

# Divorce – Legislation

## *Divorce Act*

### **Definitions**

#### **2 (1)** In this Act,

*child of the marriage* means a child of two spouses or former spouses who, at the material time,

- (a) is under the age of majority and who has not withdrawn from their charge, or
- (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life;

*court*, in respect of a province, means

- (d) for the Province of New Brunswick, Manitoba, Saskatchewan or Alberta, the Court of Queen's Bench for the Province.

### **Jurisdiction in divorce proceedings**

**3 (1)** A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding.

### **Divorce**

**8 (1)** A court of competent jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown of their marriage.

### **Breakdown of marriage**

*(2) Breakdown of a marriage is established only if*

- (a) the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding; or
- (b) the spouse against whom the divorce proceeding is brought has, since celebration of the marriage,
  - (i) committed adultery, or
  - (ii) treated the other spouse with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.

### **Calculation of period of separation**

**(3)** For the purposes of paragraph (2)(a),

- (a) spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other; and
- (b) a period during which spouses have lived separate and apart shall not be considered to have been interrupted or terminated
  - (i) by reason only that either spouse has become incapable of forming or having an intention to continue to live separate and apart or of continuing to live separate and apart of the spouse's own volition, if it appears to the court that the separation would probably have continued if the spouse had not become so incapable, or
  - (ii) by reason only that the spouses have resumed cohabitation during a period of, or periods totalling, not more than ninety days with reconciliation as its primary purpose.

### **Duty of court — bars**

11 (1) In a divorce proceeding, it is the duty of the court

- (a) to satisfy itself that there has been no collusion in relation to the application for a divorce and to dismiss the application if it finds that there was collusion in presenting it;
- (b) to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines, and, if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made; and
- (c) where a divorce is sought in circumstances described in paragraph 8(2)(b), to satisfy itself that there has been no condonation or connivance on the part of the spouse bringing the proceeding, and to dismiss the application for a divorce if that spouse has condoned or connived at the act or conduct complained of unless, in the opinion of the court, the public interest would be better served by granting the divorce.

### **Revival**

(2) Any act or conduct that has been condoned is not capable of being revived so as to constitute a circumstance described in paragraph 8(2)(b)

### **Condonation**

(3) For the purposes of this section, a continuation or resumption of cohabitation during a period of, or periods totalling, not more than ninety days with reconciliation as its primary purpose shall not be considered to constitute condonation.

### **Definition of collusion**

(4) In this section, *collusion* means an agreement or conspiracy to which an applicant for a divorce is either directly or indirectly a party for the purpose of subverting the administration of justice, and includes any agreement, understanding or arrangement to fabricate or suppress evidence or to deceive the court, but does not include an agreement to the extent that it provides for separation between the parties, financial support, division of property or the custody of any child of the marriage.

### **Effective date generally**

12 (1) Subject to this section, a divorce takes effect on the thirty-first day after the day on which the judgment granting the divorce is rendered.

### **Special circumstances**

- (2) Where, on or after rendering a judgment granting a divorce,
- (a) the court is of the opinion that by reason of special circumstances the divorce should take effect earlier than the thirty-first day after the day on which the judgment is rendered, and
  - (b) the spouses agree and undertake that no appeal from the judgment will be taken, or any appeal from the judgment that was taken has been abandoned, the court may order that the divorce takes effect at such earlier time as it considers appropriate.

### ***The Marriage Act***

#### **Where party to marriage is under 18**

18(1) Where a party to an intended marriage is under the age of 18 years, no person knowing or having been informed of the age of that party shall issue a marriage licence for the marriage, publish banns in respect of the marriage, grant dispensation of the publication of banns in respect of the marriage, or solemnize the marriage, unless

- (a) the party is a widowed spouse or divorced; or
- (b) if the party is over the age of 16 years and if custody of the party has not been granted to an agency or the Director of Child and Family Services, or some other person, pursuant to an order of a court of competent jurisdiction, consent to the marriage of the party is given

- (i) by the parents of the party, if living, or
  - (ii) if a parent of the party is dead, by the surviving parent, or
  - (iii) if the parents of the party are living separate and apart, by the parent with whom the party is living, or
  - (iv) if one parent of the party has had a committee appointed for him or her under *The Mental Health Act* or, in the opinion of the attending physician, is incapable of giving consent, by the other parent of the party, or
  - (v) if both parents of the party are dead or are prevented from giving consent to the marriage for any of the reasons mentioned in sub-clause (iv), by the guardian of the party; or
- (c) if the party is over the age of 16 years and custody of the party has been granted to an agency or to the Director of Child and Family Services consent to the marriage of the party is given by the Director of Child and Family Services; or
- (d) consent to the marriage is given by a judge of the Family Court.

#### **Production and proof of consent**

18(2) Where a consent is required under subsection (1), it shall be produced to the person issuing the marriage licence, publishing the banns, granting dispensation of the publication of banns, or solemnizing the marriage, as the case may require, and he shall satisfy himself of the genuineness of the consent.

#### **Form of consent**

18(3) A consent required under clause (1)(b) shall be in writing signed by the person giving it and verified by the affidavit or statutory declaration of that person indicating the authority on which the consent is given.

#### **SCHEDULE A (Section 24)**

Degrees of consanguinity which bar the lawful solemnization of marriage.

A person may not marry his or her grandparent, parent, child, grandchild or sibling.

The relationships set forth in this Schedule include all such relationships, whether by the whole or half-blood or by order of adoption.

#### ***The Vital Statistics Act***

#### **Registration of common-law relationships**

13.1(1) If both parties to a common-law relationship

- (a) are living in the province;
  - (b) are adults; and
  - (c) wish to register their common-law relationship;
- they shall do so in accordance with this section.

#### **Statement regarding common-law relationship**

13.1(2) Each party to the common-law relationship shall complete a statement in an approved form respecting the existence of the common-law relationship, which includes

- (a) the date on which the common-law relationship commenced;
- (b) the residence of the common-law partners; and
- (c) a statement that neither party to the common-law relationship is married to another person or is a party to another common-law relationship registered under this Act.

#### **Execution of statement**

13.1(3) The statement shall be signed by both parties and witnessed in accordance with the regulations.

#### **Registration by director**

13.1(4) On the receipt of

(a) the statement in an approved form respecting the common-law relationship; and  
(b) the prescribed fee;  
the director, if satisfied as to the truth and sufficiency of the statement, shall register the common-law relationship.

### ***Civil Marriage Act***

#### **Marriage — certain aspects of capacity**

**2** Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.

#### **Consent required**

**2.1** Marriage requires the free and enlightened consent of two persons to be the spouse of each other.

#### **Minimum age**

**2.2** No person who is under the age of 16 years may contract marriage.

#### **Previous marriage**

**2.3** No person may contract a new marriage until every previous marriage has been dissolved by death or by divorce or declared null by a court order.

#### **Marriage not void or voidable**

**4** For greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex.

### ***Criminal Code of Canada***

#### **Bigamy**

**290** (1) Every one commits bigamy who

- (a) in Canada,
  - (i) being married, goes through a form of marriage with another person,
  - (ii) knowing that another person is married, goes through a form of marriage with that person, or
  - (iii) on the same day or simultaneously, goes through a form of marriage with more than one person; or
- (b) being a Canadian citizen resident in Canada leaves Canada with intent to do anything mentioned in subparagraphs (a)(i) to (iii) and, pursuant thereto, does outside Canada anything mentioned in those subparagraphs in circumstances mentioned therein.

#### **Matters of defence**

- (2) No person commits bigamy by going through a form of marriage if
- (a) that person in good faith and on reasonable grounds believes that his spouse is dead;
  - (b) the spouse of that person has been continuously absent from him for seven years immediately preceding the time when he goes through the form of marriage, unless he knew that his spouse was alive at any time during those seven years;
  - (c) that person has been divorced from the bond of the first marriage; or
  - (d) the former marriage has been declared void by a court of competent jurisdiction.

#### **Incompetency no defence**

(3) Where a person is alleged to have committed bigamy, it is not a defence that the parties would, if unmarried, have been incompetent to contract marriage under the law of the place where the offence is alleged to have been committed.

### **Validity presumed**

(4) Every marriage or form of marriage shall, for the purpose of this section, be deemed to be valid unless the accused establishes that it was invalid.

### **Act or omission by accused**

(5) No act or omission on the part of an accused who is charged with bigamy invalidates a marriage or form of marriage that is otherwise valid.

### **Punishment**

**291** (1) Every one who commits bigamy is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

### **Certificate of marriage**

(2) For the purposes of this section, a certificate of marriage issued under the authority of law is evidence of the marriage or form of marriage to which it relates without proof of the signature or official character of the person by whom it purports to be signed.

### ***The Family Property Act***

#### **Definitions**

1(1) In this Act,

**"common-law partner"** of a person means

- (a) another person who, with the person, registered a common-law relationship under section 13.1 of *The Vital Statistics Act*, or
- (b) subject to subsection 2.1(2), another person who, not being married to the person, cohabited with him or her in a conjugal relationship for a period of at least three years commencing either before or after the coming into force of this definition;

**"common-law relationship"** means the relationship between two persons who are common-law partners of each other .