with respect to their children, notwithstanding that custody is awarded to one of the parties. This helps to remind parents that they are dealing with responsibilities to their children.

One of the major problems with the word "custody" is that it's not properly descriptive of the concept it represents. Traditionally, custody has meant the authority to make the major decisions in a child's life. However, it is commonly understood to mean residential arrangements. As we noted in our May 1998 submission, custody also implies that we are dealing with an "ownership" right of one or both parents, instead of focusing on the rights of the child and the responsibilities of the parents. As a result, it is necessary to get away from custody and move to parental responsibilities and parenting plans.

Making parental responsibilities and parenting plans the focus of a dispute allows parents to focus on the needs of their children. It also allows them a broad range of options. In this respect, it will reduce, as opposed to create, conflict. Right now, many litigants focus on winning or losing the label of "custody". A broad

range of options lessens the chance that a dispute will be perceived as a total win for one side and a total defeat for the other. Broadening the options does not provide parties with "more things to fight about" because judges already examine the panoply of parental responsibilities when they are determining who gets the label of "custody". Changing terminology will provide flexibility to the parties in negotiations, allowing them to enter a resolution which satisfies them both and which serves the best interests of their children.

Option 4 does not preclude a court from awarding all of the parental responsibilities to one particular parent in the appropriate circumstances. This might be the case, for example, where there is violence or abuse.

Many of the problems identified by those who don't want a change – enforcement problems or conflicts surrounding the *minutiae* of parental responsibilities – happen already with the current language. Enforcement problems can be dealt with through education of police officers, educators and the public as to the meanings of the new terminology. It's also up to the parties' counsel to foresee and deal with such problems when orders and agreements are drafted.

The poor experience in Australia and the United States may simply result from the newness of the system. Judges, lawyers and other participants in those jurisdictions may simply need more time to get used to thinking about parenting disputes in a different way. As a jurisdiction which has legislated joint parental responsibilities for a long time, Quebec may be a better example of how this sort of system would work. While parents do still fight about residence, disputes are resolved in the context of a legislated joint parental authority, which arguably helps to reduce conflict.

Proponents of a change in terminology do not believe it is a panacea, nor do they expect overnight results. It is true that changing terminology will not do anything

in the five per cent of cases where the parties are determined to fight. It may, however, do something in 15-20 per cent of cases where conflict is significant but resolvable. There will be a long process of getting used to the new way of thinking and of educating clients, lawyers, judges and the public about the new expectations. While there is no guarantee that changing terminology will make a difference, it won't make anything worse.

iii) Public education

It is essential that a change in terminology be accompanied by a massive public education campaign. The campaign would be focused on all participants in the family law system (lawyers, judges, police officers, therapists, counsellors, mediators and so on), as well as the general public. Its goal would be to ensure that the new language truly transforms attitudes – that people don't simply start attributing the old meanings to the new words. Without such a campaign, this exercise could be a wasted effort.

iv) Other comments

Whatever new word is used to replace "custody", we strongly urge against using phrases which imply that there is a presumption of a particular parenting arrangement. In its December 1998 Report, the Joint Committee recommended the phrase "shared parenting", which has since been misconstrued by the media, the public and clients to mean joint custody. Words such as "shared" or "joint" have become loaded and we suggest they not be used.

Any new legislative phraseology will also have to account for the fact that the words "custody" and "access" have become terms of art which are used in other legislation. Of particular concern, in our view, are the provisions of the Hague Convention governing the abduction of children to other countries. Orders must be enforceable under that Convention and we suggest that any amendments to the

Divorce Act require a mandatory provision in an order that states who has "custody" for the purposes of the Hague Convention.

B. Services

The real problems in the custody and access system have nothing to do with the legislation. No amount of legislative change is going to stop parties who are intent on fighting. The real problems arise from the lack of resources and services available to people to deal with family breakdown. Legislative changes must be accompanied, therefore, by tangible services available in all regions of the country (whether by the federal, provincial or territorial governments) and properly funded.

There are several general principles which should govern the provision of services. These apply whether those services are related to custody and access, child support or other issues.

First, their availability should not generally be contingent on parties commencing court proceedings. Many counselling and mediation services are only available to those who have commenced court proceedings. This starts the parties off on an adversarial footing and should therefore be avoided. We understand that this proposal may raise warning bells in the minds of government officials about people drifting in and out of the system and about being unable to track users of the system. If governments need to keep statistics or other information, they can develop a simple administrative procedure for parties to obtain these services.

Second, services should be provided on a systematic, consistent and ongoing basis. Right now, there is a maze of *ad hoc* programs and pilot projects which pop up quickly and, in some cases, vanish soon after. Frequently, lawyers are not told these services exist and sometimes only find out after the term of an experimental program is up.

Third, the availability of services should not stop when a person's dispute is resolved. Many service providers in the family law system close their files once a settlement or judgment is in place. However, all families have to continue to interact long after an order or settlement is obtained though the family law system. We should continue to make services available for those who need help to implement and enforce the deals they have made or the orders they have obtained.

There is no one-size-fits-all approach to family breakdown. Different types of cases need different types of responses. As a result, the system has to encompass a wide range of services. We are therefore hesitant to prioritize the services listed in the consultation paper. All of the services listed are valuable tools for judges, lawyers and other service providers. Having said this, we would suggest the following services (not listed in any priority) are the most valuable:

- Assessments – An independent expert's assessment of a child's situation is often invaluable in determining what arrangement is in the child's best interests. This service needs to be more affordable.
- Child representatives – Lawyers representing the child's interests should generally be used more in family proceedings. Some jurisdictions, such as Quebec, use them quite extensively. Legal counsel representing the children can provide a very useful voice for the children in the determination of what is in their "best interests". The government should address whether counsel's role should be as advocates for the children or *amicus curiae* (friends of the court).
- Legal Aid – Proper funding of civil legal aid continues to be a priority for the Canadian Bar Association. Family law is the area where most Canadians encounter the justice system. Everyone should have access to legal representation for matters which affect their basic financial well being and the best interests of their children. Adequate funding of civil legal aid is a prerequisite for ensuring true access to justice across the country.

- Mediation – Mediation is an important method of dispute resolution. It allows people to understand their children's needs and interests, as well as their own, in a non-adversarial environment. It allows parties to develop solutions which they can both live with, as opposed to having a resolution imposed by a third-party.
- Parent Counselling – People experiencing family breakdown are frequently at their most vulnerable, hurt and angry. These feelings frequently fan the flame of conflict, as people act out their resentment through the legal process. Parent counselling can help people cope with these emotions in a positive way so as to reduce conflict. It can also assist people who have problems with anger management, substance abuse or financial management, which are all potential triggers for conflict during family breakdown.
- Parent Education – Many parents are simply not aware of the serious effects of family breakdown and conflict on their children. Parent education programs increase awareness of these issues and educate parents on the options that are available for parenting after separation. These programs help people to reduce conflict and focus on the needs and interests of their children. Such programs have been very successful in jurisdictions such as Calgary. We believe that in most cases (one exception being emergency support or custody/access proceedings), parents should be required to take a parental education program before commencing court proceedings, although there is opposition to this proposal from lawyers in some jurisdictions such as Manitoba and British Columbia. The availability of such programs should be broadened to include smaller centres and rural areas.
- Special courts – The Section supports the use of unified family courts and believes they have been successful in jurisdictions such as Nova Scotia and Ontario. The judges in these courts have specialized expertise in family law, understand the dynamics of family breakdown and want to do family law. Judges and court workers in these courts are often skilled in alternate methods

of dispute resolution such as mediation. Services such as counselling and mediation are often available through the court process.

C. Best interests of the child

In the Section's 1998 submission to the Joint Committee, we recommended that the *Divorce Act* contain non-exhaustive directions as to what constitutes the "best interests of the child". We reproduce our suggested list, with some minor amendments, below:

- the love, affection and emotional ties between the child and each person seeking to define their parental responsibilities, other members of the child's family residing with him or her, and persons involved in the child's care and upbringing;
- the child's views and preferences, if they can reasonably be ascertained;
- the length of time the child has lived in a stable home environment;
- the ability of each person seeking to define their parental responsibilities to act as a parent and fulfill the parental responsibilities set out in this *Act*;
- the ability and willingness of each person seeking to define their parental responsibilities to provide the child with guidance, education and necessities of life and to meet any special needs of the child;
- any plans proposed for the child's care and upbringing;
- the permanence and stability of the family unit with which it is proposed that the child will live;
- the relationship, by blood or through an adoption order, between the child and each person who is a party to the application or motion;
- the caregiving role assumed by each person applying to define their parental responsibilities during the child's life;
- any history of family violence, including physical or mental abuse;
- the child's established cultural ties and religious affiliation; and

- the importance and benefit to the child of having an ongoing relationship with his or her parents.

We have amended the item which deals with family violence to delete the requirement that it be perpetrated by any of the parties applying for custody or access. We believe that judges should consider any family violence to which the child has been exposed – not just that perpetrated by any of the parties. Further, we believe the definition should be amended to include mental abuse, which is a significant problem in some families.

We continue to believe that the *Divorce Act* should also set out a list of parental responsibilities, which can be allocated as the parties agree or as the court sees fit. Again, we reproduce below the list from our 1998 submission. We have added two items to this list. These are underlined.

- Maintaining a loving, nurturing and supportive relationship with the child;
- Seeing to the daily needs of the child, which include housing, feeding, clothing, physical care and grooming, health care, daycare and supervision, and other activities appropriate to the developmental level of the child and the resources available to the parent;
- <u>Making decisions concerning the daily needs of the child;</u>
- Consulting with the other parent regarding major issues in the health, education, religion and welfare of the child;
- Encouraging the child to foster appropriate inter-personal relationships;
- <u>Encouraging the child to respect the other parent;</u>
- Making the child available to the other parent or spending time with the child as agreed by the parents or ordered by the court, so as not to cause unnecessary upset to the child, or unnecessary cost and inconvenience to the other parent;

- Exercising appropriate judgment about the child's welfare, consistent with the child's developmental level and the resources available to the parent; and
- Providing financial support for the child.

D. Family violence

i) Law

As lawyers, we continue to see a high incidence of family violence in our cases. Judges should be directed to take this into consideration, whether it is directed at the children or not, when they are assessing the best interests of the children.

As noted above, family violence should be a specific factor which the courts look at in assessing the best interests of the children. In most cases of family violence, it will be a very important factor. However, we do not believe that family violence should give rise to a legislated presumption against the alleged perpetrator. This is in keeping with our general view that there should be no legislated presumptions in resolving custody and access disputes. It also reflects our concern that creating a legislated presumption could provide an incentive for people to make false allegations.

We have mentioned above that the definition of family violence should include both physical and mental abuse. A child who has experienced mental abuse, whether directed toward them or toward another person in the household, can be just as much a victim as one who has experienced physical abuse. This should be taken into account in assessing the child's best interests.

ii) Services

In general, we believe that the priority services in this area are counselling for children, counselling for parents, supervised access and funding for legal aid.

Counselling is important to help parents deal with the underlying causes of abuse, although many of us believe that anger management and conflict resolution counselling are ineffective for an abusive partner or parent. Alcohol and drug counselling is a priority because many abusers have problems with substance abuse. Funding of supervised access is also a priority to ensure that children remain safe during access visits by abusive parents. Legal aid funding is important for the reasons noted above.

E. High conflict relationships

i) Law

Every case of family breakdown is different. Each requires a different mixture of remedies and approaches to ensure an outcome that is in the best interests of the children and, as far as possible, the parties. The *Divorce Act* should make these tools generally available to all parties and allow them – along with judges, counsel and family professionals – to select the ones that seem most appropriate for their circumstances.

There are dangers with specifying that certain remedies are available in certain types of circumstances. First, as a matter of statutory interpretation, it leads to the reverse inference that they are not available in other circumstances. Second, it provides an incentive for parties to argue about the characterization of a relationship. Is it "high conflict" such as to engage the range of remedies that would be available in those circumstances? We recognize that the term "high conflict" is a buzzword these days, but we wonder whether judges will be hesitant to characterize a particular relationship as "high conflict" because of the pejorative nature of the characterization. This would have the opposite effect of eliminating the special remedies in circumstances where they perhaps should be used. Having said this, the fact that a relationship is high conflict will likely factor into how lawyers, health care professionals and judges deal with certain cases.

There should be no special provisions in the *Divorce Act* to deal with "high conflict" cases. Judges already have the powers suggested in the consultation paper (e.g. to make specific detailed orders or to specify dispute-resolution mechanisms), or should have them, irrespective of whether the case is characterized as high conflict. It should be up to the judge's discretion guided by other professionals as to whether a particular power is appropriate in an individual case.

ii) Services

The same comment can be made with respect to services. The whole gamut of services should be available to all involved in family breakdown. The parties, counsel and judges, guided by the judgment of family professionals, should determine which services are appropriate in any given case. It may be that a particular case suggests a particular response such as therapeutic mediation. The availability of this service should not depend upon a characterization of the relationship by a judge or someone else.

Services in all cases need to be available regardless of whether the parties have engaged the court process. If they have, services should be readily available before, during and after court proceedings – for both the short-term and the long-term. This is especially true in high conflict cases, as these are the cases that will otherwise end up back in court again and again or will take their toll on government services somewhere else in the system. Although we would hesitate to say one family deserves services more, or more quickly, than another, we do believe some priority should be given to high conflict cases. This helps to keep the circumstances of these families under control and address the particular needs of their children.

F. Children's perspectives

In our discussion of services above, we noted the importance of having lawyers represent the children and of assessments. Both are methods by which the voice of children can be heard in resolving these disputes, which, of course, have a profound impact on their lives. Again, it is important to emphasize that the government should address whether the child's lawyer will be an advocate or *amicus*.

G. Meeting access responsibilities

i) Law

The consultation paper lists potential responses to access denial (at page 35). In such circumstances, judges should have wide powers to make appropriate orders, which would include the items listed. We emphasize again that the appropriate response is dictated by the unique circumstances of each case. The judge should therefore have a wide discretion to determine the best method or combination of methods to resolve the particular problem. In practice, judges should be wary of imposing monetary fines, custodial sentences and orders requiring the custodial parent to deposit money or goods (which could be ordered forfeited). Such orders have a direct negative impact on the family and its finances, which is normally not in the best interests of the child. Criminal or quasi-criminal penalties do not generally address the needs of the child, who is caught in the middle. When circumstances become drastic enough to consider such criminal or quasi-criminal penalties, there are usually issues which are better addressed through counselling, supervised access or other support services.

As we noted in our May 1998 submission, there are two sides to access responsibilities. The first is persistent denial of access by the custodial parent. This has received a huge amount of media coverage, especially during the Joint Committee hearings. However, an equally important problem is non-exercise of access by the non-custodial parent. Non-exercise of access can have a negative

impact on the children. It creates uncertainty for them as to whether the custodial parent will show up on any given occasion. It also creates uncertainty for the custodial parent, sometimes requiring them to change their schedules with little or no notice, which leads to conflict between the parents. It can also affect the child's self-esteem if they wonder about the priority they have in the non-custodial parent's life.

We also believe judges should be able to remedy persistent non-exercise of access. Obviously, this requires some different options and creativity on the part of judges, given that they cannot order a party to spend time with their children.

ii) Services

For the most part, persistent access problems would occur in high conflict families. We therefore repeat our comments from that section. A wide range of services should be available to address the problems that these families are experiencing. The parties, counsel and judges, guided by the judgment of family professionals, should determine which services are appropriate in any given case.

III. CHILD SUPPORT GUIDELINES

The Child Support Guidelines were developed to introduce certainty into the calculation of child support awards. Prior to the Guidelines, it was very difficult to predict the quantum of child support which a court would award in any given case. This confusion resulted in increased litigation and, frequently, child support awards which were insufficient to meet the children's needs. By providing a presumptive amount for child support, the Guidelines helped to reduce uncertainty. This has reduced litigation and at the same time has provided more of a "level playing field" for parents with disparate bargaining power who are negotiating over these issues.

In virtually all areas of the law, there is a tension between certainty and flexibility. The Guidelines are no exception. On the one hand, certainty is an important value because it reduces conflict by reducing the number of issues over which parties can fight. It allows lawyers to advise clients what the outcome will be in a particular case with a reasonable level of confidence. On the other hand, the strict application of hard-and-fast rules can cause unfairness in certain instances. Thus, the Guidelines build in a certain level of discretion in instances where their strict application could lead to an unfair result. Discretion tends not to be found in areas of general application but is more often a safety valve to deal with unusual circumstances. Of course, it is these discretionary provisions which have caused the most conflict and litigation.

As practitioners, we see the advantages of having objective, verifiable standards to guide our advice to clients. Too much flexibility or discretion can provide an incentive to parties to create further conflict, whether through litigation or otherwise. Frequently, this is not in their interest, nor in the interests of their children. We therefore urge the government to consider carefully any proposals to increase the level of discretion within the Guidelines and to weigh those proposals against the advantages of certainty. We recognize that this is a difficult and delicate balancing act. We also recognize that some of our proposals, set out below, increase the level of discretion. However, we believe overall that they would enhance fairness, justice and the best interests of the children involved in a dispute.

A. Shared custody (the "40-per-cent rule")

This is the most controversial provision of the Guidelines. The 40-per-cent rule in section 9 of the Guidelines applies in "shared custody" situations where the children normally reside at different times with both parents. "Shared custody" is different from "split custody", where each spouse has custody of one or more

children and has access to the other children. Split custody is dealt with in section 8 of the Guidelines.

The 40-per-cent rule is intended to address the increased costs faced by many non-custodial parents in a shared custody arrangement. Section 9 provides that if the non-custodial parent has a child for not less than 40 per cent of the time over the course of a given year, then the amount of child support is discretionary. This discretion is to be exercised taking into account the amounts in the table, the increased costs of shared custody and the conditions, means, needs and circumstances of each spouse and the children.

There are two principal issues with respect to shared custody: threshold and quantum. Threshold has two sub issues: what the threshold should be and what factors should be assessed in determining whether the threshold is met.

i) Threshold

Our experience is that custodial and non-custodial parents often attempt to arrange custody with the 40-per-cent rule, and not their children's interests, in mind. The most common situation is that of non-custodial parents who try to arrange more time with the children so as to avoid paying the table amounts. However, on occasion we also see custodial parents who try to ensure that the non-custodial parent gets less time with the children to avoid losing support. Unfortunately, this sometimes involves the custodial parent trying to turn the children against the non-custodial parent.

The traditional approach of family law is that issues of custody and access should be determined separately from issues of support. This is because a child's best interests in terms of their parenting and living arrangements should not be affected by their parents' support arrangements. The 40-per-cent rule has the unfortunate effect of linking these two issues in parents' minds and having

support considerations determining custody arrangements – which diverts attention from the best interests of the children.

The first question is what the threshold should be. We believe that the 40-per-cent rule should be removed. This figure is too arbitrary and leads parties to gerrymander time with the children in order to meet (or not meet, as the case may be) the cut-off point. We have seen circumstances where, for instance, parties fight over whether the overtime period in a child's hockey game should be counted. We support a threshold of "substantially equal", although we recognize that this introduces more discretion. "Substantially equal" is a less arbitrary determination and will reduce the incentive for parties to fight over an hour or two here or there. It is a more child-focused test.

This wider discretion is counterbalanced by our position on the second issue, namely the factors that should go toward calculating the threshold. We believe that the sole criterion should be the time that the parent is actually responsible for the child. This would include time that the parent isn't actually spending with the child, including sleep time and school time, if that parent would otherwise be responsible for looking after the child during that time. We acknowledge that there are problems with this – for example, there is more to parenting than simply spending time with the children and some time is not "quality" time. However, these concerns are outweighed by the values of certainty and simplicity. Parties need a measurement that is easy to apply. Trying to measure a person's other contributions to parenting the child or trying to determine whether time is "quality time" is vague and grants too much discretion to judges. It also provides too much incentive for parties to fight over details.

Thus, the threshold for determining whether the table amounts will apply in a shared custody situation should be whether the parents spend "substantially equal time", as measured above, with each child. This balances considerations of

certainty and flexibility. It will encourage a rational discussion between the parties, as opposed to arguing about an hour here or there. It will also allow judges to take an honest, hard look at the parties' circumstances and determine whether the table amounts should really apply.

ii) Quantum

Another problem has been the calculation of support in shared custody circumstances. Some judges and lawyers have a misconception that once the 40-per-cent threshold is met, no child support is payable. Others have applied the rules which govern split custody, even though the rules governing the two situations are clearly different. In a split custody situation, the amount of child support is equal to the difference each parent would pay to the other in child support. For example, if Parent A is required to pay a table amount of $200 for Child B (residing with Parent B), while Parent B is required to pay a table amount of $400 for Child A (residing with Parent A), then Parent B would be required to pay $200 to Parent A. Frequently this is referred to as "cross-over" or "set-off".

Once the "substantially equal time" test is met in a shared custody situation, then the Guidelines should set out a presumptive multiplier and a cross-over for calculating child support. For example, if Parent A would otherwise be required to pay a table amount of $200 for child C, who spends substantially equal time with both parents, and Parent B would be required to pay a table amount of $400 for the same child, each parent's amount would first be multiplied by the presumptive multiplier. In this example, we will use 1.5 (although we don't take a position on what the actual multiplier should be). The product would be, in the case of Parent A, $300 and, in the case of Parent B, $600. The cross-over amount would therefore be $300. This formula will always produce an amount for child support which is less than the amount which Parent B would have to pay if Parent A had sole custody.

We have spoken about how the multiplier should be "presumptive". We can imagine situations where it would be unjust to apply the multiplier – for example, if a parent paid a significantly disproportionate amount for the child's expenses. Parties should be able to rebut the presumption of a multiplier in such circumstances. Judges would then have the discretion to adjust the support accordingly. The Guidelines should make it clear, however, that the amount arrived at by the formula is a floor and not a ceiling.

Our approach above again balances the needs of certainty and flexibility. The presumptive multiplier provides parties with a good idea of what to expect while at the same time allowing for adjustment in appropriate circumstances. This may help to discourage many parties from litigating these issues, as it would allow counsel to show their clients what the likely amount of support would be at the end of the day. Clients could then make a cost-benefit analysis in terms of having to pay legal fees to achieve or oppose that amount.

B. Access costs

i) Access time

With respect to costs related to unusually high access time, we reiterate our discussion under "Shared custody", above. Parties should pay the table amount unless they can establish that they spend "substantially equal time" with the children. Judges should then apply the presumptive multiplier.

We recognize the concerns that have been expressed about non-custodial parents exercising unusually low access time and we accept that the custodial parent can incur higher costs as a result. A rule which encourages parents to exercise greater access time is certainly laudable. However, we question whether the Guidelines should be amended to reflect these concerns.

First, there may be legitimate reasons why a person has unusually low access time. In some parts of the country, people work seasonally on ships (in the coastal provinces) or in natural resource industries such as oil and gas (in the northern parts of some provinces and in the territories). These occupations frequently require a person to be away from their homes for months at a time. The legislation therefore needs to define clearly what constitutes unusually low access time, taking such circumstances into account.

Second, if a new guideline is introduced concerning unusually low access, then its application would have to be subject to the discretion of a judge. This concerns us for two reasons. It may provide people with an incentive to argue before the judge that their unusually low access should result in a reduction, not an increase, in support. Perhaps more importantly, any new discretionary power chips away at the certainty provided by the table amounts, which is one of the primary purposes of the Guidelines.

At the end of the day, we are concerned that such an amendment would encourage further litigation. We therefore question its benefits relative to the potential cost.

ii) Access expenses

We support removing unusually high access expenses from the "undue hardship" section and placing it in a separate section of the Guidelines. The *Divorce Act* should facilitate access of the non-custodial parent, as this is usually consistent with the best interests of the children. The judge should have the discretion to take into account an unusually high access expense and balance that consideration against the adverse effect that any reduction in child support could have on the child's financial circumstances.

We suggest that the Guidelines give more guidance as to what constitutes an unusually high access expense. Some cases have held that the cost of a half-hour

drive is an unusually high access expense, while others have said that a flight from the Northwest Territories to Nova Scotia, which costs over $1,000, is not. As well, a parent who sees the child less frequently may pay less in access costs overall, even if they incur higher transportation costs a few times every year, than a person who exercises frequent access.

C. Children over the age of majority

Parties should be permitted to agree, and judges should be permitted to order, that a non-custodial parent will pay some or all child support directly to a child over the age of majority. In the absence of consent or a court order, allowing a non-custodial parent to pay the child directly puts the child in the middle of a dispute between the two parents. This places children in an uncomfortable and awkward position. It also fails to recognize that child support is not an "allowance" for the children but is instead intended to defray the costs incurred by a parent which arise from having responsibility for the children.

Where a parent is paying child support for a child over the age of majority, we support amending the Guidelines to require the recipient parent to disclose certain information annually to the payor parent. This would include information concerning the status of children – schooling, living arrangements and employment situation – and their finances. We recognize that this may be intrusive, however we believe a payor parent has the right to know this information. Further, the obligation to provide this information may reduce conflict by quelling some payors' suspicions that their support is being misused.

D. Spouse standing in place of a parent

The question of how child support should be allocated among natural parents and spouses standing in the place of a parent is quite complex and is largely driven by the facts of each case. Given the wide variety of circumstances that can arise

under this heading, we suggest that the Guidelines could not provide much useful guidance without resulting in injustice in a large number of cases. The courts should continue to exercise discretion to allocate child support in a way that best suits the circumstances. Having said this, we do believe that the Guidelines should provide that this discretion will not be exercised such as to award a lower amount of support than the child would otherwise be entitled to.

An additional problem is that different jurisdictions have different definitions of what constitutes standing in the place of a parent. For instance, in British Columbia, "parent" includes a "step-parent" who has contributed to the support and maintenance of the child for at least one year. The *Divorce Act* refers simply to people "standing in the place of a parent", without defining that term.

Right now, the biological parent has the primary obligation to pay support, while the spouse standing in the place of the parent does not. There is no need to structure the parents' obligations in this manner, as there are many circumstances where the biological parent has played little, if any, role in the child's life while the person standing in the place of a parent has played quite a significant role. The Guidelines should remove the primary obligation of the biological parent and provide that the allocation of support obligations is at the discretion of the judge. Again, this discretion should not be exercised such as to award a lower amount of support than the child would otherwise be entitled to.

IV. THE FAMILY LAW SYSTEM IN THE 21ST CENTURY

Family law is the area where most ordinary Canadians encounter the legal system. When lack of resources renders the system ineffective, people lose faith not just in the family justice system but in the justice system as a whole. When people lose faith in the system, people become discouraged, they opt out of the system, they start to represent themselves and they even take the law into their own hands. All of these reactions raise further conflict and create a drain on social resources.

An effective and affordable family law system is crucial because it affects a basic building block of our society – the family. It is therefore incumbent upon all of us – lawyers, judges, legislators, government officials, mediators, psychologists and other professionals – to design a system that makes sense for ordinary Canadians. As noted at the outset of this submission, lawyers play a significant role in ensuring this system runs smoothly. They have a wealth of experience and need to be consulted at every possible stage when changes to the family law legal system are contemplated.

The family law system in the 21st century should be focussed on the needs of the users of the system, not the judges, lawyers and family professionals. We have to think hard about what services and approaches the users need. The system should ensure access to justice for all users. It should encourage the use of approaches which reduce conflict but should also recognize that there is a time and place for the adversarial process to operate. As much as possible, it should amalgamate services for families and courts under one roof. It should make services available regardless of whether a person has commenced a court proceeding. It should also make services available to people even after their dispute has been resolved, to ensure that their solutions are adequately implemented. Services should be available on a convenient, consistent and systematic basis.

As we move forward into the new century, we have to re-think our approach and attitudes toward the court system, particularly in family law matters. We have to begin to view the courts as institutions for problem solving, not avenues of last resort when solutions can't be found. To function well as problem solvers, courts need to be the venue for all types of services which will facilitate dispute resolution.

In almost all cases, settlement and compromise should be the preferred approach. It is important to remember, however, that not all cases can be settled. Some

parties are unwilling or unable to accept compromise. Some parties need immediate solutions to protect their safety and security or to ensure their short-term financial survival. The courts provide the principal avenue to ensure enforceable and, sometimes, quick results in these kinds of situations. The adversarial system is a necessary piece of the puzzle.

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

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

Adequate funding for civil legal aid increases clients' knowledge and enforcement of their rights. It also reduces the huge number of unrepresented litigants in the system. Unrepresented litigants are just that – "litigants". Because they are not represented by lawyers, they are rarely aware of (and therefore rarely use) settlement-oriented approaches, opting for the most part to use the courts. Unrepresented litigants tend to clog up the court system, thus creating a significant long-term drain on the public's resources. This is because they are

unfamiliar with court processes and procedures. They often do not have the knowledge and experience to know which battles are worth fighting and which are not. Judges and court staff frequently have to spend a lot of time explaining documents and procedures to these litigants. Proper funding and increased access to legal aid would reduce the number of unrepresented litigants, creating unquestionable value both to the clients and to the system as a whole.

Legal aid funding is a necessary investment in the social support system. Matters such as criminal charges, unlawful dismissal and family breakdown can have a serious impact on a person's job, career and education – both now and in the future. They can put a productive wage earner out of work and onto social welfare, which is a drain on the state's resources. By allowing people to address basic legal problems which could have such an impact, funding for legal aid can thus provide significant long-term savings for governments. This is especially true for family law. When a person obtains legal aid to establish an entitlement to family support, the burden on public resources is thereby lessened.

Access to justice also means developing a procedure which is efficient, inexpensive, settlement-oriented and focussed on family law. Flowing from our view of courts as "problem solvers", we believe that properly resourced unified family courts which follow the model below are the best vehicle for providing this procedure.

In many jurisdictions, family justice is simply an adjunct to the overall justice system. On top of this, there is frequently divided jurisdiction between provincial or territorial family courts and the superior courts, which can create confusion. As a result, parties in a family law case must follow detailed rules of civil procedure which are not tailored to meet their needs. They must spend significant amounts of money in drafting unnecessary paperwork. They often have to appear before judges who either have little familiarity with family law or dislike dealing with

family law cases. Perhaps more importantly, the traditional civil justice system frequently does not have the support services required to meet the unique needs of family law claimants. As a result, services tend to be scattered and disparate. They are provided by a mish-mash of private and public entities, available in some areas (principally the main centres) but not in others. As noted above, they are often added and removed seemingly on a whim. Even where settlement-oriented services are available through the traditional civil process, they are conditional upon parties commencing court proceedings, which places parties automatically in an adversarial position and having already spent money on legal fees to get that far.

In essence, we are advocating unified family courts, with services attached to them, as the "one-stop-shop" for family law. Unified family courts would be staffed by judges, conciliators, mediators and counsellors who are familiar with and committed to family law. We would also place the bulk of the publicly funded services and resources – parent education, counselling, mediation, conciliation, assessments – under the umbrella of the unified family court. This structure would ensure the more systematic and efficient use of these services. Housing these services all under one roof would also promote awareness of their availability and, by extension, their use.

The services of the unified family court would not just be available to those who had commenced court proceedings. Rather, they would be available on an ongoing basis to all who experience family breakdown, including those who need further assistance after their cases have been resolved and their files closed. If people have problems with denial or non-exercise of access, a resolution can be obtained through counselling or, in serious cases, supervised access.

Unified family courts would incorporate innovative procedures tailored to the needs of family law claimants. These could include case management, settlement

conferences and mediation. It could incorporate "judicial dispute resolution" being used in Alberta, where judges act as mediators and, if parties agree, make a binding decision. Administrative officials could make certain types of routine orders – for example for financial disclosure between the parties. Some of these powers (such as ordering financial disclosure) could be exercised even where parties had not filed pleadings. This specific power would be very useful, as settlements are often held up by an intransigent party not giving financial disclosure. It is often necessary to commence court proceedings solely to obtain financial disclosure. In the Nova Scotia Unified Family Court, conciliators can make orders for interim support limited to the table amounts in the Child Support Guidelines.

The orientation of unified family courts and the services they provide should be on obtaining a resolution in the case. Our experience is that services such as mediation can sometimes be unending and not focused on getting a result. If one method of dispute resolution isn't working, the unified family court should have the power to terminate that method. Indeed, if after a certain amount of time it becomes apparent that parties are not resolving their differences through the services provided by the court, then they should be able to file pleadings and adopt the more adversarial route. Where custody is contested, we believe that the child's wishes and interests must be reflected – either through an assessment or through a government funded child representative.

In summary, we believe many of the ills of the family law system can be resolved by adequate funding of civil legal aid and the creation of unified family courts in the manner described above. Both initiatives will naturally require extensive co-operation of all levels of government but we believe the goal of creating an efficient, effective and affordable system will benefit all Canadian families.