Submission Regarding Amendments to the *Divorce Act,* the *Family Orders and Agreements Enforcement Assistance Act* and the *Garnishment, Attachment and Pension Diversion Act*

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Submitted to: Ministry of the Attorney General, Ontario

Submitted by: Ontario Bar Association

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Introduction

The Ontario Bar Association ("**OBA**") appreciates the opportunity to provide feedback on the recent passage of federal legislation, Bill C-78, *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act* ("**Bill C-78**"). The Act, as you are aware, received Royal Assent on June 21, 2019. Bill C-78 will affect a number of family law matters in Ontario and will impact provincial legislation in two ways: (a) it creates inconsistencies between federal law and provincial law; and (b) it creates voids in provincial law for matters that exist in federal law. The purpose of this submission is to provide initial feedback for your consideration as to how to address these issues going forward.

The OBA

Established in 1907, the OBA is the largest voluntary legal organization in Ontario, representing lawyers, judges, law professors and students from across the province, on the frontlines of our justice system and in no fewer than 40 different sectors. In addition to providing legal education for its members, the OBA assists government and other decision-makers with several legislative and policy initiatives each year, both in the interest of the profession and in the interest of the public.

This submission was prepared by members of the OBA Family Law Section (the "**Section**"), which has approximately 230 lawyers who are leading experts in family law. OBA members participating in this submission include lawyers who represent a wide range of clients within the family justice system, with significant expertise in provincial and federal family law legislation.

Overview

With its potential to better meet the needs and interests of separating and divorcing Canadian families, Bill C-78 was strongly supported by organizations representing members of the legal profession, such as the Canadian Bar Association, our national organization. With its passage, this important piece of legislation introduces family law reforms that impact a number of family law areas, including in particular:

(1) the best interests of the child, (2) family violence, (3) relocation, (4) parenting terminology, and (5) dispute resolution.

The passing of Bill C-78 impacts these five areas in provincial legislation in two ways: (a) it creates inconsistencies between federal law and provincial law; and (b) it creates voids in provincial law for matters that exist in federal law.

The most practical implications of these inconsistencies and/or voids are twofold:

- Different laws will apply to parenting decisions for children of married spouses (guided by federal law) and for children of non-married spouses (guided by provincial law);
- It will create a lack of clarity for the public, the legal profession as a whole and third parties who are involved and affected by family law.

The purpose of this submission is to provide initial feedback and offer our assistance in your consideration of these issues in five specific areas of family law, including; the best interests of the child, family violence, relocation, parenting terminology and dispute resolution.

Comments and Suggested Revisions

1. Best Interest of the Child

In maintaining Canada's commitment to ensuring that children's best interests are considered in all family law matters relating to them, Bill C-78 amends and expands the best interests of the child test. As a result, there will be an inconsistency between the federal best interests of the child test (which is contained in the *Divorce Act)* and the provincial best interests of the child test (which is contained in the *Children's Law Reform Act).*

As the best interests of children is the paramount consideration for the Courts and the guiding principle in making all decisions relating to parenting issues in family law matters, the inconsistencies that will exist between the provincial and federal best interests of the child test may lead to some confusion. As such we would be happy to work with you to provide our best advice for aligning the two tests more closely to avoid the implications listed above.

For ease, in **Schedule "A"** we have highlighted the difference between the "best interests of the child" test contained in Bill C-78 and the best interest of the child test contained in the *Children's Law Reform Act* ("**CLRA**").

2. Family Violence

Bill C-78 provides a definition for "family violence" and includes a non-exhaustive list of ten possible types of violence. It also proposes that "family violence" be considered in all decisions pertaining to a child's best interest, with guidance for the judiciary on how family violence should be factored in decision making.

In Ontario, the CLRA refers to "violence and abuse". However, these terms are not defined. Specifically, there is no list of the possible types of violence or abuse that are included (e.g. psychological violence, financial violence). There is also little guidance on how violence and abuse should be considered in the context of the best interest of the child.

As ending domestic abuse and ensuring children's safety are fundamental societal values in both Canada and Ontario, widening the scope of "violence and abuse" on a provincial level to match that proposed by Bill C-78 is essential.

For ease, in **Schedule "B"** we have highlighted the difference between how Bill C-78 defines and addresses "family violence" and how the CLRA refers to "violence and abuse".

3. Relocation

Relocation of a child (sometimes referred to as "mobility"), has been one of the most challenging areas of family law to determine given that there was no governing legislation dealing with the issue. As a result, these matters were often expensive and complicated for families to resolve.

Bill C-78 introduces: (a) a mechanism for relocating parents to follow; (b) a list of factors for the judiciary to consider in determining whether the child should relocate with the moving parent; and (c) a burden of proof for the parties to establish in court.

Given that Bill C-78 will only apply to: (a) children of married spouses who are also seeking a divorce; or (b) children of formerly married spouses who are already divorced, there will continue to be a legislative void with respect to relocation matters for children who do not fall into these categories - such as children of unmarried spouses.

As relocation matters are often litigated in court, a clear articulation of relocation considerations for unmarried separated parents would be helpful to those engaged in family law matters. For ease, in **Schedule "C"** we have included some key excerpts from Bill C-78 pertaining to relocation.

4. Parenting Terminology

In an ongoing effort to decrease conflict in family law matters, Bill C-78 eliminates the use of the legal terms: "custody" and "access". These terms are replaced with, "decision-making responsibility" and "parenting time".

Accordingly, instead of one parent being granted "sole custody" or both parents being granted "joint custody" of a child, a court may determine which parent has "decision-making responsibility" over major decisions pertaining to a child. Similarly, instead of one parent having "primary residence" and the other parenting having "access", the court may order "parenting time" for a child by way of a schedule.

Given that the courts will adopt this terminology, the legal community (including lawyers, mediators and arbitrators) will adopt the same language in finalizing separation agreements and other governing documents.

Of note, third parties such as schools, government offices and medical professionals have all come to rely on the term "custody" to determine a parent's "right" to provide instructions or obtain information about a child. Some third parties (such as the Toronto District School Board and the College of Physicians and Surgeons of Ontario) even have the term included in their own respective legislation and guidelines. We therefore, encourage Ontario to be mindful of the benefits of moving quickly with third parties to address parenting terminology changes.

As a matter of public interest and to avoid the implications listed above, we would be happy to meet with you to provide our best advice on more closely aligning the language between the various pieces of family

law legislation. For ease, **in Schedule "D",** we have attached the definition and use of the new terminology in Bill C-78.

5. Dispute Resolution

In an effort to manage high conflict family law matters and reduce the burden on the court system, Bill C-78 places significant obligations on legal advisers to inform their clients of dispute resolution clauses contained in the *Divorce Act*. The anticipated result is that parties will make greater use of alternative dispute resolution models, thus diverting a larger number of cases from the overburdened family court system.

There are five clauses in Bill C-78 which refer to dispute resolution. For ease, in **Schedule "E**", we have included the five clauses in Bill C-78 that address dispute resolution.

Minimizing the burden on the courts and increasing Ontarians' access to justice are important priorities for Ontario. The void in provincial legislation as it relates to placing an onus on legal advisers to encourage dispute resolution should be rectified to honour and address those important priorities.

Conclusion

Once again, the OBA appreciates the opportunity to provide input on the impact this important piece of federal legislation will have provincially. We would welcome an opportunity to speak to you or your officials further on all of the five areas discussed above, as you work to address these and other voids and inconsistencies between the two levels of family law in Ontario.

SCHEDULE "A" – TEST FOR BEST INTERESTS OF THE CHILD

Children's Law Reform Act

24 (2) The court shall consider all the child's needs and circumstances, including,

(a) the love, affection and emotional ties between the child and

(i) each person, including a parent or grandparent, entitled to or claiming custody of or access to the child,

(ii) other members of the child's family who reside with the child, and

(iii) persons involved in the child's care and upbringing;

(b) the child's views and preferences, if they can reasonably be ascertained;

(c) the length of time the child has lived in a stable home environment;

(d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child;

(e) the plan proposed by each person applying for custody of or access to the child for the child's care and upbringing;

(f) the permanence and stability of the family unit with which it is proposed that the child will live;

(g) the ability of each person applying for custody of or access to the child to act as a parent; and

(h) any familial relationship between the child and each person

Bill C-78

16 (3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

(a) the child's needs, given the child's age and stage of development, such as the child's need for stability;

(b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;

(c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;

(d) the history of care of the child;

(e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;

(f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;

(g) any plans for the child's care;

(h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;

(i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;

(j) any family violence and its impact on, among other things,

(i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and

(ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and

(k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

SCHEDULE "B" – SECTIONS REFERRING TO FAMILY VIOLENCE

Bill C-78 states that (sections/subsections that refer to violence are italicized):

Best interest of child

16 (1) The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.

Primary consideration

(2) When considering the factors referred to in subsection (3), the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being.

Factors to be considered

(3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

(a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
(b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
(c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
(d) the history of care of the child;
(e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
(f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous up- bringing and heritage;

Children's Law Reform Act states that (sections/subsections that refer to violence are italicized):

Violence and abuse

24(4) *In assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against,*

(a) *his or her spouse;*
(b) *a parent of the child to whom the application relates;*
(c) *a member of the person's household; or*
(d) *any child. 2006, c. 1, s. 3 (1); 2016, c. 23, s. 7 (2, 3).*

Same

24(5) *For the purposes of subsection (4), anything done in self-defence or to protect another person shall not be considered violence or abuse. 2006, c. 1, s. 3 (1)*

(g) any plans for the child's care;

(h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;

(i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;

(j) *any family violence and its impact on, among other things,*
(i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
(ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and

(k) *any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.*

Factors relating to family violence

(4) *In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account:*

(a) *the nature, seriousness and frequency of the family violence and when it occurred;*

(b) *whether there is a pattern of coercive and controlling behaviour in relation to a family member;*

(c) *whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;*

(d) *the physical, emotional and psychological harm or risk of harm to the child;*

(e) *any compromise to the safety of the child or other family member;*

(f) *whether the family violence causes the child or other family member to fear for their own safety or for that of another person;*

(g) *any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and*

(h) *any other relevant factor.*

SCHEDULE "C" – KEY EXCERPTS PERTAINING TO RELOCATION

Notice

16.9 (1) A person who has parenting time or decision-making responsibility in respect of a child of the marriage and who intends to undertake a relocation shall notify, at least 60days before the expected date of the proposed relocation and in the form prescribed by the regulations, any other person who has parenting time, decision-making responsibility or contact under a contact order in respect of that child of their intention.

Content of notice

(2) The notice must set out

(a) the expected date of the relocation;

(b) the address of the new place of residence and contact information of the person or child, as the case may be;

(c) a proposal as to how parenting time, decision-making responsibility or contact, as the case may be, could be exercised; and

(d) any other information prescribed by the regulations.

Exception

(3) Despite subsections (1) and (2), the court may, on application, provide that the requirements in those subsections, or in the regulations made for the purposes of those subsections, do not apply or may modify them, including where there is a risk of family violence.

Application without notice

(4) An application referred to in subsection (3) may be made without notice to any other party.

Relocation authorized

16.91 (1) A person who has given notice under section 16.9 and who intends to relocate a child may do so as of the date referred to in the notice if

(a) the relocation is authorized by a court; or

(b) the following conditions are satisfied:

(i) the person with parenting time or decision-making responsibility in respect of the child who has received a notice under subsection 16.9(1) does not object to the relocation within 30 days after the day on which the notice is received, by setting out their objection in

(A) a form prescribed by the regulations, or

(B) an application made under subsection 16.1(1) or paragraph 17(1)(b), and

(ii) there is no order prohibiting the relocation.

Content of form

(2) The form must set out

(a) a statement that the person objects to the proposed relocation;

(b) the reasons for the objection;

(c) the person's views on the proposal for the exercise of parenting time, decision-making responsibility or contact, as the case may be, that is set out in the notice referred to in subsection 16.9(1); and
(d) any other information prescribed by the regulations.

Best interests of child — additional factors to be considered

16.92 (1) In deciding whether to authorize a relocation of a child of the marriage, the court shall, in order to determine what is in the best interests of the child, take into consideration, in addition to the factors referred to in section 16,

(a) the reasons for the relocation;
(b) the impact of the relocation on the child;
(c) the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;
(d) whether the person who intends to relocate the child complied with any applicable notice requirement under section 16.9, provincial family law legislation, an order, arbitral award, or agreement;
(e) the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;
(f) the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and
(g) whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

Factor not to be considered

(2) In deciding whether to authorize a relocation of the child, the court shall not consider, if the child's relocation was prohibited, whether the person who intends to relocate the child would relocate without the child or not relocate.

Burden of proof — person who intends to relocate child

16.93 (1) If the parties to the proceeding substantially comply with an order, arbitral award, or agreement that provides that a child of the marriage spend substantially equal time in the care of each party, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child.

Burden of proof — person who objects to relocation

(2) If the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child of the marriage spends the vast majority of their time in the care of the party who intends to relocate the child, the party opposing the relocation has the burden of proving that the relocation would not be in the best interests of the child.

Burden of proof — other cases

(3) In any other case, the parties to the proceeding have the burden of proving whether the relocation is in the best interests of the child.

Power of court — interim order

16.94 A court may decide not to apply subsections 16.93(1) and (2) if the order referred to in those subsections is an interim order.

Costs relating to exercise of parenting time

16.95 If a court authorizes the relocation of a child of the marriage, it may provide for the apportionment of costs relating to the exercise of parenting time by a person who is not relocating between that person and the person who is relocating the child.

Notice — persons with contact

16.96 (1) A person who has contact with a child of the marriage under a contact order shall notify, in writing, any person with parenting time or decision-making responsibility in respect of that child of their intention to change their place of residence, the date on which the change is expected to occur, the address of their new place of residence and their contact information.

Notice — significant impact

(2) If the change is likely to have a significant impact on the child's relationship with the person, the notice shall be given at least 60 days before the change in place of residence, in the form prescribed by the regulations, and shall set out, in addition to the information required in subsection (1), a proposal as to how contact could be exercised in light of the change and any other information prescribed by the regulations.

Exception

(3) Despite subsections (1) and (2), the court may, on application, order that the requirements in those subsections, or in the regulations made for the purposes of those subsections, do not apply or modify them, if the court is of the opinion that it is appropriate to do so, including where there is a risk of family violence.

SCHEDULE "D" – DEFINITION AND USE OF NEW TERMINOLOGY

Definitions:

decision-making responsibility means the responsibility for making significant decisions about a child's well-being, including in respect of (a) health; (b) education; (c) culture, language, religion and spirituality; and (d) significant extra-curricular activities

parenting time means the time that a child of the marriage spends in the care of a person referred to in subsection 16.1(1), whether or not the child is physically with that person during that entire time

Application:

Parenting order

16.1 (1) A court of competent jurisdiction may make an order providing for the exercise of parenting time or decision-making responsibility in respect of any child of the marriage, on application by

(a) either or both spouses; or

(b) a person, other than a spouse, who is a parent of the child, stands in the place of a parent or intends to stand in the place of a parent.

Contents of parenting order

(4) The court may, in the order,

(a) allocate parenting time in accordance with section 16.2;

(b) allocate decision-making responsibility in accordance with section 16.3;

(c) include requirements with respect to any means of communication, that is to occur during the parenting time allocated to a person, between a child and another person to whom parenting time or decision-making responsibility is allocated; and

(d) provide for any other matter that the court considers appropriate.

SCHEDULE "E" – FIVE USES OF DISPUTE RESOLUTION

1. Definition section:

family dispute resolution process means a process outside of court that is used by parties to a family law dispute to attempt to resolve any matters in dispute, including negotiation, mediation and collaborative law;

2. Family dispute resolution process

7.3 To the extent that it is appropriate to do so, the parties to a proceeding shall try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process.

3. Duty to discuss and inform

7.7 (2) It is also the duty of every legal adviser who undertakes to act on a person's behalf in any proceeding under this Act
(a) to encourage the person to attempt to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so;

4. Certification

7.7 (3) Every document that formally commences a proceeding under this Act, or that responds to such a document, that is filed with a court by a legal adviser shall contain a statement by the legal adviser certifying that they have complied with this section

5. Family Dispute Resolution Process

16.1 (6) Subject to provincial law, the order may direct the parties to attend a family dispute resolution process