

# New Directions: Divorce and Administrative Law

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## INTRODUCTION

In Canada, as in most of North America, divorce mediation is attracting considerable attention in the legal community. Mediation is touted as a means of resolving disputes in divorce that can reduce both the economic and emotional costs to the parties. Proponents contend that mediation reduces hostilities and is able to address the emotional aspects of divorce which the traditional court structure is not able to accommodate. By allowing participation in the process, mediation is also seen as better able to foster greater compliance with the agreement made between the parties. Throughout the United States and Canada mediation has become an entrenched component of the judicial system. Mediation organizations have sprung up across both countries, Canada having established a national organization (Family Mediation Canada) back in 1984. Although no legislation has been passed specifically toward regulating mediation the federal *Divorce Act*, R.S.C. 1985 (2nd Supp.), c.3, s.9(2), now requires all practitioners to inform clients of the option to mediate before continuing with the traditional, formal divorce procedure. (1) The growth in family mediation is part of a new approach to handling disputes at marriage breakdowns outside of the traditional court setting.

In December, 1998 the federal government released a Report of the Special Joint Committee on Child Custody and Access. The Report recommends, among many other things, that divorcing parents be encouraged to attend at least one mediation session to develop a parenting plan for their children. In addition to recognizing the importance of mediation, the Report sets the stage for a number of initiatives to support divorcing families. It recommends that all parents be required to participate in education programs on the effects of divorce; that children have an opportunity to be heard when decisions affecting them are being made; that an officer of the federal Parliament be appointed to promote the welfare and best interests of children under the federal *Divorce Act*; and that a broad range of non-litigation support services be offered. The Report also contains several recommendations that call for the federal, provincial and territorial governments to work in cooperation to achieve a nation wide co-ordinated response to issues like enforcement, public awareness on the impact of divorce and accreditation criteria for family mediators. (2)

The literature in support of mediating divorce and these recent recommendations show that divorce is moving, and perhaps must move, in a new direction to meet people's needs. The direction that is being called for is a dejudicialized form of settling divorce actions. While mediation programs have been connected to the court, the new initiatives needed are beyond the traditional role of the court. The argument put forth in this paper is that to offer the best service to divorcing couples, the government should create a comprehensive administrative system that can provide services to meet every family member's needs. An administrative agency offers the best structure for handling divorce in a non-adversarial manner. It has the flexibility to provide a wide range of functions, thus allowing divorcees to choose the services that will work best for them and their family.

## HISTORY OF DIVORCE

*Early Beginnings*

Historically, the grounds of divorce have reflected a mix of theology and expediency. In the early times of the Roman Empire, mutual consent or even unilateral repudiation provided sufficient grounds to terminate a marriage. A legal precedent from eighth century Europe stated a couple need only have a clerk or notary authenticate their agreement of dissolution. This tradition existed into the tenth century until the Church of Rome declared marriage to be a sacrament. The Church alone claimed authority to conduct marriage and would only dissolve a union that was invalid at its inception. A few claims were made for annulment or desertion, and in some instances marriages were simply never formalized. By the end of the sixteenth century marriage jurisdiction came under the purview of the state and civil divorce emerged. Secular courts were established to authenticate the grounds put forth by the parties. The marital offence was the sole just cause for divorce. (3)

England was slow to the formal divorce evolution, until 1857 divorce in England required an Act of Parliament. England's legislation, the *Divorce and Matrimonial Causes Act, 1857 (Act of 1857)*, created divorce as a form of punishment for misbehaviour during marriage. A guilty wife could not claim maintenance after divorce and the innocent spouse had a better claim to custody. In some instances the guilty spouse was liable to forfeit all or part of the financial benefits received from the marriage. Where the husband obtained a divorce on the grounds of adultery, he was entitled to damages from his wife's paramour. (4) Divorce was about property, in this instance a husband's property in his wife. The value of the husband's property in his wife was diminished if she had sexual relations with another man, thus the husband was entitled to compensation. (5)

The history of divorce is in some respects a study of women's systemic inequality in marriage. At common law the doctrine of marital unity made clear the superiority of the husband. The woman lost her separate legal identity and was subsumed within that of her husband's. As mentioned, divorce was about property and inheritance. A married man had a legal obligation to support his wife and she a continuing claim on his assets. Divorce was a means of allowing men to reacquire control over their property, free from the wife's claim. Inheritance required the need for certainty of paternity, which created the insistence on adultery as the primary marital sin. (6) The English *Act of 1857* created a double standard for men and women. Men could petition for divorce on the sole ground of adultery. For women to use this ground they had to prove the adultery and at least one other ground of divorce (desertion, bigamy, rape, sodomy or bestiality). This requirement was not abolished in Canada until 1925. (7) The *Marriage and Divorce Act of 1925* permitted the wife to sue on the ground of adultery alone. This was the Federal Parliament's first legislative act under its jurisdiction over marriage and divorce obtained with Confederation in 1867. The legislation only applied in provinces where courts had the power to grant divorces but the same principle came to be followed in parliamentary divorces. (8) Even with this action, divorce law in general failed to evolve with the changing ideal of the family, namely that marriage could be for love and not just economic necessity. The single-minded emphasis on adultery as a ground for divorce was out of date with this new conception of marriage. It presented many problems for those seeking to end marriage for other reasons. (9)

### *Divorce in Canada*

At Confederation in 1867, the federal government acquired responsibility for marriage and divorce under section 91(26) of the *British North America Act (BNA Act)*. The provinces were given power over the solemnization of marriage in section 92 (12). Following 1867 the provinces proceeded to pass marriage acts while the federal government did nothing under its powers. Divorce law was a mishmash across the country of English and pre-Confederation colonial statutes. Divorce was available through two methods across the country. In provinces without divorce courts, citizens could access a Parliamentary divorce. An individual marriage was dissolved through the passage of a private statute without reference to any general legislation. (10) Parliamentary divorces were provided for residents of Quebec and Newfoundland as well as for persons whose domicile was uncertain. For colonies acquired by cession,

such as Quebec, the existing laws of the territory continued in force. The Civil Code which continued there stated clearly that marriage could only be dissolved by the natural death of one of the parties. Newfoundland did not acquire the English law of 1857 because it had received its own legislature in 1832. The Supreme Court of the province held the provincial courts could only decree judicial separation, not dissolutions of marriage. Ontario also operated on parliamentary divorces for a time. The common law of England was adopted as of 1792 which left Upper Canada with no divorce law. Ontario gained authority to grant divorces through the court by a federal statute passed in 1930 which introduced the law of England for dissolution and annulment of marriage as of 1870. [\(11\)](#)

Some provinces had established judicial divorce prior to 1867. In 1860, New Brunswick established a court of Divorce and Matrimonial Causes where the grounds for divorce were adultery, impotence, frigidity and consanguinity. In 1866, Nova Scotia established a similar court with the same grounds, save frigidity. Prince Edward Island established its divorce courts by acts of the legislature in 1833 and 1835. Section 129 of the *BNA Act* provided for legal and legislative continuity, which allowed provincial law in central government jurisdiction to remain in force until superceded. The Maritime provinces' divorce legislation continued in force until 1968, frozen during that time as amendments were solely within the jurisdiction of the federal government. [\(12\)](#) The divorce law of the remaining western provinces and territories became essentially the English law of 1857 because of their respective dates of reception of English law and its continuation on entry into Canada. [\(13\)](#)

In 1968 the Canadian Parliament introduced the *Divorce Act*. The Act provided two grounds for a divorce, matrimonial fault and marriage breakdown. The enumerated fault grounds included adultery, cruelty, rape, sodomy, bestiality, commission of a homosexual act and bigamy. The indicia of a marriage breakdown sufficient for divorce were imprisonment, addiction, desertion, non-consummation and separation. The allowance for separation was the most significant ground. A marriage breakdown was presumed where the parties lived separate and apart for three years. [\(14\)](#) The extension of the legal grounds past simple fault made the process more attractive to those who previously regarded it with distaste. The number of divorces in Canada increased by 1978 to a number almost five times greater than it had been a decade before. This increase was probably due in part to the backlog of cases now eligible as well as the attraction of the new no fault proceedings. [\(15\)](#) However, contrary to the expectations of the time, there has only been one three year period since 1968 when the divorce rate dropped (1982-1985). Divorce rates rose steadily from 1968 and then, following the drop from 1982-1985, experienced a sharp increase after amendments were made to the *Divorce Act* in 1985 (which came into effect in 1986). [\(16\)](#) These amendments introduced marriage breakdown, based on proof of one year separation, as a ground for divorce. Although the fault-based grounds of adultery and physical or mental cruelty remained, the 1985 legislation marked the start of true no-fault divorces in Canada. Before the introduction of the *Divorce Act* in 1968 the divorce rate was 8 percent. By 1987, a year after the amendments, the rate had skyrocketed to 44 percent. The rate has stabilized (at its lowest calculation) to somewhere around 40 percent. [\(17\)](#)

Following the first divorce legislation and into the 1970s divorce carried a substantial social stigma. Today, however, most Canadians consider divorce to be a right. Adults are free to marry whom they wish and also to end that relationship if it becomes unsatisfactory, unhealthy or unsafe. Although adults are free to secure their own personal happiness, a marriage breakdown can become very complicated, particularly where children are involved. Research has shown the negative impact divorce can have on children. Most children of divorce experience dramatic declines in economic circumstance. They can be faced with a multitude of changes like the possible abandonment of at least one parent, the diminished capacity of both to attend to their needs (due to the parent's own stress), as well as changes in otherwise familiar living settings. Some children may experience long term behaviour problems, depression, poor school performance, low self-esteem and/or difficulties in future intimate relationships. [\(18\)](#)

Even with the move to no-fault divorces, a marriage breakdown invariably means pain, bitterness, sadness and upheaval in people's lives. There will be some trauma and disruption for all family members. No matter who initiates the divorce each partner is likely to experience a variety of emotions like anger, regret and even relief. The conflicts which precipitated the divorce will almost always carry-over into post divorce relationships if they are not dealt with and resolved in some way. The most obvious casualties of ongoing conflict are the children. (19) Some research suggests that children's adjustment problems after divorce are not related to as much to the change in family structure but rather to this parental conflict that remains part of the ongoing family dynamics. Psychologist Constance Ahrons suggests that parents going through a divorce can work towards amicable relationships by giving all family members the opportunity to deal with their emotions around the loss of the family unit and by staying in control of the process, rather than letting the adversary nature of the court system escalate their conflicts. (20)

## **DIVORCE AND THE ADVERSARY SYSTEM**

The factors discussed, like the growing number of divorces, the recognition of no-fault and the sensitivity to children as significant players in the process, mark a distinct transition in family law. This shift has forced the question of whether the traditional adversary model of dispute resolution is appropriate for disputes on marriage breakdown. The adversarial approach to the resolution of divorce rests on several assumptions. One is that divorce is a legal event in which the state has an interest. Historically, divorce was controlled by the church and the state under the belief either or both have a responsibility to supervise. Second is an assumption divorce is the result of fault on one side. This presumption continues to be present in legislation, even where it is disguised as a no-fault scheme. Other assumptions are that divorce is a judicial process that is tied to court process and not the choices of the parties and that spouses to a divorce have competing interests which are inherently difficult to resolve. Lawyers are hired to advocate only for the interests of their clients, which assumes the pursuit of one spouse's interests is not consistent with the interests of the other. (21)

The adversary system relies on the parties to present evidence and for an impartial decision maker to make a determination on that evidence. The exercise pits one litigant against the other, increasing hostility. The atmosphere is artificial - a search for truth and falsehood when little can be absolutely true or false in marital histories and children's best interests. Nowhere in Canada have these concerns led to a complete abandonment of the adversarial system. However, certain modifications are being made in an attempt to lessen the negative effects. (22)

Today family law is less arbitrary and reflects concepts of equity and fairness. There is a view of marriage as a social and economic partnership, that the product of the marriage should be shared between spouses, custody laws emphasize the best interests of the child and economic support is determined on the basis of financial need and ability to pay - conduct is not a consideration. Emphasis is placed on negotiation, mediation and other means of reaching an early resolution. Courts and legislators are beginning to recognize the need for maintaining a cooperative framework that will last, particularly for the sake of the children. An adversarial process leads to bitterness and hostility which undermines the cooperation necessary for continued parenting. Research has shown that those who suffer most from an adversarial divorce are the children. The chief precursors to family dispute resolution alternatives are among others the exorbitant costs of a divorce, the emotional strain for adults and children and the long delays in the courtroom that keep people in limbo while litigating their family law matters. (23)

## **MEDIATION IN CANADA**

### *Origins*

In Canada, the development of court-connected mediation has dramatically changed the face of family law. By 1984, mediation in divorce was available in virtually every province and territory. The desire of private practitioners to obtain training in family mediation outstrips the supply. National organizations have evolved to represent these interests, educate the public, establish standards of practice, codes of ethics and training programs. In simple terms - family mediation is firmly established in North America. (24) The highlights of the chronological development of family mediation in North America (1961-1986) can be seen in Appendix A.

Court-based mediation services are readily available across the country. The services may include reconciliation counseling, divorce counseling, and custody and access investigations. Some services are limited to just issues of custody and access. Many of the court-connected services were initiated by family court judges who were motivated by their first hand observations of the dysfunctional effects of the adversarial process on divorcing families. (25) This feeling can be seen in Judge Rosalie Abella's following observation with respect to the adversary system and custody disputes:

Truth and law have little to do with custody adjudications. The adversary system, which was designed to accommodate their confluence, is not the appropriate structure within which to make such decisions. The inapplicability of the adversarial system to family law is further exaggerated by the incongruity of feuding counsel in what should be a benign exercise in dispute resolution. The adversarial process thereby is alleged to generate an antipathetic climate that encourages zealously combative lawyers and intractably defiant

clients. Dissolving families deserve less ignoble exits as they relocate and allocate their former parts. (26)

To avoid the harsh effects of the adversary process courts and legislators have turned to the gentler hand of mediation.

### *Definition*

Mediation is a means of resolving conflict through a neutral third party. The mediator's role is to facilitate communication, guide the parties to a definition of the issues and work toward a resolution by helping the parties through their own negotiations. Divorce mediation recognizes that emotions are an integral part of the resolution process and must be dealt with. The parties can air emotions even though these feelings would be irrelevant to a court proceeding. The goal is to manage feelings, not repress them such that they may resurface as post divorce litigation.

Where litigation tends to reinforce hostilities, mediation reduces tension through direct communication and cooperation in a structured process. With lawyers speaking for their clients, the actual participants are denied the opportunity to control their situation and express their feelings. Mediation fosters self-esteem and competence. It can also help the parties develop problem solving skills that can help to avoid future conflict. The emphasis in mediation is not on right and wrong or on who wins but on finding a workable solution to meet everyone's needs. (27)

### *Advantages*

The advantages of mediating a marriage breakdown are numerous. A solution that is agreed to by the parties is always better than one imposed, as it increases the likelihood of the resolution lasting longer. It is common for a bitter court battle to return to the courts again and again. Mediation gives a result tailor made to the needs, expectations and lifestyles of the parties. (28) The advantages of mediation can be grouped in at least five areas. One, is the positive reconstruction of family relationships. Mediation can produce positive outcomes in helping families learn to work together and to develop skills to resolve

future disputes. Mediation promotes cooperation and compromise which leads to greater compliance because the outcomes are directed by the parties. The long-term effects are less re-litigation and less stress for all family members. Second, mediation resolves both legal and emotional issues. Mediation provides a flexible process that can address both of these areas. Litigation is focused on and limited to only addressing legal issues. When outstanding emotional conflicts are not resolved the spouses and children will experience long-term negative consequences. Third, mediation responds to children's interests. It encourages parents to reach agreements that meet the needs of their children. The process is flexible enough that the mediator can meet with the children. Under existing law the interests of the child generally do not come before the court. Fourth, mediation saves time and money. There is evidence to support family mediation is less costly than litigation and is a quicker resolution of disputes. (29) Research in the United States has shown that a three-hour mediation session can save a full day in court, with the corresponding economic savings. (30) Fifth, mediation enhances personal autonomy. Reaching their own agreement increases the parties' personal autonomy and reduces state intervention. Parties are free to control the process, raise issues they consider important and discuss the facts they believe are relevant, rather than those picked by the court. This is unrestricted by court rules or legal precedents which narrow the options for a solution. Parties are more likely to comply and report a greater sense of user satisfaction than parties going through the court system. (31)

### *Arguments Against*

The rise of mediation has brought several cautions and critiques. One is that mediation neglects broader social values involved in achieving justice. Judicial decisions interpret the social values embodied in authoritative texts such as the Constitution and family law statutes, and then accord these values with broader social interests and notions of justice. (32) Also, as a form of private ordering, mediation removes divorce from the public realm and amounts to the re-privatization of the family. Traditional patterns of inequality can flourish away from public view. (33)

A second caution is that mediation fails to protect individual rights. By using lawyers the adversarial system ensures the law is being used for the client's best interests. It is argued that the adversarial model was purposefully designed and is not needlessly combative. Mediation is also criticized for ignoring power imbalances. Mediation is a form of private ordering and operates to some degree on an assumption of equal power, which does not conform to the reality of male-female relationships. Women are disadvantaged because of the inequality of bargaining power they have in society. Abused women are especially vulnerable as the mere presence of their abuser can intimidate and make it difficult for them to articulate their needs. Mediation is not appropriate for couples with a history of abuse even where the mediator is highly trained. Poorer parties are also at risk of being coerced into disadvantageous settlements. Mediation does not protect those who are disadvantaged because of either personal or systemic imbalances in bargaining power. (34)

A fourth area of concern is that mediation reinforces the existing social order. The mediator is presented as a neutral third party but mediators operate from within their own paradigm which often validates the existing social order and the roles it casts. For example a mediator may focus on the best interests of the child but in doing so neglect the woman's interests, thus keeping her in an economically, socially and psychologically vulnerable position. (35) There is a strong argument that extensive mediation will weaken legal precedent. A system of informal settlement diverts cases from judicial consideration which takes away the opportunity to refine law through the ongoing development of legal precedent. Finally, mediation is criticized for providing no record for judicial review. Mediation assumes the agreement is the end of the process. This trivializes the remedial dimensions of lawsuits. If the parties to mediation subsequently seek a modification to their agreement the judge must reconstruct the situation retrospectively with no formal record. This is likely to offset any saving

of judicial time the settlement was able to generate in the first place. In addition, the lack of record offers no procedural safeguards for identifying an agreement that reflects inequality. [\(36\)](#)

It is undeniable that mediation offers substantial benefits for resolving spouses' conflicts at marriage breakdown. There are also some valid cautions. If, however, a structure was created within which the criticisms could be addressed there would be an impressive alternative for families facing divorce. The next section will look at the possibility of finding an answer in administrative law.

## **ADMINISTRATIVE LAW - A NEW APPROACH FOR DIVORCE**

Administrative agencies have not historically been created as part of a well-defined approach to government. Rather, they have been created on an ad hoc basis to respond to specific problems. Two world wars, a world-wide depression and several recessions have all demonstrated the need for government to control and regulate a wide range of activities. Government intervention has expanded into almost all aspects of life. A variety of reasons have been put forth in creating administrative bodies. Among them are the need to relieve the courts from having to provide decisions in a substantial number of cases with similar facts, as well as the ability of administrative bodies to present a less costly alternative. There is an argument for diverting responsibility for the resolution of complex and sensitive issues to specialized agencies. Another argument emphasizes the need for flexibility in the daily administration of government

operations. It is a need to implement creative strategies through innovation and experimentation, rather than becoming stuck in the more cumbersome legislative or judicial processes. [\(37\)](#)

All of these reasons support creating a comprehensive administrative agency to process divorce applications and offer support services to help resolve conflict at marriage breakdown. The number of divorces has increased significantly since Confederation and again since the first and second legislative acts by Parliament in the area. Research is confirming the multiple and complex issues involved in dissolving marriages. This is further evidenced by the court itself looking for alternatives to its own adversarial processes. The trend is toward mediation offered by people trained in resolving emotional conflict and who are also sensitive to the effects of unequal bargaining positions. The recommendations, mentioned earlier, by Parliament's Joint Committee on Child Custody and Access call for new innovations and cooperative measures between governments to assist families seeking to rebuild their lives.

## **ROLES AND FUNCTIONS OF ADMINISTRATIVE AGENCIES**

Administrative bodies can differ dramatically. The terminology itself shows the differences as administrative bodies can be referred to as boards, commissions, agencies or tribunals. Even with vast differences in structure and activity, there are roles and functions that are characteristic of administrative institutions. Administrative bodies may carry out one or all of these functions but they are worth exploring to create a basic understanding of the capabilities of administrative law. Looking generally at the roles administrative agencies can play offers a structure for showing how administrative law can incorporate mediation, answer some of its criticisms and thus provide a comprehensive mechanism of service delivery for divorcing families.

### *Assistant*

One role of administrative agencies has been to take part of the work load off of the more traditional branches of government. [\(38\)](#) The inadequacy of the traditional court system has become more prevalent since the change in attitude toward divorce. The divorce rate has increased dramatically and leveled at a

number the courts cannot handle in a time efficient manner for parties looking to end their marriage. Divorce was not contemplated in this way at Confederation, thus an alternative means was not needed, nor contemplated at that time. Divorce adjudication has reached a size and complexity that would welcome the assistance of an administrative agency.

### *Substantive Expert*

A second characteristic of administrative agencies is their use as experts in substantive matters. It is difficult for one judge to develop all the different kinds of expertise needed to resolve all disputes. Where needed expertise requires the development of a new court or new court functions, an administrative agency can just as easily be developed and used. (39) A driving force behind the mediation movement has been the recognition by family court judges that the adversarial system is ill-suited to divorcing couples, and that they are unable to deal with the emotional issues which is necessary for a final resolution. Placing divorce resolution in an administrative agency allows spouses to be served by people specifically trained in all issues that are part of divorce. An administrative agency also provides a structure for monitoring accreditation and ongoing training of these employees.

Mediation is criticized for ignoring power imbalances, broader social values and for maintaining the existing social order. These concerns can be addressed through the manner in which mediation is carried out. There are a range of mediation practices, which will all impact differently on clients. The majority of divorce mediators are social workers or lawyers. It is the individual paradigm of the mediator that will affect the outcome of mediation. Rather than criticize this certainty, an administrative agency can ensure all of its mediators, arbitrators and adjudicators are operating from a paradigm that will be sensitive to the interests of all family members, to power imbalances as well as their own effect on the process.

Mediation does not have to be a form of social control. It can be a means of empowerment. Linda Girdner suggests that empowering mediators will recognize a responsibility to balance power between the parties. This type of mediator would accept there are times when power cannot be evened out. Thus, times when an appropriate agreement cannot be reached. An empowering mediator is sensitive to not unwittingly pressuring a party to settle. The empowering mediator knows when issues remain that cannot be mediated they must be resolved by another method. Mediation conducted in this way can answer the concern that

mediation does not protect the individual interests of those less power, like women or economically disadvantaged parties. (40)

Making mediation part of an administrative agency's function allows the use of experts specifically trained in all aspects - emotional, psychological, economic, legal, etc. - that will interplay between spouses seeking a divorce. This will also ensure a consistency in service that is not presently available. Today divorcing spouses may receive dramatically different service depending on where they go. The absence of compulsory regulations governing the standards of practice and requirements for minimum training creates a situation where anyone can establish him or herself as a mediator. (41) Setting up an agency that all divorcing families would go through ensures a certain level of service and expertise.

A certification program for family mediators is currently being developed by Family Mediation Canada. All mediators performing divorce mediation for the courts will have to meet the new certification requirements. The certification creates two categories of mediation. Comprehensive certificates require the mediator to have education and training in all aspects of divorce, including mental health and ethics components. The Family Relationships certificate requires training in all areas except property law. Mediators applying for certification in either category will need to pass a comprehensive exam as well as submit a videotape to be assessed for the procedures they use. (42) A certification program similar to this could be adopted and implemented by the administrative agency, or all hiring could be based on

mediators having this certificate.

### *Procedural Expert*

An administrative structure provides an advantage for solving procedural difficulties. The advantages over traditional courts are numerous. Economy, speed in decision making, ability to quickly meet new conditions and freedom from technicalities are but a few. Administrative agencies have been able to relax the formal rules of evidence and avoid heavy reliance on adversarial techniques. (43) These advantages address some additional criticisms faced by mediation. One is that because mediators have no recognized power, they are unable to compel disclosure of financial statements which may be crucial in determining property division and child and spousal support. Within an administrative structure mediators can be given this ability in the enabling statute.

A second criticism that can be addressed involves the private nature of mediation. The concern is that no one outside of the parties and the mediator can monitor what has transpired because the proceedings are not recorded. The lack of record means the process cannot be assessed for its fairness and there is no way to review the values brought to bear in reaching the settlement. A record would permit an examination of the underlying beliefs and thus combat the concern that the process reinforces the existing social order. Without a transcript there is no way to challenge procedural inadequacies. (44) Rules for record keeping and general documentation can be easily mandated within an administrative agency.

A related concern is that mediation causes a re-privatization of the family as the necessary public scrutiny is removed when divorce is taken out of the court. The discussion so far has contrasted mediation with litigation. The reality of divorce proceedings is that up to 90 percent of divorces settle out of court after a process of bargaining that occurs between the parties? lawyers. (45) Available evidence suggests parties do not go to court at all until they have worked matters out and are ready for the judicial rubber stamp. Mnookin and Kornhauser state that consideration must be given to what substantive or procedural safeguards are necessary to protect various social interests when negotiations are done in this way, namely outside of the courtroom between lawyers. The authors state that perceived legal standards, regardless of their correctness, can have serious effects on the relative bargaining power of the parties. (46) Even for those couples who do not conduct their divorces through the court a new structure is needed. This need may be even greater than for those couples whose agreement at least reaches the eyes and ears of a judge. Settlements out of court are made in the shadow of the law. Being outside of the court house does not reduce the adversary nature of the process but rather places it in the back and forth, unmonitored lobbying of lawyers each out to achieve the best result for their client.

An administrative agency could address these difficulties. It offers a venue that, although not as public as the courts, is more public than existing court-connected mediation programs. The privatization of divorce law would be less in an administrative (public) structure than if the parties continue to go behind the closed doors of their lawyers or private mediators. As has been mentioned, the use of specially trained mediators will do more to balance power differentials than the existing negotiations done between lawyers based on their predictions of what a judge might do. The rubber stamp of the court can just as easily become that of the administrative agency. This rubber stamp would at least be done by an expert with the time to scrutinize the agreement to ensure it meets societal standards of fairness.

One of the most important concepts in administrative law is "natural justice". Although natural justice can be understood generally as fairness, it is usually concerned with two main issues - fair procedure and bias. Fair procedure encompasses the right to be heard. This includes the right to notice that a decision is being made that affects the person, the right to have each side of the issue presented to the decision-maker, the right to know the information being considered by the decision-maker and to comment on it, and the right to have the decision made on the information presented, not on extraneous materials. (47)

This right is to be heard by an unbiased decision-maker. Natural justice as a guiding principle of administrative law ensures a high standard of fairness for parties going through mediation within its structure. In a mediation setting the parties will be accorded a corresponding opportunity to participate in the negotiations leading up to an agreement. Exclusion from the negotiation process would likely be seen as tantamount to a breach of natural justice. (48) This guarantee will be present for mediation conducted as part of an administrative agency but will continue to not be for parties who go to a private mediator or even a court-connected mediation program. As a guiding principle, natural justice also requires a degree of record keeping. While records would need to be kept on all sessions, provisions could exist to state the records cannot be used by one party against the other in adjudication, so as not to undermine the cooperativeness of the mediation process.

### *Adjudicator*

Administrative agencies often perform adjudicative functions. This could occur when conflict arises between private parties but the existing courts are not seen as a suitable forum for the resolution. The problem may be a lack of expertise or simply the large number of adjudications needed. The advantage of administrative agencies as adjudicators is their ability to relax the rules of evidence and in not being constrained by precedent. (49) This has obvious benefits for divorce adjudication. Divorcing spouses usually have no incentive to take cases to court for their precedential value. A divorcing spouse will generally have no expectation that an adjudicated case will create precedent, or that any precedent created will be of personal benefit in future litigation. (50) Divorce cases need to be decided on their own specific circumstances, a process which is more suited to the flexibility of administrative agencies than the adherence to *stare decisis* by the courts. In a comprehensive structure an adjudicative function could be carried out as but a small part of the larger workings. Couples who are not suited to mediation, or who are left with one issue in dispute, could go before a tribunal that is equally specialized. The agency could supply each spouse with independent advice but allow them to make their own arguments on the issues they feel are relevant. In this way an adjudication could still promote autonomy and a sense of involvement and control, even though it involves a more adversarial structure.

An adjudicative function, in some fashion, is a key component simply to address the current time delays in getting disputes before the courts. For example, a couple who has completed their divorce but subsequently needs to modify the custody agreement is faced with having to return to their lawyers and possibly a judge. A parent who is denied access on the weekend may have to wait months to get before a judge to have his or her access agreement enforced. In the least, an administrative agency could be given jurisdiction for hearing modifications and issuing interim orders to satisfy the parties' needs in the short-term. An available adjudicative function will also answer the concern that mediation does not protect individual rights. The option of appearing before an unbiased decision-maker, with independent advice, will allow the parties to advocate for their own interests as needed.

### *Other*

Some other functions of administrative agencies that are supportive of placing divorce in this model, are roles as manager, investigator, researcher, and educator. Agencies are often set up for no other reason than to manage a particular program, conduct research or monitor an activity. A comprehensive administrative agency for divorce would carry out all of these functions. Research in particular is needed for ongoing law reform in the area. Accurate information on divorce is difficult to collect because of the fragmented and varying avenues available for dissolving marriages. One final function of administrative agencies worthy of mention is their role as intermediaries. Administrative agencies have an important role as an intermediary in areas where the division of legislative power makes cooperation between the provinces and central government essential. (51) Divorce is certainly an area requiring joint effort from the two levels of Canadian government.

## CHILD CUSTODY DISPUTES IN ALBERTA

Support for a similar, alternative model of divorce resolution has been proposed in an article by the Honorable Hugh Landerkin, a provincial court judge in Alberta. (52) He proposes the court move to a summary administrative model, particularly for handling custody disputes. He states explicitly that this model moves the court closer to an administrative tribunal, thus requiring the court to pay particular attention to natural justice issues. Judge Landerkin states that research on procedural justice shows that with attention to procedure design, a court can enhance not only the quality of the relationship between the litigants but also their satisfaction with the judgement regardless of what it says. (53) Satisfaction can come from more than just favourable outcomes.

Judge Landerkin proposes a three-stage model to improve the existing court process. The first is an application stage where the court adopts a standardized affidavit both parties must complete so the court obtains a base of information about the parents and the children. The second stage is judicial dispute resolution. The court affirms two basic concerns of procedural justice, first the need for normative standards to obtain efficiency and legal objectivity, and second, the need for the parties to participate fully in the process. This stage effects a balance between the right of divorcing spouses to private ordering and the inherent checks afforded by the public ordering of a court system. At this stage the judge adopts the role of mediator. If no success is achieved, the judge can proceed by offering a mini-trial hearing. This allows the parties to receive a non-binding, judicial expression of opinion with a view to settlement. During the mini hearing the judge employs all of his or her knowledge and experience to help the parties reach a solution without the necessity of trial adjudication. The judge uses mediation skills to work with the parties, in an open court, on record, without hearing evidence, in an attempt to resolve the conflicts. This may be done over time, through a series of consent orders and adjournments, as long as the case moves toward a disposition. If the process continues to be unsuccessful, the judge completes the mini-trial by rendering a non-binding expression of judicial opinion. This opinion will be based on the best interests standard, after the judge has acquired information from the full participation of the parties in an informal manner. If the conflict is still unresolved, the parties move to the third and final stage - they are given a trial date before a new judge. (54)

This search for a new approach is motivated by a concern about the ever-increasing volume of custody disputes filed in the court. The goal is to explore alternatives to court resolution as both the court and the litigants search for alternative tools to aid in this task of dispute resolution. Courts are moving away from idealized notions of the adversarial system of dispute resolution. (55) The argument in this paper is that Judge Landerkin's model is better suited to an administrative institution. The principles of all three stages can be conducted there. Instead of a judge, the stages would be conducted by a specially trained mediator, arbitrator or tribunal member. The administrative structure would reduce the cost as its employees would not be paid judges' salaries. It also has the time flexibility that is required to conduct the process properly. Judges' many responsibilities would restrict the amount of time they could spend with a family. The administrative agency can also complete the gaps in service delivery by offering additional education, counseling, and order enforcement programs. The comprehensive administrative model argued for here requires seeing administrative law beyond the heavily adjudication-oriented version that is popularly perceived. Administrative law must be seen as a

framework for empowerment to appreciate that collaborative models are usually more productive than adversarial ones. (56)

## DENMARK

Henrik Andrup argues that the means used to resolve disputes on divorce should depend on the end sought to be achieved. (57) He identifies four objectives of matrimonial procedures: a) preserving the

marriage, b) moralizing conflict resolution, c) safeguarding the best interests of the child and d) assisting broken families. The two procedures he discusses for achieving these objectives are the traditional court proceedings and administrative matrimonial proceedings.

Andrup argues that while the traditional court may be adequate for objectives a) and b), it is definitely irrational in realizing either objective for protecting the best interests of the child or assisting broken families. Therefore, legal systems that have given up moralizing or prohibiting divorce can manage the latter two objectives better through an administrative structure. Both objectives are achievable through natural administrative functions that require officials with extensive insight in the type of problems divorce creates. An administrative structure would employ people thoroughly trained as experts, or have a larger staff of specialists, each representing a narrower field.

The state will always want to place limits on what spouses agree to on marriage breakdown. All agreements would require the official's approval for registration and validity. Andrup suggests it is natural to assign this controlling function to the advising, guiding and registering administrative authority. The result is a public institution to which the whole divorce clientele is directed and which deals with all problems of divorce.

The Danish experience is that even "unprepared" spouses will be able to manage their own problems after a single discussion alone with a qualified employee. If the advisor succeeds in providing a complete settlement of which she or he can approve the documents are drawn up and registered, without any court hearing. Ninety percent of all divorces are concluded under this administrative model in Denmark. The families have the benefit of lower costs (no lawyers) and a much faster resolution than in the courts.

The main problem identified by Andrup is when parties cannot reach an agreement. The administrative authorities must still help to find solutions. However, if the situation is regarded as adjudicating a conflict between two private parties, there is a danger the administration will trespass in the sphere of the courts. He goes on to argue that it may not always be correct to define and/or place family disputes on the same footing as other types of conflicts between private citizens. Conflicts between spouses are not comparable to disputes between citizens who have not experienced the intimate contact of matrimonial cohabitation. The better distinction may be to ask if conflicts involving the best interests of children are conflicts of a judicial nature. It has been proven that court proceedings have direct and damaging effects on children. This leads to the conclusion that judges are less suited to making determinations on the child's best interests than a specialized administrative official who has negotiated with parents and child.

## **DIVORCE AND THE CONSTITUTION**

### *Fragmented Jurisdiction*

Under the Canadian Constitution the government of Canada appoints judges of the superior courts, while the provinces appoint judges for their respective provincial courts. The provinces do not have the authority to confer upon a provincial court judge the jurisdiction to deal with matters which are recognized as solely within the purview of the superior courts. Provincial court judges hear a large volume of family law cases. When dealing with family matters the provincial court is often referred to as "family court". Judges in this court hear cases dealing with maintenance, custody, access and guardianship. They also deal with applications for variations of provincial court orders and enforcement of maintenance orders made by either the provincial or superior courts. Family court judges cannot deal with cases arising under the federal *Divorce Act* or matters involving the ownership of matrimonial property. These matters have come exclusively within the jurisdiction of superior courts. However, superior courts can be given jurisdiction over all the above mentioned family law matters to add to their existing jurisdiction over matrimonial property and applications for divorce and corollary relief. (58)

The provincial power to create courts is by virtue of section 92(14) of the *BNA Act*, 1867, which confers power in relation to the administration of justice in the province. Provincial courts established under this provision are confined to issues governed by provincial law. Section 96 of the same Act imposes limits on the power of provincial legislatures to invest jurisdiction in

provincial courts. Section 96 implicitly stipulates that a province may not vest in an inferior (provincial) court a jurisdiction that is analogous to that exercised by a superior court. (59)

Most family law has come about since Confederation and as new laws have been created the provinces have tended to vest the adjudicatory power in their own inferior courts. In the *Adoption Reference*, [1938] S.C.R. 398, the Supreme Court of Canada considered the validity of four provincial statutes concerning adoption, neglected children, illegitimate children and deserted wives. The legislation was cast into constitutional doubt because each statute conferred a new jurisdiction on the inferior court of the province. The Court held that s. 96 contemplated the existence of limited jurisdiction courts and this jurisdiction could be expanded when it remained within the competence of the province. The Court found that provisions for adoption orders, enforcing maintenance obligations and child protection were analogous to the traditional jurisdiction exercised by the justice of the peace, not the superior courts. (60)

In *Re B.C. Family Relations Act*, [1982] 3 W.W.R. 1 (S.C.C.), the Supreme Court followed the *Adoption Reference* and upheld the provincial court's jurisdiction over guardianship and custody. The reasoning was that once adoption has been admitted to be within the inferior court's power then the included orders of custody and access should not be treated differently. However, the court struck down provisions permitting the provincial court to make orders with respect to the family home. This kind of remedy involved adjudication of property rights and injunctive relief, power that was more conformable to that exercisable by a s. 96 court. (61) The decision shows that a unified family court would have to be established at the superior court level, a s. 96 court, to permit all jurisdiction for family matters to be handled in one place. The substantive law of divorce is within federal legislative authority, so it is the federal Parliament that has the power to invest courts with divorce jurisdiction. The federal Parliament has chosen, at this point, to confer divorce jurisdiction on the superior courts in each province. (62)

The practical difficulties of a split jurisdiction between superior and inferior courts are that litigants who commence proceedings in provincial court may find only a partial resolution of the issues. A provincial court judge may enforce a superior court order, such as maintenance made in connection with divorce, but only a superior court may vary such orders. The desired enforcement will thus be delayed if either party argues for a variance of the order. (63)

Economic consequences for litigants also flow from the fragmented jurisdiction. Study has shown more litigants will go to the provincial court without legal representation. By virtue of its simpler process and summary procedures the provincial court is the forum where persons with limited resources seek an inexpensive resolution of their problems. Superior court procedures are governed by a complex set of rules dealing with all aspects of a case. The procedures there presume a lawyer will be involved. The result of these differences is that cases involving significant amounts of money end up in superior court while those without, land in the inferior court. (64) The need is for a court that can meet all citizens needs regardless of economic

status. Unified family courts have certainly been an attempt to lessen confusion, but by virtue of the above s. 96 discussion, the creation must be of superior (unified family) courts.

### *Transfer of Jurisdiction*

In February, 1979, the federal government reached a tentative agreement with the provinces for the

transfer of the legislative power over ?marriage and divorce? from the Parliament to the provincial legislatures. (65) There is no doubt that within the list of federal legislative powers, marriage and divorce is an anomaly. Historically, it resulted from the desire of Quebec to make the procurement of divorce more difficult for a Protestant minority in a predominantly Roman Catholic province. Having the power in federal authority kept the ability to create legislation out of their hands. Since 1867, popular beliefs and attitudes have changed to the point it is no longer defensible to have such an artificial distinction - federal power over the beginning and end and provinces everything in between and after - for the original reason. (66)

The essence of the proposal was that jurisdiction to grant divorces and corollary relief would transfer to those provinces who wished to have it, those who did not would remain under the federal *Divorce Act*. The federal government would have power to set jurisdictional rules to determine when a province acquires jurisdiction to grant a divorce (ie: residency requirements). Also, the federal government would retain jurisdiction over extra-provincial enforcement, or a constitutional provision would require each province to recognize and enforce orders of another province. The proposal was justified on the arguments that divorce is a matter of strictly local and private concern, the transfer of jurisdiction to the provinces would enable each to make laws to conform more closely to the local and ethical values of Canadians living in the provinces, and a transfer to the provinces would permit a more integrated approach to family law within the provincial jurisdiction. (67)

Arguments against the transfer were sufficient to stop the proposal from going through. Some of the arguments against the transfer were that it could lead to the creation of provincial marriage havens and divorce meccas, provincial variations could occur without any basis in social or ethical differences, and transferring jurisdiction of marriage and divorce to the provinces would increase the problems of inter-provincial recognition of marriages and divorces, the increasing mobility of Canadians would only aggravate this problem. A Constitutional guarantee that divorces granted in one province will be recognized throughout the country does not automatically solve problems relating to the enforcement, variation and discharge of corollary orders respecting custody and maintenance. Further support against such a transfer can be seen in the ongoing confusion for litigants in the United States (no national regime), as well as in Australia's decision to move to a federal regime. (68) The failure of this proposal shows that a new scheme over divorce must have provisions for a national (central government) component.

### *Delegation*

The undesirability of transferring divorce jurisdiction to one level of government means that creating an administrative agency with complete jurisdiction will require a scheme where both levels delegate functions to one body. This may be in the form of one level delegating power to an administrative agency created by the other or both delegating functions to a body created in a cooperative effort. In the *Nova Scotia Interdelegation* case, [1951] S.C.R. 31; [1950] 4 D.L.R. 369, the Supreme Court of Canada rejected the argument that the federal Parliament and provincial legislatures could delegate legislative power directly to one another. Each level of government is sovereign in their own sphere as defined by the *BNA Act*, and can only exercise the legislative powers given to them by sections 91 and 92. The court has relaxed this position to permit extensive delegation between governments through various devices. One device is administrative delegation, whereby functions are delegated to an official, minister or administrative tribunal of the other level of government, or to a tribunal created by both levels. (69)

In *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569, 68 D.L.R. (2d) 384, the Court examined the federal *Motor Vehicle Transport Act* which delegated power to provincial highway transport boards to regulate inter-provincial trucking, a matter within federal jurisdiction. Justice Cartwright writing for a 5-2 majority stated it is well settled that Parliament may confer upon a

provincially constituted board the power to regulate a matter within the exclusive jurisdiction of Parliament. Parliament did not delegate its law making power but rather maintained the ability to terminate the powers given to the Board or alter the manner in which the powers are exercised. (70) The legislative scheme here was an administrative inter-delegation coupled with an anticipatory incorporation by reference. To avoid the *Nova Scotia Interdelegation* prohibition on delegating legislative powers, the federal Parliament delegates to an agency of the provincial legislature and directs that agency to apply provincial law. (71) When combined, inter-delegation and incorporation by reference can offer a means to an integrated approach to complex socio-economic issues that require involvement by both levels of government.

*Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198; 84 D.L.R. (3d) 257, involved the constitutionality of several pieces of legislation creating a solution, through federal-provincial cooperation, to the problems of regulating the marketing of agricultural products. The majority of the Court found the scheme to be legitimate, a finding otherwise would mean the Constitution makes it impossible, by federal-provincial cooperation, to arrive at a practical scheme for a product involving intra-provincial and extra-provincial trade. The scheme created a body properly empowered by provincial authority to regulate intra-provincial trade and was properly delegated authority from the federal government for extra-provincial trade. (72)

These two cases legitimate the ability of the federal and provincial governments to create an administrative body to deal with issues of combined national and provincial concern. Divorce and its consequences are certainly issues that cross provincial boundaries, particularly in light of modern mobility. The recommendations of the Special Joint Committee on Child Custody and Access call repeatedly for federal-provincial cooperation, demonstrating that divorce concerns have reached a state that requires joint governmental efforts in service delivery to divorcing families. The recommendations require cooperative measures to establish a nation-wide response to failures in parenting orders, a national computerized registry for parenting orders, legislative amendments to give consistent rights to extended family members across the country, public awareness programs and continued efforts for a unified, single body to adjudicate family matters. (73) The needed response to divorce and its ancillary matters requires a cooperative scheme of delegation, and an obvious venue is an administrative agency created through delegation.

### Section 96

If the scheme to create an administrative agency for divorce involved a provincially created tribunal with delegated functions from Parliament, the constitutional concerns are not over. Section 96 has come to stand for the claim that the judicial function (as performed by superior courts) cannot be eroded through the provincial legislatures or Parliament enacting legislation which assigns such functions to non-court decision-making agencies. The value behind this constitutional restraint may well be a desire to keep significant legal adjudication in the hands of judges - a group marked by legal training and security of tenure and pay. Others, however, have criticized the judicial interpretation of s.96 as unduly constraining the provinces in their choice of institutional structure for the administration of provincial laws. (74)

In *Labour Relations Board of Saskatchewan v. John East Iron Works Ltd.*, [1949] A.C. 134; [1948] 4 D.L.R. 673 (P.C.), the Privy Council examined the constitutionality of powers given to a Labour Relations Board. The Court posed two questions to consider the Board's validity: is the power exercised judicial or administrative?; and if it is judicial, is the tribunal analogous to a superior, district or county court? (75) The *John East* test has given way to a similar, yet more comprehensive test created by Justice Dickson in *Reference Re Residential Tenancies Act*, [1981] 1 S.C.R. 714; 123 D.L.R. (3d) 554. In this case the court looked closely at the impact of s.96 on provincial administrative tribunals. Dickson J. suggested a three-step approach to the resolution of a s.96 challenge to an administrative tribunal's

powers. The first step is a historical inquiry into the power to see whether it "broadly conforms" to the powers of a superior court at Confederation in 1867. In *Sobeys Stores Ltd v. Yeomans and Labour Standards Tribunal (NS)*, [1989] 1 S.C.R. 238; 57 D.L.R. (4th) 1, Justice Wilson clarified this step. If the inquiry finds the jurisdiction was exclusively within the power of the superior courts, it goes directly to the next step. If, however, the jurisdiction was shared, the legislation may be held to be valid on the historical test. To be shared the work must have been broadly coexistent with that of the superior courts at Confederation. The historical inquiry is a nation wide examination of the conditions in 1867. (76)

Early divorce laws in Canada differed from province to province depending on the date when English law was received in the province. In Newfoundland and Quebec until 1968, and Ontario until 1930, there was no judicial procedure to obtain a divorce, a federal act of Parliament was necessary in every case. (77) England's first divorce legislation was in 1857, which conferred divorce jurisdiction on the superior courts. For the four Western provinces and two territories this legislation was their first divorce legislation, as of their respective reception dates. Nova Scotia, New Brunswick and Prince Edward Island, however, had each enacted their own divorce laws prior to their entry into Confederation. Divorce jurisdiction in 1867 was thus a combination of Parliamentary enactments in Ontario and Quebec and provincially created court processes in Nova Scotia and New Brunswick. On the historical inquiry step it cannot be said that divorce jurisdiction was exclusively in the power of superior courts.

The historical inquiry will differ depending on the adjudicative function being examined. On a general inquiry for jurisdiction over granting divorces, the power was not exclusively in the hands of s.96 courts. However, in *Re B.C. Family Relations Act*, discussed above, the court found that inferior courts could not make orders with respect to the marital home because property division was conformable to a power exercisable by a s.96 court. (78) On the historical inquiry test an adjudicative function within an administrative agency may pass for granting divorces, custody and guardianship orders, but likewise violate s.96 for any orders having to do with property.

The second step of Dickson's s.96 test requires a consideration of the judicial function within its institutional setting. The inquiry is to determine if the function is different in its context, and thus no longer said to be judicial. A tribunal faced with a private dispute between parties, called upon to adjudicate through the application of a recognized body of rules, in a manner consistent with fairness and impartiality, is normally said to be acting in a judicial capacity. A judicial task involves the consideration of competing rights of individuals or groups.

An administrative function would involve a question of policy, involving the competing views of the collective good of the community as a whole. (79)

In the setting of a larger institution, an adjudicative function is part of a complex (complete) social scheme to deal with family break ups. The function is part of a comprehensive attempt to assist families and ensure protection for children and disadvantaged spouses. The scheme is in part to meet a need for accessibility by offering lower costs, less formal and more timely procedures. The objective, even of the adjudicative function, is to reduce the conflict between the individuals and look for a solution for the whole family that will combat the long-term negative effects of divorce. In this way the function is more toward improving the parties' contributions to the family and the community, rather than to declare a winner between two individuals. As part of a large agency whose purpose is empowerment through settlement and education, the adjudicative function should not even resemble the traditional adversary model used by judges. The adjudication process would not be constrained by strict rules but would allow the parties to speak before the tribunal, offering the facts and information they find relevant. In this scheme the adjudicative function is one of policy as its goal is to remove the long-term effects of divorce. The result will be that people affected by divorce are better able to function at home, work, school and in the community-at-large.

The final step in Dickson's analysis is to review the tribunal's function as a whole, its setting in the institutional arrangement. Depending on its context, it is possible for an administrative tribunal to exercise powers and jurisdiction which were once exercised by s.96 courts. The scheme will be valid if the judicial powers are merely a subsidiary or ancillary to the general administrative functions, or if the powers are necessarily incidental to the achievement of a broader policy goal of the Legislature. The scheme will be invalid when the adjudicative function is a sole or central function of the tribunal. (80)

The administrative scheme envisioned here is not the creation of a tribunal to replace the court in hearing divorce applications. It is a vision of a comprehensive agency that can offer education, counseling, mediation, enforcement and other forms of assistance necessary for families to rebuild their lives after divorce. An adjudicative function is not a central feature. It is

an incidental requirement for full service delivery. A mechanism needs to exist for families who are not appropriate for mediation or who come to agreement on all but one or two issues.

### *Result*

The creation of an administrative agency for divorce, if done properly, can avoid the major constitutional barriers. *Re Agricultural Products Marketing Act* allows a cooperative scheme between the two levels of government where the issue is such that it falls in provincial and federal authority. Throughout this paper it has been argued and shown that this is the case for divorce. The current manifestation of divorce requires measures to remove the complexity of a split jurisdiction, but more importantly to move family breakdown away from the adversarial process. If not done through a joint scheme, *Coughlin* allows the delegation by Parliament to a provincial administrative body. Parliament cannot delegate, or in any way give away, its law making power. All that need be delegated is a regulatory function. The Parliament and provincial legislatures would continue to monitor and legislate on divorce according to society's

needs. The administrative tribunal can use delegated rule making power for ongoing tinkering to achieve appropriate procedures and regulation to meet new circumstances as they arise.

The greatest challenge to a provincial administrative agency that offers an adjudicative function would be that it is in violation of s.96. The above discussion demonstrates how an agency could be designed to make it past the test set up in *Reference Re Residential Tenancies*, and thus operate constitutionally. The last step of Dickson's test may even allow the adjudicative component of an administrative agency to deal with property division (clearly a s.96 function), where it is incidental to the larger purpose of mediating and settling disputes through negotiation.

The main concern of section 96 is that the provinces cannot take the traditional jurisdiction of the superior courts or the appointment power of the Governor General. As has been mentioned, this is why unified family courts can only validly be created in superior courts. Section 96 was a bar to a federal-provincial scheme to create a unified criminal court, with provincially appointed judges, in *McEvoy v. Attorney General of New Brunswick and Attorney General of Canada*, [1983] 1 SCR 704, 148 DLR (3d) 25. The scheme failed Dickson's test as the proposed court was obviously a judicial body; its judicial aspect did not change when considered in its factual setting; nor would it exercise administrative powers to which its adjudicative functions were incidental. (81) The proposal in *McEvoy* was for a statutory court which is distinguishable from the scheme envisioned here. The adjudicative function is not central and, for the most part, is undesirable. If necessary, the enabling statute could recognize a right of appeal to the superior court of the provinces, and maintaining a judicial-adjudicative role there.

## **CONCLUSION**

This discussion has only scratched the surface of many issues that warrant a comprehensive examination in and of themselves. At the same time, some very important considerations (ie: service to common law relationships or relationships with violence) have gone unmentioned. It was simply not possible to cover every aspect or issue that might arise in proposing a new approach in this area of family law. The purpose here is to offer administrative law as an avenue for a better approach to resolving marriage breakdown. By looking at the evolution of divorce law, its history and future, it is clear the issues are multifarious and presently are being dealt with in a very fragmented way.

The scheme here encourages the already emerging trend toward federal-provincial cooperation. Together, the two levels of government can create an all-service agency whose purpose is to reduce the short and long-term hardships imposed by divorce. The result would find people more settled in their personal lives and thus better able to contribute to their family, community and country. This goal can only be achieved by removing divorce from the adversarial system and giving the process back to the parties - by providing state support, not state control. To embrace the administrative agency proposed here as an answer requires seeing divorce law as unsettled and in need of a new approach to resolve its many issues. It also requires seeing administrative law not as a system of negative control, but as a forum amenable to a process of empowerment.

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APPENDIX A

Department of Justice Canada

Dispute Resolution Award in Law Studies

**New Directions: Divorce and Administrative Law**

by

Kathy Carmichael

June 30, 1999

**APPENDIX A**

**CHRONOLOGICAL DEVELOPMENT OF FAMILY MEDIATION IN NORTH AMERICA**

ORGANIZATION DEVELOPERS YEAR

Conciliation Court Meyer Elkin 1961

Los Angeles County Hugh McIssac

The first court-based mediation service in North America.

Association of Family and Judge R.A. Pfaff 1963

Conciliation Courts Meyer Elkin

The first international association of family mediators. Initially directed at court-based services, more recently it has included private mediation as well.

Divorce Counseling Unit Gerry Gaughan 1969

Health and Welfare

Ottawa, Ontario

The first initiative by the federal government, following the enactment of the *Divorce Act* in 1968, to encourage established counseling services to offer conciliation services to divorcees.

Supportive Separation System Mario Bartoletti 1971

Family Life Centre Judge T. Moore

Markham, Ontario

The first non-court based family counseling agency in Ontario offering comprehensive conciliation services to separating couples.

Conciliation Services Judge M. Bowker 1972

Family Court

Edmonton, Alberta

The first court-based conciliation service in Canada.

Conciliation Counseling Judge David Steinberg 1973

Family Court

Hamilton, Ontario

The first court-based conciliation service in Ontario.

Conciliation Project, Prov. Ct. Howard Irving 1974

Family Division Judge H.T. Andrews

Toronto, Ontario

A three-year demonstration research project, funded by Health and Welfare Canada, examining the effectiveness of family conciliation services.

Family Mediation Association O.J. Coogler 1975

Bethesda, Maryland

The first mediation association focused on private mediation.

Frontenac Family Referral Judge G. Thomson 1975

Services, Family Court

Kingston, Ontario

The first court-based, comprehensive mediation service in Ontario, offering assistance with such issues as custody, access, property and financial support.

Conciliation Service Judge J. VanDuzer 1977

Unified Family Court

Hamilton, Ontario

The first federal-provincial venture establishing a court-based conciliation project.

Academy of Family Mediators John Haynes 1978

Claremont, California

An association of family mediators that encourages a more clinical approach to mediation.

Family Conciliation Service Chief Justice Jules Deschenes 1981

Superior Court

Montreal, Quebec

The first court-based conciliation service in Quebec offering comprehensive mediation.

Ontario Association for John Goodwin 1982

Family Mediation Mario Bartoletti

Toronto, Ontario Ellen Macdonald

The first provincial family mediation association in Canada.

Family Mediation Services James MacDonald 1982

of Ontario Phillip Epstein

Toronto, Ontario

The first court-based conciliation service in Ontario, established specifically for the Supreme Court.

The Family Mediation Fran Kitley 1984

Project, Law Society of Barbara Landau

Upper Canada Legal Aid; Craig Perkins

Sub-Committee on Mediation

and Assessments

The first research project to evaluate the cost-effectiveness and social benefits of mediation services for legally aided clients.

Family Mediation Canada Howard Irving 1984

Toronto, Ontario Audrey Devlin

The first national mediation association in Canada, with representatives from every province. Established by the Department of Justice.

Code of Professional Conduct Barbara Irving 1986

Ontario Association for

Family Mediation

The first code of conduct for family mediators established in Canada.

Taken From: Landau, B., M. Bartoletti & R. Mesbur. *Family Mediation Handbook* (Toronto: Butterworths, 1987) at 11 - 13.

1. M. Shaffer, "Divorce Mediation: A Feminist Perspective" (1988) 46:1 *U. Toronto Fac. L. Rev.* 162 at 163-65. Section 9(2) reads: It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters.
2. Canada, Report of the Special Joint Committee on Child Custody and Access, *For The Sake of The Children* (Ottawa: Public Works and Government Services Canada, December 1998) (Joint Chairs: L. Pearson & R. Galloway) [hereinafter *For the Sake of the Children*] at xvii - xxiii.
3. Statistics Canada, *Divorce: Law and the Family in Canada* (Ottawa: Minister of Supply and Services Canada, 1983) at 6-7.
4. *Ibid.*
5. J.G. Snell, *In the Shadow of the Law: Divorce in Canada 1900-1939* (Toronto: University of Toronto Press, 1991) at 9.
6. *Ibid.*
7. H.H. Irving & M. Benjamin, *Family Mediation: Theory & Practice of Dispute Resolution* (Toronto: Carswell, 1987) at 28.
8. Canada, *Report of the Special Joint Committee of the Senate and House of Commons on Divorce* (Ottawa: Queen's Printer, June 1967) (Joint Chairs: Honourable A.W. Roebuck, Q.C. & A.J.P. Cameron, Q.C., M.P.) [hereinafter *Report on Divorce*] at 52.
9. Irving & Benjamin, *supra* note 7 at 33.
10. *Ibid.* at 49.
11. *Report on Divorce, supra* note 8 at 47-51.
12. Irving & Benjamin, *supra* note 7 at 49.
13. *Report on Divorce, supra* note 8 at 50-51.
14. C. Davies, Q.C., "Divorce Reform in England and Canada" (1993-94) 10 *C.F.L.Q.* 285 at 287.
15. Statistics Canada, *supra* note 3 at 3.

16. 0Canada, Department of Justice, *Evaluation of the Divorce Act: Phase II - Monitoring and Evaluation* (Ottawa: Bureau of Review, May 1990) at 32-33.
17. 0*For the Sake of the Children*, *supra* note 2 at 3.
18. 0*Ibid.* at 10-11.
19. 0Canada, Department of Justice, *Court-based Divorce Mediation in Four Canadian Cities: An Overview of Research Results* by C.J. Richardson (Ottawa: Minister of Supply and Services Canada, February 1988) at 7.
20. 0C. R. Ahrons, *How to Make Divorce Less Painful for Children*. Website <http://ericps.ed.uiuc.edu/npin/pnews/pnewo95/pnewo95e.html>, viewed June 14, 1999.
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22. 0H. Sachs, "The Dejudicialization of Family Law: Mediation and Assessments" in E. Sloss, ed., *Family Law in Canada: New Directions* (Ottawa: Canadian Advisory Council on the Status of Women, 1985) at 86-87.
23. 0B. Landau, M. Bartoletti & R. Mesbur, *Family Mediation Handbook* (Toronto: Butterworths, 1987) at 2-3.
24. 0Irving & Benjamin, *supra* note 7 at 48.
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26. 0Ontario, Policy Development Division, *Report of the Attorney General's Advisory Committee on Mediation in Family Law* (Toronto: Ministry of the Attorney General, February 1989) at 24.
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