

Court File No.:

**FEDERAL COURT**

BETWEEN:

L'APRÈS-RUPTURE, FATHERS ARE CAPABLE TOO: PARENTS ASSOCIATION  
(F.A.C.T.) and LEGAL KIDS,

Plaintiffs

- and -

HER MAJESTY THE QUEEN,

Defendant

**STATEMENT OF CLAIM**

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim made against you involves the Best Interests Test under the *Divorce Act*, R.S.C. 1985, c. 3 ("Act") and is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the *Federal Court Rules*, 1998, serve it on the plaintiffs' solicitor or, where the plaintiffs do not have a solicitor, serve it on the plaintiffs, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside of Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the *Federal Court Rules*, 1998, information concerning the local offices of the Court, and other necessary information may be obtained on request to the Administrator of this Court at Montréal (telephone (514) 283-4820) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

August \_\_\_\_, 2003

Issued by: \_\_\_\_\_  
(Registry Officer)

Address of local office: The Registrar  
Federal Court of Canada  
30 McGill Street  
Montreal, QC H2Y 3Z7

TO: ATTORNEY GENERAL OF CANADA  
The Honourable Martin Cauchon  
Justice Building  
284 Wellington Street  
Ottawa, ON K1A 0H8

AND TO: Department of Justice Canada  
André Lespérance  
Guy Favreau Complex  
200 René-Lévesque Blvd West  
East Tower, 9th Floor  
Montréal, QC H2Z 1X4

### **Claim**

#### **I. Relief Requested**

1. The Plaintiffs claim:
  - a. A declaration that the “Current Test” (as defined herein) and sections 16(1), 16(2), 16(8) and 16(10) of the Act are inconsistent with sections 2(b), 2(d), 7, 12, 15 and 28 of the *Canadian Charter of Rights and Freedoms* (“Charter”);
  - b. A declaration that the Current Test and sections 16(1), 16(2), 16(8) and 16(10) of the Act are inconsistent with sections 1(a) and 1(b) of the *Canadian Bill of Rights*, 1960, c. 44 (“Bill of Rights”);

- c. A declaration that the Charter, the Bill of Rights, and the common law, or any of them, require that the Current Test be interpreted so as to require a showing of harm or likelihood of harm to a child before a court may deprive a parent of equal custody of the child;
- d. A declaration that Parliament may not enact legislation regarding child custody that does not provide for the views of the child to be heard and considered by a court addressing the question of custody;
- e. A declaration that Parliament may not enact legislation regarding child custody that treats parents who are married differently than those parents who are not married;
- f. A declaration that Parliament may not enact legislation regarding child custody that prefers the relationship of either parent and their child over that of the other;
- g. A declaration that Parliament may not interfere with decisions, agreements and arrangements between parents regarding custody, care and control of their child (whether conceived or not), absent a showing of harm or likelihood of harm;
- h. Such further and other relief as may be just; and,
- i. Costs of this action on a full indemnity basis.

## **II. The Parties**

- 2. The Plaintiff, L'Après-Rupture, is a corporation registered under the laws of Quebec. The organization's mission is to defend and promote the rights of children, in maintaining strong and essential relationships with their biological parents and extended family, to develop and put in place mechanisms designed to maintain strong and affective relationships with their biological parents and extended families, to assist fathers and

groups of fathers and parents in the promotion of fatherhood and the family, and to develop a social conscience regarding the negative effects on society and the family of the rupture of the conventional family.

3. The Plaintiff, Fathers Are Capable Too: Parenting Association, also known as F.A.C.T., is a non-profit company registered under the laws of Ontario. The organization's objective is to provide support and counselling to non-custodial parents involved in the divorce or separation process, and to promote shared parenting.
4. The Plaintiff, Legal Kids, is a non-profit company registered under the laws of Alberta. The organization's objective is to ensure children's legal rights are respected, maintained and protected during the divorce of their parents.

#### *The government*

5. The Attorney General of Canada is responsible for the conduct of litigation for and against Her Majesty the Queen in Right of Canada and, as Minister of Justice, has the superintendence of all matters connected with the administration of justice in Canada within the jurisdiction of the Government of Canada, including the provision of legal advice to the Government.

### **III. Introduction**

#### *Current system imbalanced*

6. There exists an imbalance in child custody laws and their implementation favouring the mother over the father in the name of the best interests of the child. This claim lays out the legal and constitutional reasons why the current system for determining child custody on family break-up cannot be constitutionally maintained.

#### **IV. The Case**

7. The fundamental freedoms and the principles of equality, privacy and parental responsibility embedded in the Charter, the Bill of Rights and the common law protect and preserve the custodial rights of parents, even after the dissolution of their marriage. The test (“Current Test”) for determining questions of custody and access in the event of a divorce action or in any proceedings relating thereto set forth in sections 16(1), 16(2), 16(8) and 16(10) of the Act is inconsistent with the Charter and the Bill of Rights. Furthermore, common law principles require the courts to interpret the Act in a manner that does not unnecessarily undermine parental responsibilities.

##### *Current Test flawed*

8. The Current Test is biased against fathers. It violates fathers’ rights, including equality, liberty and privacy rights, freedom of association and expression, and other common law and statutory rights.
9. This bias against fathers does not just violate fathers’ rights - it also interferes with family relationships, and improperly deprives children of divorce of the benefits of a full family relationship.

##### *Double standard for state interference with child-parent relationship*

10. The Current Test treats parents whose marriage has broken down differently than parents whose marriage is intact, by establishing a different test for interference in the relationship between the parents and children.

##### *The child-parent relationship survives divorce*

11. The family is the foundational social institution. The make up of one’s family is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal cost. The connection to one’s

family is permanent. The fact that certain members of a family have chosen to change the nature of their relationship through a divorce, or otherwise, does not extinguish the existence of the family relationship. The child-parent relationship is sustained and abiding, even where parents are granted a divorce.

*Parental duty*

12. Parents owe a duty of care and control to their children. This includes, at a minimum, the duty to provide the essentials of life to their children. The essentials of life include physical, intellectual, emotional and spiritual elements. Parents have a duty to meet the needs of their children with respect to each of these elements. Absent a showing of harm or likelihood of harm, the parent-child bond must remain inviolable. There are infinite ways in which to meet the needs of a child. *Prima facie*, society must trust both parents to look out for the best interests of their child.

*Both parents equally important to a child*

13. Each family and each parent has a different approach to parenting. These approaches are based on a number of factors, including tradition, culture and religion. The current subjective test plays favourites as between different approaches to parenting, typically choosing the mother's approach. A rational and constitutional test would value and preserve both the father's and the mother's approach.

*Children's rights*

14. Children have the right to receive the care of their parents. In particular, children have the right to have their basic needs met, not just materially, but also through the moral, educational, spiritual and disciplinary guidance that each parent gives to a child. Children do better when both their father and their mother have an active role in their lives.

Deprivation of the physical, intellectual, emotional and spiritual connection between a child and a parent causes irreparable harm, with life-long consequences.

15. The Current Test is not consistent with the United Nations (“UN”) *Convention on the Rights of the Child* (“Convention”), which Canada has ratified.

16. As it applies to a child of a divorce, the Current Test violates Article 16(1) of the Convention, which declares that:

“(N)o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence.”

17. When the Current Test is applied to award sole custody to one parent, it is inconsistent with Article 18 (1) of the Convention, which states that parties:

"shall use their best efforts to insure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

18. When a custody order is granted in the absence of a hearing of the views of the child, the principles of the Convention set forth in Article 12 thereof are violated. Article 12 of the Convention reads as follows:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

*Parents' rights*

19. Parents have the right to associate with and communicate with their children, to relate to them and to interact with them, regardless of whether the parents divorce or remain married. Changes in the relationship between the parents should have no impact on the status of the parents and the relationship of the parents to the children.

*Parliament must act fairly and with equity*

20. Parliament may not pass legislation that treats parents differently based on marital status. In particular, Parliament may not arbitrarily apply different standards for government intervention in family relationships solely based on the marital status of the parents.

21. Parliament may not arbitrarily interfere with the decisions, agreements or arrangements of parents regarding their children (even agreements made prior to a child's conception relating to potential marital breakdown). Nor may Parliament provide different standards for government interference in such decisions, agreements or arrangements solely based on the marital status of the parents.

22. Furthermore, Parliament may not establish a legislative test which leads to or allows systemic discrimination against fathers, based on their gender.

*Historically required standard for state interference*

23. When a child needs protection, the Court has a duty ensconced in history to stand in the place of parents, through the exercise of the Court's *parens patriae* jurisdiction. This has been the historically required standard (“Historically Required Standard”) for state interference in parenting. The Court may only rely on its *parens patriae* jurisdiction to interfere with the relationship between parent and child when the physical or psychological integrity of the child will otherwise be harmed. The *parens patriae* jurisdiction was not created as a substitute for good parents, but to fill the void when a child had no parents, or when that child’s parents had abandoned their children or were objectively shown to be harming their child.

*Historical standard protects against favouritism*

24. This Historically Required Standard constitutes a safeguard against the preferences of one person (whether judge, social worker or child psychologist) for or against a particular parent or parenting style. The removal a child from the joint and equal custody of both parents interferes with a child’s well-being. Both fathers and mothers have important and distinct roles to play in raising a child, and the decision to deny a parent custody should be made only when the Historically Required Standard is met.

*Maximum contact with both parents desirable*

25. Alternatively, the Current Test must be interpreted to require equal and joint custody in light of the requirement in section 16(10) of the Act for the maximum contact with each parent and the recently completed long term studies demonstrating that children are likely to fare better in life when both parents play a significant role in their lives.

**V. Defects in Current Test**

*Statistically, mothers more likely to receive sole custody of children of the marriage*

26. In Canada, a divorced mother is nearly ten times as likely as is a divorced father to receive sole custody of their children. In the *Survey of Child Support Awards: Interim Analysis of Phase 2 Data* presented to, and published by, the Department of Justice (By the Canadian Research Institute for Law and the Family), Her Majesty the Queen in Right of Canada (2001), a total of 14,067 custody cases in Canada were analyzed and it was determined that custody was allocated on the following basis:

- a. the mother (sole custody): 80.4 %;
- b. the father (sole custody): 8.6 %;
- c. shared custody: 5.3 %; and
- d. split custody: 5.0 %.

*Subjective nature of law allows for bias - one part of the problem*

27. The Plaintiffs claim that family law proceedings suffer from the following shortcomings and that these shortcomings are some of the factors denying fathers and men equality and fundamental justice:

- a. the extensive use of hearsay and unsworn evidence (collected through child psychologists and others) in custody hearings;
- b. a lax approach to due process; and
- c. an over-reliance on independent child assessors, who vary widely in their skills, personal preferences, prejudices and sensitivities.

*The interpretation of the Current Test - another part of the problem*

28. The Current Test, as outlined in section 16(8) of the *Act*, requires the courts to consider “only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.” Section 16(10) of the *Act* further outlines the principle that a child “should have as much contact with each spouse as is consistent with the best interests of the child...” Both of these sections, taken together, appear objective on first glance. However, they are capable of subjective application, with the 16(8) best interests language being given far more weight than the 16(10) maximum contact requirement.

*Current Test invites subjective decision-making*

29. By outlining vague and subjective points of reference to determine a child’s best interests, the *Act* invites subjective decision-making, and substitutes personal preference for an objective standard.

**VI. Divorce Act**

30. In the *Act*, Parliament has subsumed and delineated the Court’s *parens patriae* jurisdiction in the event of divorce.

*Children’s status unchangeable*

31. The *Act* does not directly or indirectly alter the status of a child within a family. The *Act* does not declare a child a ward of the state upon a marriage breakdown. Nor does the *Act* purport to dispossess either parent of their child. Nor would it be constitutional for the *Act* to do these things.

## **VII. Current Test**

32. Sections 16(1), 16(2), 16(8) and 16(10) of the Act set forth the Current Test for a judicial order interfering with the custodial relationship between a parent and a child, which requires no more than the following:
- a. **the order is made in the context of an action for divorce or related proceeding;**
  - b. **there is evidence of that which is in the “best interests” of the child; and**
  - c. **the order provides for as much contact with each spouse as is consistent with the “best interests” of the child.**

## **VIII. Constitutional Best Interests Test**

33. The principles of the common law, including those of statutory interpretation, the Bill of Rights and the Charter require that the Current Test be amended to include a fourth element: namely, **evidence of harm**. They also require a fifth element: that the Courts hear the freely expressed views of the child. Unless each and every one of these preconditions have been satisfied, there is no compelling state purpose for denying to parents the exclusive right and responsibility to determine what is in the best interest of their children. A constitutionally valid statement of the best interest test would read as follows:
- a. **the order is made in the context of an action for divorce or related proceeding;**
  - b. **there is evidence of that which is in the “best interests” of the child;**
  - c. **the order provides for as much contact with each spouse as is consistent with the “best interests” of the child;**

- d. **the Court is satisfied the child will otherwise experience harm or will be likely to experience harm; and**
- e. **the order is made after the child has had the opportunity to express his or her views freely to the Court.**

This proposed test currently applies to married parents and their children. No court may interfere with or sever a family's internal relationships without meeting this high standard. There is no good reason to excuse the state from meeting this same high test in the case of marriage breakdown.

**IX. Serious Interference with Psychological Integrity of Parents and Children**

*Current Test harmful*

- 34. The child-parent relationship will often suffer serious negative impact when either parent is denied a custodial relationship with their child. Parents who are denied equal status are marked with a stigma of inadequacy. Furthermore, parents are branded as "unfit" when relieved of custody. A denial of joint custody derogates from the important role parents must play in the life of their child. An individual's status as a parent is normally fundamental to personal identity. The stigma and distress resulting from a loss of parental status is a particularly serious consequence of governmental interference with the parent-child relationship.

*Current Test estranges parents*

- 35. The Current Test effectively estranges non-custodial parents from their children without cause. It restricts the opportunity to communicate, to explore relationships and fully exercise freedom of expression and association.

*Current Test intrudes into families*

36. In addition to the distress arising from the deprivation of communication, expression and companionship between parent and child, government interference with the parent-child relationship constitutes a gross intrusion into a very private and intimate sphere. Absent a compelling purpose, the government of Canada must refrain from entering into the home and disturbing the complex and significant relationship between parent and child.

*Current Test disparages fatherhood*

37. In the overwhelming majority of cases, the application of the Current Test allocates sole custody to the mother and limits the relationship between the father and the child. A test that leads to this consequence cannot be justified in a free and democratic society as a reasonable limit on constitutionally guaranteed rights and freedoms. The consequence of the application of the Current Test sends unmistakable messages to children and all Canadians: mothers are better parents and fathers are not good at parenting. This is untrue. Mothers and fathers have different approaches to parenting, but both are needed by children. There ought not to be either a female or male standard of parenting; rather, both mothers and fathers should be involved as parents, and should be unrestricted by court order from having meaningful parental involvement.

**X. Charter Rights**

*Current Test violates freedom of expression*

38. The Current Test, in purpose or effect, interferes with and is inconsistent with the freedom of thought, belief, opinion and expression of the Plaintiffs guaranteed under section 2(b) of the Charter. Section 2(b) of the Charter reads:

2. Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

The Current Test *inter alia*, prevents a child and parent from fully expressing themselves to each other and, in particular, prevents a parent from expressing love, opinion, knowledge and direction when that parent is denied equal custody of the child.

*Current Test violates freedom of association*

39. The Current Test, in purpose or effect, interferes with and is inconsistent with the Plaintiff's freedom of association guaranteed under section 2(d) of the Charter. Section 2(d) of the Charter reads:

2. Everyone has the following fundamental freedoms:

(d) freedom of association.

Currently, almost ninety percent of custody orders interfere with the rights of children to associate with one of their parents, usually the father.

*Current Test violates right to liberty*

40. The Current Test, in purpose or effect, interferes with the Plaintiffs' right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice guaranteed in section 7 of the Charter . Section 7 of the Charter reads:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The process in the Act governing the determination of custody is inconsistent with the principles of fundamental justice, because it allows a Court to deprive a parent of custody in the absence of a showing of harm.

*Current test is cruel treatment*

41. The Current Test, in purpose or effect, interferes with the Plaintiffs' right to be free from cruel or unusual treatment guaranteed under section 12 of the Charter. Section 12 of the Charter reads:

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Depriving a parent of the right to be a full and equal custodian of a child is cruel and unusual treatment. A court-ordered loss of custody of a child can be emotionally as painful as any other loss of a child, such as the experience of a death of a child or a missing child. The child is subject to the same cruel treatment when deprived of the full benefit of a child-parent relationship.

*Current Test violates equal protection*

42. The Current Test, in purpose or effect, interferes with the Plaintiffs' right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination on the basis of sex or marital status guaranteed under section 15 of the Charter. Section 15 of the Charter reads:

15. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Act does not provide equality under the law when one gender is ten times more likely to receive sole custody of a child.

*Current Test violates equality of men and women*

43. The Current Test, in purpose or effect, is inconsistent with section 28 of the Charter. Section 28 of the Charter reads:

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

This section gives primacy to gender equality. The Act is a gross violation of this principle. There are no conditions under which the Charter allows Parliament to give priority to females.

*Current Test is unreasonable*

44. The limits on the Plaintiffs' Charter rights and freedoms imposed by the Current Test are not reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society. Paragraphs 6 through 37 above explain some of the ways in which the Current Test is not reasonable in a free and democratic society. The Current Test also fails the test set for free and democratic societies in the Convention.

*Current Test inconsistent with the Charter*

45. Under section 52 of the *Constitution Act*, 1982, the Constitution is the supreme law of Canada and to the extent the Current Test is inconsistent with the Constitution, the Current Test and the provisions in the Act reliant upon the Current Test are of no force or effect.

**XI. Bill of Rights**

*Current Test violates liberty*

46. The Current Test is inconsistent with section 1(a) of the Bill of Rights, which guarantees the Plaintiffs the right to life, liberty, security of the person, and enjoyment of property and the right not to be deprived thereof except by due process of law. Section 1(a) of the Bill of Rights reads:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law.

The Current Test is biased against men and fathers. Furthermore, the Current Test for determining the “best interests” of a child and questions of custody violate due process principles when a showing of harm is not a requirement of the law.

*Current Test violates equality*

47. The Current Test is inconsistent with section 1(b) of the Bill of Rights, which guarantees the right of the Plaintiffs to equality before the law and the protection of the law. Section 1(b) of the Bill of Rights reads:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour,

religion or sex, the following human rights and fundamental freedoms, namely,

(b) the right of the individual to equality before the law and the protection of the law.

The Current Test discriminates against men and fathers, and in favour of women and mothers, in that it disproportionately awards sole custody to mothers.

48. The Current Test also discriminates against divorced parents in relation to married parents, in that it allows a lower legal standard by which these family relationships may be impacted and terminated by the state.

## **XII. Common Law**

### *Current Test inconsistent with common law*

49. Section 26 of the Charter recognizes other rights and freedoms not enumerated in the Charter. Among those rights is the common law right of the parent to custody of the child and the common law responsibility to make decisions for and on behalf of the child, including the right to make decisions, agreements and arrangements regarding care, control and guardianship.

### *Joint and equal custody the ideal*

51. Section 16(10) of the Act recognizes the importance of this parental responsibility. The authority to make custody and access decisions in the “best interests” of a child under section 16(8) of the Act is limited by section 16(10) of the Act, which requires a court to pursue the objective of providing a child with “as much contact with each spouse as is consistent with the best interests of the child.” Only joint and equal custody meets the high standard set in section 16(10). Section 16(10)

requires a very high standard to deviate from full participation of both parents in every aspect of their child's life.

**XIII. Place of Trial**

52. The Plaintiffs propose that this action be tried at the City of Montréal in the Province of Québec. The trial is expected to require fewer than 30 days.

DATED at Montréal, in the Province of Québec, on the \_\_\_\_ day of August, 2003.

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Ruth Veilleux  
Barrister Solicitor

Marchand, Magnan, Melançon, Forget  
Société en Nom Collectif / General  
Partnership  
Advocats / Barristers & Solicitors  
1 Place Ville-Marie  
Bureau / Suite 1900  
Montréal, QC H3B 2C3  
Telephone: (514) 393-1155  
Facsimile: (514) 861-0727

Acting on behalf of:

Gerald D. Chipeur

Chipeur Advocates  
Barristers Solicitors  
2380 Ernst & Young Tower  
440 - 2<sup>nd</sup> Avenue SW  
Calgary, AB T2P 5E9

Telephone: (403) 537-6536  
Facsimile: (403) 537-6538

Court File No.: \_\_\_\_\_ 2003.

**FEDERAL COURT**

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BETWEEN:

L'APRÈS-RUPTURE, FATHERS ARE CAPABLE  
TOO: PARENTS ASSOCIATION (F.A.C.T.) and  
LEGAL KIDS,

Plaintiffs

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HER MAJESTY THE QUEEN,

Defendant

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**STATEMENT OF CLAIM**

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Ruth Veilleux  
Barrister Solicitor

Marchand, Magnan, Melançon, Forget  
SOCIÉTÉ EN NOM COLLECTIF / GENERAL PARTNERSHIP  
Advocats / Barristers & Solicitors  
1 Place Ville-Marie  
Bureau / Suite 1900  
Montréal, Québec H3B 2C3  
Téléphone: (514) 393-1155  
Télécopieur: (514) 861-0727

On behalf of:

Gerald D. Chipeur  
Barrister Solicitor

Chipeur Advocates  
2380 Ernst & Young Tower  
440 - 2<sup>nd</sup> Avenue SW  
Calgary, AB T2P 5E9  
Direct Line: (403) 537-6536  
Facsimile: (403) 537-6538

File No. 1066-001