

***Divorce Act* reforms could be coming down the pipe**

By Cristin Schmitz

July 15 2011 issue

One of Justice Minister Rob Nicholson's new parliamentary secretaries says he suspects the Harper government will roll out *Divorce Act* reforms in its new majority mandate.

"I really don't know at this point — but it wouldn't at all surprise me," commercial litigator and New Brunswick Conservative MP Robert Goguen told *The Lawyers Weekly* as he was winding up his Moncton law practice. "It'd be conjecture," Goguen noted, "but I suspect there will be some. I've seen some of the stuff and I know there is a need for it."



Official Conservative Party policy says the *Divorce Act* should be changed to presumptively grant joint custody to parents, unless it is clearly demonstrated not to be in the best interests of the children. So far Nicholson has been tight-lipped about possible upcoming custody and access amendments, but several years ago he did solicit suggestions for reform from family law practitioners attending the Canadian Bar Association (CBA) annual conference. The CBA has opposed joint custody presumptions as derogating from the "best interests of the child" principle which governs custody and access matters.

Vancouver family law practitioner and Delta-Richmond East MP Kerry-Lynne Findlay, Nicholson's other new parliamentary secretary, told *The Lawyers Weekly* "there has definitely been interest expressed — I know that from [Conservative] caucus colleagues — to see changes in the *Divorce Act* and one of the issues that they zero in on is the idea of joint custody to both parents — even grandparents in certain cases."

The shape of any future reforms are “not my call to make,” emphasized Findlay.

But she also stressed that as a long-time family law lawyer “personally I would want to ensure that that ‘best interests of the children’ test still works within any legislative changes that may come.”

She elaborated: “I would still want to see that as being a cornerstone...Whether the [Act’s] wording might be changed somewhere — or even if presumptions are looked at..., I would fight, frankly, to see that that [best interests of the child] test remains a part of any legislative changes. I believe personally very strongly that what is in the best interests of the child or the children — which is our current test — I believe that works well personally because that can sometimes end up in shared parenting, sometimes one parent carries it more than the other. So personally if that remains paramount and it gives the discretion [to] the parties and lawyers and judges involved to do what’s best for the child, I think that is the ultimate test.”

She noted “that whatever our government does, we are committed to promoting certainly positive outcomes for the entire family...but the child’s best interests, I think, still has to remain the cornerstone test.”

Nicholson’s two parliamentary secretaries are newbie MPs, although neither is new to politics. Both senior legal practitioners have a lot to offer the justice minister with complementary skills and a combined total of 57 years of experience in the legal trenches.

Findlay, 56, was called to the Bar in 1979 after graduating from U.B.C. Law School. The mother of four children, ages 15 through 29, she has practised law in Vancouver, most recently with Alliance Lex emphasizing family, estates and employment law. A former president of the CBA’s B.C. Branch, she is a certified collaborative law practitioner and family law mediator. She also has expertise in general civil litigation and aboriginal land/lease negotiations. She became a part-time member of the Canadian Human Rights Tribunal in 2006. She ran (and lost) for the Canadian Alliance Party in 2000.

Moncton native Goguen, 54, practised corporate commercial law, bankruptcy and insolvency, and civil litigation/personal injury law — most recently with Actus Law. The bilingual father of three (the youngest is 12) is very active in charity work and is also president of the Progressive Conservative Party of New Brunswick. He is a former chair of the Canada Pension Plan Review Tribunal in N.B. (Both parliamentary secretaries are obliged to wind up their practices.)

Goguen said he had "a good run" practising. "It was extremely exciting because there was never one day that was the same," he explained. "Law is such a varied thing." The highlight was "being able to put a smile on people's faces when you were able to deliver the result."

Added Goguen, "what I am doing now is certainly far different than what I have done in the past 27 years as a litigator, but it's every bit as important. And it's a different way of helping people and making society a better place to live."

However unlike when he was practising, as an MP "instead of your being able to sit there and concentrate on anything for an hour, you are lucky if you get 10 minutes before you go on to the next task. It's very, very accelerated," he said.

After years of applying the law, Goguen said he relishes the prospect of helping make law. "It's a very exciting challenge," he enthused.

Despite past accusations from prominent Conservative politicians, including Prime Minister Stephen Harper, that the judiciary is too activist under the Charter and too lenient in sentencing, both Goguen and Findlay were generally laudatory of the Bench.

"I think the courts have been very even-handed. I think they've applied the Charter as they've seen to interpret it," commented Goguen. "I don't see anything that's completely out of whack. We have the brightest minds in the courts and certainly they have a role to play."

Remarked Findlay, "I believe fundamentally in the independence of the judiciary and I think our system is one of the best in the world, if not the best." She said she is "very comfortable" with her party's tough-on-crime approach. "I believe the focus is correct which is the protection of the public, and to spend more energy and focus on protection of the public than perhaps we've seen historically."

To that end, mandatory minimum sentences are sometimes justified, she said. "Having said that there is still a lot of discretion in the judiciary and I respect the exercise of that."

Findlay said her goal as parliamentary secretary is to help achieve "a greater confidence in the judicial system in the public, which I think is brought about by a better balancing between the rights of the accused and the concerns of victims and their families and I think we can do that."

Asked whether she will fight for the rights of the accused as well, Findlay replied “absolutely — of course, because our system — which is what makes it great — is based on being [presumed] innocent until proven guilty so it’s very, very important that we safeguard the rights of the accused, but that we also balance it with the public’s need to have confidence in that system.”