THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

August 11, 2010

Lise Lafrenière-Henrie
Senior Counsel/Coordinator
Family Law Policy
Justice Canada
East Memorial Building, 4th Floor
284 Wellington Street
Ottawa, ON K1A 0H8

Dear Ms. Lafrenière-Henrie:

RE: Family Law Reforms

I am writing on behalf of the Canadian Bar Association's National Family Law Section (CBA Section) in response to your request for input as to whether the *Divorce Act* should be amended to provide express authority for Variation of Interim Corollary Relief Orders and Interim Variation of Final Corollary Relief Orders. The CBA Section supports such amendments, and appreciates the opportunity to comment.

A report on these issues was submitted to Justice Canada in 2003 by the late Professor James G. McLeod. The CBA Section has reviewed Professor McLeod's report and concurs with his analysis of the state of the law. We support his recommendation to provide express jurisdiction in the *Divorce Act* for these two issues, and to establish explicit tests for the threshold for changing corollary relief, dependent upon whether the case pertains to child support, spousal support or custody. To the extent possible, we believe those tests should be clear and consistent to avoid confusion. They should also reflect thresholds developed in current case law across Canada.

Variation of Interim Corollary Relief Orders

Under the current legislative framework for the variation of interim corollary relief orders, it is generally accepted that a court may change the order. However, courts may approach this power either as a variation proceeding under section 17 of the *Divorce Act*, or by recognizing that interim orders are inherently variable pursuant to section 15 of the Act. In our view, principles of statutory interpretation preclude the variation of interim orders pursuant to section 17, since that section is expressly limited to "final" orders. Further, we have found that practical problems occur as a result of having two distinct approaches carrying different legal burdens and requiring varying evidentiary matters to be addressed.

Increasingly, interim orders continue for an extended time, either because of delays in the court system, or because of parties' personal circumstances. The goal should be to encourage settlement as much as possible, while also recognizing that interim orders may, unfortunately, be in place for a considerable period. As noted by Professor McLeod, principles underlying the child support guidelines, and recent

decisions of the Supreme Court of Canada,[1] support child support orders being regularly updated according to a payor's current income. Allowing interim changes to interim orders is consistent with those principles.

The CBA Section supports established thresholds for changing interim orders. Thresholds should not be so low as to encourage repetitive motions, but be reasonable to allow relief where appropriate. In custody and access cases, Professor McLeod suggests significant risk or possibility of significant benefit to a child to justify a change. We believe that this proposed threshold is sufficiently high to discourage parents in high conflict cases from bringing spurious motions, but also to protect a child's best interests. In child and spousal support cases, Professor McLeod suggests that updated information or a compelling change necessitating immediate action be the required threshold.

In our view, thresholds should be straightforward and as consistent as possible, including between custody and support cases. We believe that the thresholds outlined by Professor McLeod could be simplified, and should better reflect tests already adopted by Canadian courts.

Interim Variation of Final Corollary Relief Orders

Interim variation of final orders has been more problematic than variation of interim orders. Further, courts have been inconsistent as to whether they may vary a final order on an interim basis. If a court determines that it does not have the power to make an interim variation of a final order under the *Divorce Act* now, it could prevent a court from dispensing needed relief in a particular case. Although the party could still apply for an expedited hearing or a retroactive variation, this may be inadequate to address a clear and immediate hardship.

We agree that the thresholds for interim variation of final orders should be somewhat higher than for interim orders, as suggested by Professor McLeod. He proposes that final orders in custody and access matters should only be varied on an interim basis if children's interests are at risk absent immediate action. He also suggests that final support orders should be varied on an interim basis where there has been a substantial change of circumstances and the hardship of denying relief prior to trial outweighs the hardship of granting relief on an interim motion. While we believe that thresholds should be set out in legislation, we would again urge similar thresholds for both support and custody matters.

Thank you for considering the views of the CBA Section. We appreciate that issues basic to Canadian families are a priority for the government.

Yours truly,

(signed by Gaylene Schellenberg for Grant W. Gold)

Grant W. Gold
Chair, National Family Law Section

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1 See for example, *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, [2006] 2 S.C.R. 231, 2006 SCC 37.