FOREWORD

The International Year of the Family renders it appropriate to apply a retrospective and prospective lens to the evolution of family law in Canada. The year that stands out as the cornerstone of family law reform in Canada is 1968. In that year, judicial divorce was introduced for the first time for Quebec and Newfoundland domiciliaries. Prior thereto, they had been required to obtain a divorce by Private Act of Parliament. The *Divorce Act, 1968* was the first comprehensive federal statute to regulate divorce in Canada. It introduced radical changes to the grounds for divorce. Adultery, a long established ground for divorce in Canada, was supplemented by new offence grounds, the most significant of which were cruelty and desertion. No-fault grounds for divorce were introduced, the most important of which was separation for a period of not less than three years. The *Divorce Act* did far more than liberalize the grounds for divorce. It revolutionized spousal and child support on divorce, matters which had been previously regulated by provincial legislation. The long-established doctrine of the matrimonial offence was substantially abandoned in favour of a needs and capacity approach to spousal support and formal legal equality was established between the spouses with respect to their support rights and obligations.

Beginning in the 1970s, provincial support legislation mirrored the *Divorce Act, 1968* by shifting away from notions of guilt and innocence to concepts of need and capacity to pay. In an age when increasing numbers of married women were entering the labour force, economic self-sufficiency became the clarion call of the legal profession, including the Canadian judiciary. Economic justice for separated and divorced women was perceived as the provincial statutory right to share in the proprietary fruits of marriage by way of equitable property division. Such economic justice overlooked the fact that few, if any, Canadian families can provide long-term economic security for family members by way of property sharing. It took 25 years and the decision of the Supreme Court of Canada in *Moge*[1] to strike down the unrealistic attitude of many Canadian courts towards economic self-sufficiency. The impact of a huge increase in the divorce rate on the feminization of poverty – which was already well known to many displaced homemaking spouses in their 40s and 50s and to many separated and divorced young mothers – was clearly articulated by Madam Justice Claire L'Heureux-Dubé of the Supreme Court of Canada in her insightful and incisive analysis of spousal support in *Moge* and in her forceful concurring but minority opinion concerning child support in *Willick*.[2]

Family law reform has not been confined to husbands and wives during the past quarter century. Support rights and obligations between unmarried cohabitants of the opposite sex have been created by legislation in many Canadian provinces. Property sharing between unmarried cohabitants, although not legislatively endorsed, has been judicially recognized on the basis of unjust enrichment and the doctrine of constructive trust. In this new era of the *Canadian Charter of Rights and Freedoms*, courts are now being called on to determine the rights and obligations of unmarried cohabitants of the same sex. Major statutory reforms respecting the rights of children have also been

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[1] *Moge* v. *Moge*, [1992] 3 S.C.R. 813.

[2] *Willick* v. *Willick*, [1994] 3 S.C.R. 670.

implemented during the past 25 years. The distinction between legitimacy and illegitimacy is no longer legally significant. In addition, there has been a growing demand that the voice of children be heard. The importance of the wishes of children in custody and access disputes has received judicial and legislative sanction throughout Canada. Independent legal representation for children is a *fait accompli* with respect to charges under the *Young Offenders Act*, is gaining ground in child protection proceedings and exists occasionally in hotly contested custody and access proceedings.

Radical changes in family law have not been confined to substantive rights and obligations. New procedures for resolving family disputes have emerged. Mandatory financial and property statements are filed by the parties in litigation relating to support and property sharing. Mandatory pre-trial conferences have been implemented to promote consensual resolution or narrow the issues in dispute. Joinder and consolidation of proceedings and judicially controlled case management have simplified the litigation process. Formal offers to settle and the judicial discretion over costs are used to encourage the consensual resolution of issues. More radical changes in process that are currently emerging include the use of mediation, conciliation and arbitration as adjuncts or alternatives to the judicial process. These innovative processes are the subject of several pilot projects in diverse Canadian provinces. The evolution of Unified Family Courts, with comprehensive and exclusive jurisdiction over family law and with access to auxiliary support services, came to a halt after a promising beginning in the mid-1970s. There are recent signs that federal and provincial governments have a renewed interest in Unified Family Courts in the search for more efficient and constructive processes to resolve family disputes.

The variety and immensity of the changes that have occurred in family law during the last quarter century are lucidly described in the article prepared by Madam Justice Rosalie Abella, of the Ontario Court of Appeal, which constituted the keynote address at the 1994 National Family Law Program. In her paper entitled "The Law of the Family in the Year of the Family", Madam Justice Abella articulates five fundamental precepts that lie at the heart of family law, namely:

> (1) The family unit, however you define it, is the central unit of society.
> (2) Both spouses, regardless of gender, are equally important members of the family.
> (3) Where there are children, their best interests govern.
> (4) The state has an interest in facilitating the well-being of families.
> (5) Families have a right to be free from an arbitrarily intrusive state.

As Madam Justice Abella points out, although few would challenge these precepts, there are many fundamental disagreements about how to apply them. One American writer has observed that "as fashions change and new interest groups emerge, family law is at risk of becoming a series of experiments that never report results in ways that can help inform the legislative process."[3] Large scale empirical studies of the impact of legal change on the family have been relatively rare in Canada although the federal Department of Justice has acknowledged their importance and undertakes a periodic review of the functional impact of divorce legislation. Much more needs to be done. We must not simply collect and evaluate data; we must also re-examine the fundamental nature of

[3] F.E. Zimring, "Foreword" in S.D. Sugarman & H.H. Kay, *Divorce Reform at the Crossroads* (New Haven: Yale University Press, 1990) vii at viii.

family law. In the words of Madam Justice Abella, "we have spent too much time tinkering with the edges of the law, and not enough examining what its central premises should be...." Therein lies the challenge for future family law reformers.

The need for family law to respond to socio-economic exigencies is the underlying thesis of Madam Justice Claire L'Heureux-Dubé, of the Supreme Court of Canada, in her illuminating paper entitled "Re-examining the Doctrine of Judicial Notice in the Family Law Context". In family law, more than any other area of law, judges are perceived as discharging a policy-making role that goes far beyond the passive application of judicial precedent and legislative provisions. Once this is acknowledged, it becomes apparent that there is a need for courts to clarify the policy assumptions on which their decisions are based; the merits of taking judicial notice of relevant socio-economic facts thus becomes apparent. The Supreme Court of Canada has frequently taken judicial notice of social science research and socio-economic data in *Charter* cases. It is still grappling with the proper approach to the admission of extrinsic socio-economic data in family law cases. The recent decisions of the Supreme Court of Canada in *Moge* and *Willick* indicate, however, that the current debate in Canada has shifted from whether judicial notice has a role to play in establishing the social context of legislation to how and in what contexts it will be used. Madam Justice L'Heureux-Dubé's paper provides a clearly defined framework for the proper use of extrinsic socio-economic data in the judicial interpretation and application of family law statutes. She presents compelling reasons for a more liberal application of the doctrine of judicial notice than that traditionally acknowledged by Canadian courts. Surely, it is better to proceed in the light, albeit sometimes dim, that is revealed by available socio-economic data, rather than struggle in the darkness of unsubstantiated and subjective judicial assumptions. As Madam Justice L'Heureux-Dubé observes: "If we do not find it objectionable for judges to make 'plausible assumptions' in order to resolve issues of policy that underlie a particular legal role or normative framework, why is it more objectionable when the judge actually takes the initiative to verify whether these assumptions are, indeed, well-founded?...The character and uses of [extrinsic socio-economic] information in the family law context often do not require that stringent restrictions be placed on the judge's ability to take note of evidence of this nature. Where the complexity of the material may be beyond the capabilities of the individual judge, the use of a court-nominated expert may fill this lacuna."

The importance of empirical research in evaluating statutory provisions and the processes used in their implementation is exemplified in Professors Nicole Roy, Louis Gélinas and Bartha Maria Knoppers' paper entitled "Étude empirique du processus d'expertise en droit québécois en matière de garde, d'accès et de protection de la jeunesse". This paper represents part of a multi-disciplinary study of the welfare of children in the Quebec judicial system.

This fact finding study examines the use of psychosocial services by the Quebec Superior Court in custody and access disputes and reliance on psychosocial assessments by the Quebec Youth Court in child protection proceedings. The authors found that psychosocial services are seldom used in custody and access disputes. The authors conclude that further research should be undertaken to determine the attitudes of the Bench and Bar towards the use of psychosocial services and the impact of these attitudes on the utilization of such services. The findings of the authors respecting reliance on psychosocial assessments in child protection proceedings before the Quebec Youth

Court generate far more serious cause for concern. Although frequently relied upon in Youth Court, psychosocial assessments do not conform to any established pattern. Children are often subjected to multiple evaluations but it is rare for all members of the family to be interviewed by a single expert with overall responsibility for the psychosocial assessment. The comprehensiveness and reliability of experts' reports are suspect when the manner in which assessments are undertaken does not conform to any prescribed standards of practice. While the authors do not provide a blueprint for change, they raise important questions pointing to the need for further research with a view to devising uniform standards of practice with respect to assessments undertaken by psychosocial experts.

We must not forget that family law and its processes exist to protect the interests of family members and that omniscience is not a prerogative of the legal profession nor of any other profession. We would do well, therefore, to more actively involve family members in child placement processes to the extent that this is consistent with the best interests of the children. Legal and psychosocial interventions should be facilitative rather than authoritarian in seeking to balance the autonomy and integrity of the family unit and the need to promote the protection and best interests of children.

Professor Donald Poirier's paper, entitled "La liberté d'établissement du parent gardien: les aspects constitutionnels" explores the extent to which a custodial parent is entitled to change the residence of the children when this involves a move to a different city, province or foreign country. Before the *Divorce Act* of 1986, Canadian courts consistently acknowledged that, in the absence of exceptional circumstances, such as a *mala fides* intention to undermine the access privileges of the non-custodial parent, the custodial parent had the right to remove the children without the permission of the non-custodial parent. However, judicial attitudes changed after the *Divorce Act* became law in 1986. This change was largely attributable to subsection 16(10) of the *Divorce Act* which stipulates that "[i]n making an order [for custody or access], the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact." In *Carter* v. *Brooks*,[4] the Ontario Court of Appeal departed from its previous stance by fettering the freedom of the custodial parent to move with the children to a new province or country. Limitation of the custodial parent's mobility right was imposed because of contemporary legal and psychological opinion that it is in the best interests of children to preserve positive relationships with both the custodial and the non-custodial parent after a divorce. While this conventional wisdom may be legitimate where there is no parental alienation after the divorce, it generates problems if a custodial parent wishes to remove the children to another province or country and the non-custodial parent insists on maintaining existing access privileges. Professor Poirier examines *Carter* v. *Brooks*, which has been followed in Prince Edward Island and Quebec, in light of the judgments of the Supreme Court of Canada in *Young* v. *Young*,[5] wherein all seven judges agreed that, if the *Canadian Charter of Rights and Freedoms* applies to custody and access disputes, the criterion of the best interests of the child, which constitutes the basis of custody and access dispositions under both federal and

[4] (1990), 30 R.F.L. (3d) 53 (Ont.C.A.)

[5] [1993] 4 S.C.R. 3.

provincial legislation, does not contravene the *Charter*. The seven judges were divided, however, on the fundamental question whether the *Canadian Charter of Rights and Freedoms* applies to parental custody and access disputes. After examining the various judicial opinions expressed in *Young* v. *Young*, Professor Poirier concludes that custody and access disputes, like child protection disputes, warrant the application of the *Canadian Charter of Rights and Freedoms*. He thereby rejects the contrary opinion expressed on the *Charter* in *Young* v. *Young* by L'Heureux-Dubé, J., with whom Gonthier and La Forest, JJ. concurred. Professor Poirier consequently concludes that a custodial parent's mobility rights should be recognized pursuant to sections 6 and 7 of the *Canadian Charter of Rights and Freedoms*. He further concludes that, independently of the *Charter*, the right of the custodial parent to move with the children should ordinarily be recognized, a point of view that would presumably be endorsed by L'Heureux-Dubé, J. in light of her definition of the rights and responsibilities of the custodial parent in *Young* v. *Young*. Professor Poirier suggests that *Carter* v. *Brooks* was either wrongly decided or it should be confined to its facts. The recent unreported judgment of Abella, J.A. of the Ontario Court of Appeal in *MacGyver* v. *Richards*,[6] may eliminate some of the uncertainty generated by *Carter* v. *Brooks*, regardless of the ultimate outcome of the *Charter* issue which is the subject of Professor Poirier's analysis.

Professor Poirier's endorsement of the custodial parent's mobility right is quite compelling. Courts have not imposed restraints on non-custodial parents who decide to move to a new province or country even though this can result in undermining pre-existing access arrangements. Why then, should custodial parents be restricted in their mobility right, if they are acting in good faith in seeking to establish an extra-provincial family residence? In many cases, a change of province, or even country, will not necessitate exclusion of the non-custodial parent from further meaningful involvement with the child. It will simply require a restructuring of the parenting arrangements so that physical access becomes less frequent but more substantial in duration. Alternatively, some other form of shared parenting arrangement may be appropriate. In this age of the telephone, e-mail and efficient ground and air transportation, preservation of meaningful relationships between children and distant parents is not beyond the realm of human ingenuity, provided that the parents do not allow their personal conflicts to intrude. Nor is long distance parenting a phenomenon that is confined to the children of separated and divorced parents. In any event, we must not forget that divorce frequently begets imperfect solutions for children and their parents.

The law should be cautious before eroding the rights of custodial parents who have the primary responsibility for raising the children. It is not enough for the law to impose obligations and responsibilities on parents. Certain rights and privileges should be accorded to go with those obligations and responsibilities. The best interests of the children cannot be isolated from the interests of the family at large. There will be cases where the child's family network before a divorce is such that it would be contrary to the best interests of the child to allow the custodial parent, albeit for good cause, to establish a new residence for the child in another province or country. In that event, the parents and extended family members must become much more flexible and imaginative

[6] (1995), 22 O.R. (3d) 481 (C.A.)

as they attempt to devise parenting arrangements that can accommodate the interests of the child as well as those of all other affected family members. Far too often, judicial decisions, against the background of which lawyers negotiate parenting arrangements, are the product of an adversary process that is ill-equipped to provide a disposition that truly reflects the best interests of the child. In the absence of abuse or other exceptional circumstances, legal and judicial processes must encourage the consensual resolution of parenting disputes. As a first step, statutes and rules of civil procedure should require a mandatory family conference and the filing of a parenting proposal or plan by all interested parties prior to allowing any case to proceed to a contested trial, including one in which the focus relates to the mobility right of the custodial parent.

Professor Bala's paper, entitled "Compromise or Confusion? The Proposed 1994 *Young Offenders Act* Amendments", reviews Bill C-37 which introduces extensive amendments to the *Young Offenders Act* with respect to the following matters: longer maximum sentences in youth court for first and second degree murder, transfers to adult court, the statutory *Declaration of Principle* and dispositional guidelines, alternatives to custody, levels of custody, and placement in mental health facilities, medical and psychological assessments, conditional discharges, information sharing and records, and youth statements to police. Writing with his usual clarity, Professor Bala evaluates these changes in light of the historical evolution of the law relating to juvenile delinquents and young offenders and the current political climate within which the amendments were framed. Professor Bala views Bill C-37 as a compromise measure that was intended to satisfy public demand for a more retributive approach to youth who commit the most serious offences and, in particular, murder, while preserving the fundamental integrity of the youth justice system in limiting the use of custody and promoting rehabilitation. Whether this compromise will achieve its goals is wisely left unanswered by Professor Bala who concludes that the ultimate effect of the statutory amendments will depend more on judicial interpretation and provincial implementation than on Parliamentary intent. Many readers will agree with Professor Bala's concluding observation that the impact of the statutory amendments on the incidence of juvenile crime is unlikely to be significant and that reducing the level of juvenile crime will require the implementation of more sophisticated and relatively expensive correctional, educational and social policies. In an age of budgetary cut-backs, however, there is little hope that such policies will see the light of day in the foreseeable future.

As the 21st century approaches, the brave new world of innovative birth technologies raises complex social, ethical, health and legal issues.

An examination of the legal literature of the 1950s and 1960s (see, for example, Glanville Williams, *The Sanctity of Life and the Criminal Law*[7]) indicates that the pressing legal questions of that era related to whether artificial insemination of a spouse with the semen of a third party donor constituted adultery and how, if at all, the legal presumption of legitimacy arising from conception or birth in lawful wedlock could be rebutted by proof beyond all reasonable doubt that the child was born as a result of the artificial impregnation of the spouse with the semen of a third party donor. In those days, when HLA blood tests were just evolving and DNA finger printing was unknown, rebuttal of the legal presumption of legitimacy, which required evidence that satisfied

[7] G. Williams, *The Sanctity of Life and the Criminal Law*, (London: Faber and Faber Ltd, 1958).

the criminal law standard of proof, was difficult if not impossible when, as was commonly the case, the physician mixed the semen of the husband with that of the donor before impregnating the wife.

Oh, how simple life seemed to be in the era when legal rights and obligations were concerned with the traditional nuclear family to the exclusion of third party rights and obligations. It is not much more than 25 years ago that courts denied access rights to the putative father of an illegitimate child. Cases like "Baby M" were beyond the imagination of most lawyers in those days. Modern reproductive technologies have spawned a multitude of new problems. For most family law practitioners, the contemporary focus is likely to revolve around the validity, enforceability and effect of surrogate contracts, the legal characterization of a parent, the respective support rights and obligations of genetic, natural and quasi-adoptive parents, the custody and access implications of child birth resulting from the new birth technologies, succession rights, the extent to which the parties to a surrogacy arrangement or the courts may intervene in pregnancy and child birth, and any residual rights and liabilities that may ensue from the separation of conception from sex and pregnancy. However, the legal implications of new birth technologies go far beyond the field of family law. Indeed, most fields, including contracts, torts, property and the criminal law will be affected if innovative birth technologies continue to be unregulated. The legal implications of pre-natal diagnosis and sex selection, gene therapy and genetic engineering, the transmission of diseases, such as AIDS, and the use and abuse of fetal tissue will test the ingenuity of the legal mind, to say nothing of the social and ethical implications of the new reproductive technologies.

These and many other issues occupied the attention of the Royal Commission on New Reproductive Technologies which presented a comprehensive two-volume report entitled "Proceed With Care" to the federal government on November 15, 1993. A summary of the scope of the Royal Commission's public inquiries and research and the primary recommendations formulated in its Report is provided by Jean Rhéaume's commentary entitled "La procreation, une affaire de famille". This commentary provides a clear and succinct overview of early changes in the composition of the Commission, its goals and aspirations, and the majority and minority opinions and recommendations set out in its Report.

Almost two years have now passed since the publication of the Report without any legislative initiatives having been taken. One can only hope that the Royal Commission Report will not be shelved indefinitely. The issues are far too important to be resolved solely by interested parties and their legal or medical advisors. The need for legislative guidelines and regulation is self-evident if the interests of families and respect for human dignity are to be preserved.

This issue of the OTTAWA LAW REVIEW closes with a detailed review of "The Private State and the Public Family", a collection of sixteen essays by Polish and British legal scholars, economists and sociologists. The reviewer, Professor Mykitiuk, points out that gender inequities often result from privatization of the family, particularly when this policy is driven by governments seeking to reduce financial assistance for dysfunctional families. Professor Mykitiuk concludes that the privatization of the family, whether in Britain and other Western countries or in Poland and other Eastern European countries, has resulted in the withdrawal of necessary support for many families without any

corresponding enhancement of individual liberty or reinforcement of family solidarity. There are lessons to be learned from this experience by Canadian federal and provincial governments as they struggle to reduce their deficits.

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