BRIEF TO THE LAW AMENDMENTS COMMITTEE ON BILL 131, PARENTING AND SUPPORT ACT

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1. Issues, Background

My comments on Bill 131 are focussed on only two topics:

(1) the continued use of the term "**custody**":
that term should be removed from proposed sections 2(ba), 18(1)(a) and the rest of the current s. 18, and be replaced with the term "parental decision-making authority"; and

(2) the **relocation** provisions:
changes need to be made to clarify the language of the proposed section 18(H)(1)(a) and (b), as well as s. 18H(3). Specific language will be suggested below.

I should state at the outset that the Department of Justice undertook a balanced and methodical process of consultation on the contents of this Bill, in sharp contrast to the inadequate process followed by the Department of Community Services for Bill 131. I commend the Department for its open approach. The result is that I am generally supportive of the contents of Bill 131, with the exception of the two issues identified above. The changes in Bill 131 will generally improve the state of family law in Nova Scotia. I think it could be made better, if the Committee were to make the small, but significant, changes that I am suggesting.

I have taught family law at Dalhousie for the past 30-plus years. I practised family law for many years, as a lawyer in a private firm and as executive director of Dalhousie Legal Aid Service. I have served as a consultant on family law matters to the Departments of Community Services and Justice provincially, as well as to the Department of Justice federally. I served as a member of the Expert Advisory Panel for the family law reform project that led to this proposed legislation. I have lectured to lawyers, judges and mental health professionals in Canada and around the world on relocation issues. I have researched and published widely on the subject, in Canada, the United States and Great Britain. I was consulted by both the British Columbia and Manitoba governments on their relocation provisions. The B.C. changes have been in effect since March 2013. Manitoba's are found in Bill 33, now before their Legislature.

2. That Word "Custody"

Bill 131 wisely moves us away from the traditional win/lose, fixed language of "custody" and "access". Now parents will make "parenting plans", courts will make "parenting orders", parents will have "parenting time", and non-parents will have "contact". By changing the language, we hope to change practices and attitudes. Bill 131 gets rid of "access" and that whole notion of a parent being "just an access parent".

But Bill 131 leaves in that old idea of "custody" of a child, the word that parents really do argue about and the word that really is a source of perennial conflict.

Most of the language of Bill 131 can be traced back to the 2002 proposed changes to the federal Divorce Act, found in Bill C-22, which died on the order paper in 2003. Alberta adopted that modern language in its new Family Law Act in 2003 and B.C. did the same in its 2011 changes (which came into effect in 2013). Bill C-22 replaced "custody" with "exercise of parental responsibilities". Alberta replaced it with the "powers, responsibilities and entitlements of guardianship" (as they retained their concept of guardianship). B.C. uses the term "parental responsibilities".

Bill 131 only goes part way in changing our language. **The word "custody" should be removed and replaced with the term "parental decision-making authority"**, a term already used in the proposed amendments, e.g. the proposed s. 17A(2) that deals with "parenting plans".[1]

3. The Relocation Sections

If the relocation provisions become law, we will be the second Canadian province to legislate in this area. B.C. was the first, with their new Family Law Act which came into effect in March 2013. Manitoba has proposed relocation provisions in their Bill 33, in the new Family Law Act, but finalisation of that bill has been put off to their next sitting. To date, the federal government has not introduced such amendments to the Divorce Act, but there has been much talk about the possibility. Many American states and many other countries around the world have legislated on relocation.

The relocation of parents is now the "hottest" issue in parenting law, in Canada and around the world. It is now the most likely way for parents to end up before the court, when one of them proposes to move far away with a child. Sometimes the move takes place a few years after separation, after a parenting order or agreement has been in place, but more often these days a parent proposes to move shortly after separation, such that it becomes an issue right off the bat. When you review these amendments, keep in mind that 90-95 per cent of parents seeking to relocate with a child are women.

There is general consensus in family law now that mandatory notice of moves by parents makes sense. It is the one point upon which everyone agrees. Bill 131 implements such mandatory notice, in proposed s. 18D for a "change of residence" and in proposed s. 18E for "relocation", with the necessary exemption or waiver of notice where necessary in s. 18F. In general, the provisions of s. 18G and 18H are sound, but they need some small, but significant, changes.

Keep in mind why section 18H is being proposed. Since the Supreme Court of Canada's decision in *Gordon v. Goertz* in 1996, there has been little guidance, and thus little

[1] If there is concern for enforcement of "rights of custody" under the *Hague Convention on Child Abduction*, part of a parenting plan will involve identifying the parent with whom the child shall reside, in s. 17A(3)(a), which should be sufficient for Hague purposes.

predictability, in relocation cases. The Court just said that each case required an inquiry into the best interests of the child, based upon the provisions of the Divorce Act. Almost twenty years later, there is a consensus that Gordon has resulted in less predictability for parents, more litigation, more conflict and more uncertain results. The Supreme Court of Canada has now refused to grant leave to appeal, i.e. to reconsider Gordon, 16 times.

Moves are allowed in Canada generally in about 50 per cent of all litigated cases, but there is much variation across the country: provinces like B.C. and New Brunswick allow 60 per cent of move, Ontario and Alberta about 50%, but Nova Scotia and Newfoundland and Labrador are down below 40 per cent. Much as we can say generally that primary caregivers are allowed to move, and general those with substantially equal shared parenting are not allowed to move, the results in an individual case can be very hard to predict, as each judge has her or his own views on the subject.

Parents need to be able to plan their lives. Lawyers need to be able to advise clients about likely outcomes. And judges need more guidance from legislators, as they aren't getting it from the Supreme Court of Canada. The current version of s. 18H offers some guidance, but it's not clear enough.

The Guidance of Section 18H(1)

I agree generally with the three-pronged approach of s. 18H(1). But two changes should be made, to avoid misinterpretation:

(i) the language of s. 18H(1)(a) needs tweaking, to remove the reference "and any person opposing the relocation is not substantially involved in the care of the child"; and
(ii) the wording of s. 18H(3)(a) should be revised to offer explicit guidance on "actual time" spent with the child, to clarify the guidance of s. 18H(1).

First, **section 18H(1)(a).** As the vast majority of relocating parents are women, this means that the "not substantially involved" phrase will usually be applied to fathers. This feeds directly into gendered stereotypes about parenting roles, where fathers who do a minimal amount of child care are labelled "substantially involved", even though the mothers do more than 80 per cent of the caregiving and are the "primary caregivers".

A focus upon "primary caregiving" under para. (a) means that the evidence will be mostly positive, about the actual care provided by the primary caregiver. Under Bill 131, the primary caregiver has a double burden, not only to prove "primary caregiving", but also to prove that the other parent is "not substantially involved" in the child's care. We now have the relocating parent required to prove something negative, to prove that the other parent is "not substantially involved", which runs contrary to the whole tone of these amendments (which try to avoid the win/lose language of "custody" and "access").

In the result, the inclusion of "not substantially involved" in para. (a) will make it harder for primary caregiving parents to move, when compared to the existing law. At present, if a parent is characterised by a judge as the "primary caregiver", the parent is almost always

allowed to move, provided that the move is planned, on notice and there has been past compliance with access and court orders. Many of these parents would not be able to prove the other parent is "not substantially involved" and thus would fall into para. (c). This version of para (a) will make the outcome less predictable for primary caregivers, which is hardly the purpose of the amendments.

Next, **s. 18H(3)(a).** A better way to clarify the guidance of section 18H(1) is to be more specific about actual time spent with the child under s. 18H(3)(a). I would suggest it be amended to read as follows (additions in italics):

> (3) In applying this Section, the court shall determine the parenting arrangements in place at the time the application is heard by examining
> (a) the actual time the parent or guardian spends with the child *and, more specifically, under subsection 18H(1)(a) above, whether the child typically spends not less than 12 out of 14 overnights in an ordinary two-week period (other than summer months or holidays) with the primary caregiver and, under subsection 18H(1)(b) above, whether the child typically spends not less than 5 overnights in an ordinary two-week period (other than summer months or holidays) with each parent or guardian;*
> (b) the day-to-day care-giving responsibilities for the child; and
> (c) the ordinary decision-making responsibilities for the child.

Note that this subsection specifies three considerations for the court, not just "time". Time must be understood in the context of care-giving and decision-making. The wording I have suggested would put "actual time" in context, but also provide some concrete, practical guidance for parents, lawyers, and judges.

I can understand the Department's concern for the use of any measure of time in s. 18H. We don't want parents to be out there with stopwatches every day. Manitoba's Bill 33 uses only parental time, a bad idea: relocation is favoured if the primary caregiver has the child for more than four-fifths "of the overnight stays over the course of a year" (s. 45(4)), and not if a parent cares for the child "for at least one-third of the overnight stays over the course of a year" (S. 45(3)).

But some guidance on parenting time is important. If the Legislature doesn't do it, then each individual judge will make up their own "guide" on time. Based on my research, this has been the experience in every American state and province that has avoided using time. In B.C., for example, there is an onus on the moving parent where the parents have "substantially equal parenting time". Some judges have interpreted that as not less than 40 per cent of the time, others as 36 per cent, some as low as 29 per cent. One judge said 30 per cent was not enough, another said that 36 per cent was not enough. And remember, the B.C. language is more specific than ours. Our proposed s. 18H(1)(b) just says "a substantially shared parenting arrangement".

Similarly, what does s. 18H(1)(a) mean when it says "primary caregiver" or a person is "not substantially involved"? Will a court conclude that a father who visits every Saturday for 5 or 6 hours is "substantially involved"? Will another court conclude that a parent who spends one overnight a week is "substantially involved"? Keep in mind that what drives clause (a) is the

dominant role of the "primary caregiver" in the child's life. What empirical and clinical knowledge we have tells us that what matters for that child is to remain in the care of her or his primary caregiver, even if she or he is moving. Like it or not, parenting time is an important measure of the primary caregiver's dominant role in the child's life. Not the exclusive measure, but an important measure. Again, if the Legislature does not give any guidance on time, then we leave it to each individual judge to make that decision.

The inevitable result of this vagueness will be more, not less, unpredictability and inconsistency. That's the exact opposite of what s. 18H(1) is intended to do. We need some definition of actual time in s. 18H. We can debate the precise language, or percentages. I have proposed definitions of time that are practical and realistic for s. 18H(3), and that put "time" in its proper context.

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