Proposed Amendments to the *Family Law Act*: Permitting a Former Spouse to Have Standing to Claim Spousal Support

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ONTARIO BAR ASSOCIATION
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L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association ("**OBA**") appreciates this opportunity to propose a legislative amendment to allow a former spouse to claim spousal support under the *Family Law Act*. This current gap in the spousal support framework results in unfairness and incentivizes challenges to the validity of a foreign divorce as a workaround way to regain the ability to claim spousal support. A simple amendment to the s. 29 definition of "spouse" would resolve this issue, promote fairness, save judicial resources, align with legislation in other provinces, and address Ontario court jurisprudence that has noted the need for a legislative fix.

Ontario Bar Association

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 16,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.

This submission was prepared and reviewed by members of the OBA's Family Law and Child & Youth Law sections. Members of these sections represent a wide range of clients within the family justice system, both in litigation and various alternative dispute resolution processes. They have significant expertise in provincial and federal family law legislation, case law, and applicable court rules across the full spectrum of family law issues.

Executive Summary

Ontario's current spousal support framework leaves a significant gap that harms vulnerable former spouses, particularly those divorced outside Canada. Under the *Family Law Act*, only "spouses" may seek support, and the Ontario Court of Appeal has repeatedly held that this does not include *former* spouses. At the same time, former spouses divorced abroad cannot seek support under the *Divorce Act,* because corollary relief is only available alongside a Canadian

divorce. As a result, former spouses divorced abroad have no clear statutory avenue to claim spousal support in Ontario.

This gap creates hardship and incentivizes potential payors to obtain foreign divorces to avoid support obligations. It also drives unnecessary, costly litigation over the recognition of foreign divorces - not to dispute marital status, but because of the impact of the foreign divorce cutting off a potential recipient's ability to claim spousal support. The problem disproportionately affects women, particularly Muslim, immigrant, and migrant women, who often face economic vulnerability and systemic barriers accessing justice. The Ontario Court of Appeal has acknowledged the inequities and explicitly called for legislative reform.

Ontario is behind other provinces. The legislation in Alberta, British Columbia, Manitoba, and Prince Edward Island all permit former spouses to claim spousal support. Their experiences show that allowing former spouses standing reduces unnecessary litigation on recognition of a foreign divorce and ensures support claims are addressed on their merits.

A simple amendment to add "or someone who was formerly a spouse as defined in subsection 1(1)" to the s. 29 definition of "spouse" for Part III (Support Obligations) would resolve the problem. This change would not guarantee entitlement; former spouses would still need to prove compensatory, needs-based, or contractual grounds, consistent with Supreme Court of Canada jurisprudence.

To provide clarity and align with the *Divorce Act*, Ontario should also consider adopting a clear residency requirement for former spouses seeking support.

These reforms would reduce litigation, promote fairness, and better protect economically vulnerable former spouses, bringing Ontario's family law system in line with modern Canadian practice.

Spousal Support Generally

The *Divorce Act* and provincial support statutes are intended to deal with the economic consequences of the marriage or relationship breakdown for both parties. [1] The purpose of spousal support is to relieve *economic* hardship that results from "marriage [or an unmarried spousal relationship] or its breakdown". Equitable distribution can be achieved in several ways, like spousal and child support, and by division of property. In many cases, the absence of accumulated assets requires one spouse to pay support to the other to effect the equitable distribution of resources.[2]

It is important to remember the underlying authority for an award of spousal support: "Spousal support is a creation of statute, so that standing to claim support, entitlement to support, and form, duration and amount of support are all governed by the relevant support statute."[3]

The Current Situation: Who Has Standing to Claim Spousal Support in Ontario

Ontario's *Family Law Act*

Section 29 outlines specific definitions that apply to Part III (dealing with support obligations) of the *Family Law Act* ("***FLA***").This section includes the definition of "spouse", which does ***not*** include former spouses.[4] Multiple Ontario Court of Appeal ("**ONCA**") cases have held that a

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[1] *Bracklow v. Bracklow*, 1999 CanLII 715 (SCC), at para 34.

[2] *Moge v. Moge,* 1992 CanLII 25 (SCC), 1992 CarswellMan 143 (WL), at paras 44 & 46 [para references to WL; no para numbers in CanLII).

[3] *Rezagholi v. Ezami,* 2010 ONSC 5469 (CanLII), at para 125.

[4] *Family Law Act,* RSO 1990, c F.3, s. 29, provides for the following definition of "spouse" that applies to Part III of the *Act*:

> "spouse" means a spouse as defined in subsection 1 (1), and in addition includes either of two persons who are not married to each other and have cohabited,
>
> (a) continuously for a period of not less than three years, or
>
> (b) in a relationship of some permanence, if they are the parents of a child as set out in section 4 of the *Children's Law Reform Act*.

Note that s. 1(1) defines "spouse" for the purposes of the *Act* as follows:

> "spouse" means either of two persons who,

former spouse cannot seek spousal support under the *FLA*.[5] The result is that all of the support obligation provisions in Part III, including the s. 30 obligation of spouses for support section, do not apply to former spouses.

Section 30 of the *FLA* currently provides as follows:

> **Obligation of spouses for support**
>
> **30** Every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so. R.S.O. 1990, c. F.3, s. 30; 1999, c. 6, s. 25 (3); 2005, c. 5, s. 27 (7).[6]

The *Divorce Act*

A spouse or former spouse may apply for spousal support under the *Divorce Act*.[7]

However, the ONCA has repeatedly held that a Canadian court does not have jurisdiction to hear and determine a "corollary relief" proceeding under the *Divorce Act* following a recognized divorce in a foreign jurisdiction.[8] In other words, corollary relief (including spousal support) under the *Divorce Act* is only available in conjunction with a Canadian divorce.

The court cannot get around this jurisdictional obstacle by granting "a further or second divorce order." It is not proper to grant a divorce order in respect of a marriage dissolved by a valid foreign order.[9]

> (a) are married to each other, or
>
> (b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.

[5] *Sonia v. Ratan*, 2024 ONCA 152 (CanLII), at para 11, citing *Rothgiesser v. Rothgiesser*, 2000 CanLII 1153 (ON CA), at para 26, *Okmyansky v. Okmyansky*, 2007 ONCA 427 (CanLII), at para 42, & *Cheng v. Liu*, 2017 ONCA 104 (CanLII), at paras 27-30.

[6] *Family Law Act,* RSO 1990, c F.3, s. 30.

[7] *Divorce Act*, RSC 1985, c 3 (2nd Supp), ss. 2 [definitions include that a "*spouse* includes, in subsection 6(1) and sections 15.1 to 16.96, 21.1, 25.01 and 25.1, a former spouse"] & 15.2(1) [spousal support order].

[8] *Okmyansky v. Okmyansky*, 2007 ONCA 427 (CanLII), at paras 31, 35-36, & 38 & *Rothgiesser v. Rothgiesser*, 2000 CanLII 1153 (ON CA), at paras 18 & 28.

[9] *Ali v. Ibrahim*, 2019 ONSC 300 (CanLII), at para 52.

The Problem with the Current Situation in Ontario: Spouses Divorced Outside of Canada are Restricted in their Ability to Claim Spousal Support

Significant Hardship for Spouses Divorced Outside of Canada ("Foreign Divorces"), Who are Prevented from Claiming Spousal Support in Ontario Without Complex Litigation

The current state of the law is that a former spouse divorced outside of Canada by a foreign court is prevented from claiming spousal support under the Ontario *FLA* or the federal *Divorce Act*, unless they can prove that the foreign divorce should not be recognized by an Ontario court. This creates a financial incentive for one spouse (who would normally be the payor spouse upon the breakdown of the marriage) to obtain a divorce from outside of Canada to avoid their obligations to the other spouse (who is usually financially disadvantaged and would normally be the claimant/recipient spouse). This creates further litigation over whether the foreign divorce should be recognized, not because of the divorce itself, but because of its impact on potentially extinguishing the right to bring a spousal support claim.

As a result of the current law, in early 2024, the ONCA in *Vyazemskaya v. Safin* introduced a new defence to recognition of a foreign divorce: "unfair forum-shopping". This defence was based on the "repugnant fact" that the husband was attempting to avoid spousal support obligations in Ontario when he obtained a foreign divorce.[10] This new defence is somewhat confusing given that the other recognized public policy-based defences are based on morally-repugnant foreign laws. Whereas the defence based on unfair forum shopping tactics is based on morally-repugnant facts, namely "decisions taken [by a spouse] to avoid the application of domestic laws."[11]

Importantly, the ONCA in *Vyazemskaya* also noted the negative implications of the *status quo*: "There can be no doubt that the present state of the law in Ontario can result in **significant**

[10] *Vyazemskaya v. Safin*, 2024 ONCA 156 (CanLII), at paras 17 & 45.

[11] *Vyazemskaya v. Safin*, *ibid*, at paras 31-37, citing various cases [showing different interpretations as to whether fact-based conduct should be considered under the public policy exception to recognition of a foreign divorce]. For some discussion of the confusion created by this new defence, see Rebecca Winninger & Vanessa Lam, "Recognition and Impact of a Foreign Divorce in Canada" (2024) 43 CFLQ 231, pp. 250-251 (available on WL).

hardship for spouses or former spouses in need of support."[12]

On the same day as *Vyazemskaya*, a different panel of the Ontario Court of Appeal released *Sonia v. Ratan*, which similarly recognized the significant hardship that could result, and further called for legislative change as follows:

> [93] Family law legislation in other Canadian provinces permits former spouses to apply for support.[2]
>
> [94] The addition of the words "or former spouse" to s. 30 of the *Family Law Act* to ensure that spouses who divorce in foreign jurisdictions can bring applications for support in Ontario is an issue that, in my view, could be addressed by the Ontario legislature. Further, it may be that the foregoing line of jurisprudence could be revisited.[13]

In February 2025, there was also a failed *Charter* challenge to the definition of "spouse" in s. 29 of the *Family Law Act* in *Mehralian v. Dunmore*. However, in that case, the Ontario Superior Court of Justice found no violation of s. 15 of the *Charter* because the applicant's constitutional challenge was a collateral attack on the court's prior rulings that the parties' foreign divorce was valid, for which she did not exhaust available grounds of appeal. Further, there were problems with how her claim was framed: the applicant's Notice of Constitutional Question was based on marital status only, despite her argument relying on additional prohibited grounds of discrimination (recognizing the intersecting grounds of discrimination at play in these cases).[14]

In addition, at least one judge of the Ontario Superior Court of Justice has tried to get around the problem created by former spouses divorced abroad being excluded from claiming spousal support by interpreting s. 29(b) of the *Family Law Act* as applying in the unique circumstances where the former spouse could still meet the definition of "spouse" because the parties resumed cohabitation after the foreign divorce, and were in a relationship of some permanence and had a child together.[15] However, this particular part of the decision was an alternative finding and thus

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[12] *Vyazemskaya v. Safin*, 2024 ONCA 156 (CanLII), at para 43 [emphasis added]. See also *Karkulowski v. Karkulowski*, 2014 ONSC 1222 (CanLII), at paras 68-71 [the inability to pursue spousal support in Ontario due to a foreign divorce may be extremely prejudicial to the partner with the support claim].

[13] *Sonia v. Ratan*, 2024 ONCA 152 (CanLII), at paras 92-94.

[14] *Mehralian v. Dunmore*, 2025 ONSC 649 (CanLII), at paras 1-3, 55-69, & 71-101.

[15] *Rasaei v. Bahman*, 2025 ONSC 2074 (CanLII), at paras 5-6 & 45.

obiter, and it is unclear if future cases will follow this approach. The case is, however, another example of how much court time is being taken up and how complicated litigation has become because of the current wording of the *Family Law Act*.

Legislation in Other Canadian Provinces and Territories

Many other provinces have resolved this issue by permitting former spouses to claim spousal support (five other provinces have made the change already). This reduces the need to challenge the validity of the foreign divorce and allows parties to proceed to the real issue of support and determine that issue on its merits.

In Alberta, s. 46(g) of the *Family Law Act*[16] defines "spouse" to include a former spouse and party to a marriage.

In British Columbia, s. 3 (2) of the *Family Law Act*[17] confirms that a spouse includes a former spouse. The Court of Appeal for British Columbia confirmed in *R.N.S. v. K.S.,*[18] that the B.C. *Family Law Act* defines spouse to include former spouses and does not restrict the definition to include only those divorced in Canada. The decision, acknowledging the support needs of former spouses in B.C., was released in 2013. This means that for the past 12 years, B.C. has been ahead of Ontario in recognizing and addressing the financial obligations owed to former spouses.

In Manitoba, s. 64 of the *Family Law Act*[19] defines spouse to include a former spouse and permits them to apply for spousal support.

While the *Parenting and Support Act*[20] in Nova Scotia does not specifically define a spouse as a former spouse (refers to persons who are married, have entered into a form of marriage that is void, or who are not married but have cohabitated under certain circumstances), fairly recent case law implies that a former spouse can in fact seek spousal support. In *Charapovich v. Charapovich*,[21]

[16] *Family Law Act,* SA 2003, c F-4.5, s. 46(g).
[17] *Family Law Act,* SBC 2011, c 25, s. 3(2).
[18] *R.N.S. v. K.S,* 2013 BCCA 406 (CanLII), at para 42.
[19] *The Family Law Act,* CCSM c F20, s. 64.
[20] *Parenting and Support Act,* RSNS 1989, c 160, ss. 2(m) and 3.
[21] *Charapovich v. Charapovich.* 2022 NSSC 124 (CanLII) at para. 13.

the Court stated that a spouse who has a foreign divorce can still "be able to make claims for parenting, child support and spousal support under the *Parenting and Support Act,* R.S.N.S. 1989 c. 160 because those claims aren't dependent on marital status."

In Prince Edward Island, s. 30 of the *Family Law Act*,[22] confirms that every spouse or former spouse has an obligation to provide support for himself or herself and for the other spouse or former spouse, in accordance with need, to the extent that he or she is capable of doing so.

These examples from across Canada clearly demonstrate that permitting former spouses to claim spousal support is both practical and just. Ontario's continued exclusion of this right not only leaves vulnerable individuals without recourse but also lags behind the legislative progress made in other provinces. It is time for Ontario to follow suit, ensuring that family law reflects the lived realities of all former spouses.

Disproportionate Adverse Impacts on Disadvantaged, Vulnerable Groups

In the recent *Charter* challenge, the applicant and some of the intervenors wanted to show that the current law creates a disadvantage that disproportionately impacts women, Muslim women, and immigrant and migrant women, who are often economically dependant and face significant systemic barriers. However, the terms of the intervention and the timeline limited the non-governmental intervenor's ability to adduce evidence. The Superior Court of Justice held that the discrimination claim required specific social science evidence and, potentially, expert witness testimony.[23] The court itself noted that the applicant and supporting intervenors "raised important and, if they could be proved, troubling aspects of the current treatment of former spouses in Ontario. It is an unfortunate fact that *Charter* claimants often lack the resources to amass a voluminous litigation record."[24] The court thus dismissed the constitutional challenge, but this decision does not preclude a future *Charter* challenge on a different case, with a proper evidentiary foundation.

Family law commentators have also noted systemic concerns and called for legislative reform:

[22] *Family Law Act,* RSPEI 1988, c F-2.1, s. 30.

[23] *Mehralian v. Dunmore*, 2025 ONSC 649 (CanLII), at paras 148-152.

[24] *Mehralian v. Dunmore*, *ibid*, at para 154.

> …Financial disparities between spouses can exacerbate power imbalances, with the economically disadvantaged spouse facing significant hurdles in navigating complex legal issues and attempting to access legal representation in multiple jurisdictions. This situation underscores the importance of equitable legal supports and policies designed to safeguard the rights of disadvantaged spouses to obtain support… upon the end of a marriage.
>
> …where the impacts of recognizing a foreign divorce appear arbitrary or unintentional, there is a strong argument for legislative reform. It is difficult, for example, to think of a public policy rationale for preventing spouses divorced abroad from accessing spousal support, since that denial presumably shifts the burden of support onto the state.[25]

The Proposed Solution: Permitting Former Spouses to Claim Spousal Support and Potentially Adding a Residency Requirement to the *Family Law Act*

Proposed Change to Section 29 of the *Family Law Act*

The OBA proposes that the main change needed to resolve this complicated issue is to add the words "or someone who was formerly a spouse as defined in subsection 1(1)" to the definition of spouse in s. 29 of the *FLA*, which would alter the definition for all Part III (Support Obligations) provisions. The amended definition would read:

> **Definitions**
>
> **29** In this Part,
> "spouse" means a spouse as defined in subsection 1 (1) **or someone who was formerly a spouse as defined in subsection 1(1)**, and in addition includes either of two persons who are not married to each other and have cohabited,
>
> (a) continuously for a period of not less than three years, or

[25] Rebecca Winninger & Vanessa Lam, "Recognition and Impact of a Foreign Divorce in Canada" (2024) 43 CFLQ 231, p. 268 (also available on WL) [footnote omitted]. See also Aaron Franks & Michael Zalev, "Franks & Zalev – This Week in Family Law", FAMLNWS 2023-06 (WL) ["In our respectful view, the problem requires a legislative fix; not a judicial one. …The Court would not have been in the position of having to make this difficult decision on these difficult facts if the law of Ontario allowed former spouses to claim support. Again, this requires legislative action."] & Aaron Franks & Michael Zalev, "Franks & Zalev – This Week in Family Law", FAMLNWS 2020-07 (WL) ["Therefore, spouses that are subject to a foreign divorce cannot claim support in Ontario under the *Divorce Act* or under the *Family Law Act* - a terribly unfair situation and the reason some spouses run to foreign jurisdictions to get divorced. This really must change.].

(b) in a relationship of some permanence, if they are the parents of a child as set out in section 4 of the Children's Law Reform Act. ("conjoint")

This is a simple change that would reduce adversarial and complicated litigation while promoting fairness, and is in line with the legislative changes that Alberta, British Columbia, Manitoba, and Prince Edward Island have made.

Despite the ONCA's comments in *Sonia v. Ratan* recommending adding "former spouse" to s. 30 of the *FLA*, in our view, a cleaner and more comprehensive route is amending the definition of spouse in s. 29. This is because the s. 29 definition applies to all of Part III (Support Obligations) (ss. 29-49), which includes, for example, various provisions that deal with the purpose and amount of support payable to a spouse (ss. 33(8)-(9)), the obligation to provide support existing without regard to the conduct of a spouse (s. 33(10)), and the power to vary an order for support of a spouse (s. 37(2)). If s. 30 was amended (instead of s. 29) to include former spouse, multiple other sections within Part III that refer to or apply with respect the support of a spouse would also need to be amended.

On the other hand, if s. 29 is amended, the only section in Part III that already refers to "a spouse or former spouse" is s. 46(2), which provides for who a restraining order may be made against.[26] If the definition in s. 29 is amended to include a former spouse, then only the words "or former spouse" in s. 46(2) should be removed as redundant.

Our proposed amendments would take away the current incentive for the potential payor spouse to obtain a divorce in a foreign jurisdiction and then argue that the foreign divorce alone prevents a potential claimant spouse from pursuing spousal support that they might otherwise be entitled to.

The Difference Between Standing to Make a Claim and Entitlement to Spousal Support

Note that adding a former spouse as someone who can potentially claim spousal support under the *FLA* does ***not*** mean that all former spouses will be entitled to spousal support.

[26] *Family Law Act,* RSO 1990, c F.3, s. 30.

Just like a former spouse divorced in Canada, a married spouse who is separated but not divorced, or a common-law spouse who was never married, a former spouse divorced outside of Canada would still need to prove entitlement to spousal support. There are three different conceptual bases for spousal support: compensatory, non-compensatory (needs-based), or contractual entitlement. These established grounds to entitlement apply to both the *Divorce Act* and provincial support statutes, based on leading Supreme Court of Canada case law.[27]

Residency Requirement or Leaving the Common Law "Real and Substantial Connection" Test

While adding the this language to s. 29 would solve the standing problem, a further enhancement would be statutory guidance to add some sort of residency requirement. Unlike the *Divorce Act* (which has a habitual residence requirement for either spouse)[28], there is no overarching residency requirement to commence an action for relief under the *Family Law Act*. Instead, ss. 30 and 31 of the *FLA* simply sets out the obligation to provide support to a dependant spouse or child.[29] A court may make a support order, upon an application, under s. 33(1).[30]

For clarity and consistency with the *Divorce Act*, the OBA recommends a residency requirement that could be added to the *Family Law Act* to provide that the court has jurisdiction to order spousal support to a former spouse if:

(a) either former spouse has been habitually resident in the province for at least one year immediately preceding the commencement of the proceeding (as in s. 3(1) of the *Divorce Act* for a divorce proceeding);

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[27] *Bracklow v. Bracklow*, 1999 CanLII 715 (SCC), at paras 34 & 49.

[28] *Divorce Act*, RSC 1985, c 3 (2nd Supp), ss 2(1) [definitions of "divorce proceeding", "corollary relief proceeding", and "variation proceeding"], 3(1) [the court has jurisdiction in a divorce proceeding if either spouse has been habitually resident in the province for at least one year immediately preceding the commencement of the proceeding], 4(1) [the court has jurisdiction in a corollary relief proceeding if either former spouse is habitually resident in the province at the commencement of the proceeding, or if both former spouses accept the jurisdiction of the court], & 5(1) [the court has jurisdiction in a variation proceeding if either former spouse is habitually resident in the province at the commencement of the proceeding, or if both former spouses accept the jurisdiction of the court].

[29] *Family Law Act,* RSO 1990, c F.3, ss 30-31.

[30] *Family Law Act, ibid*, ss 33(1).

(b) either former spouse was habitually resident in Ontario at the time of separation (note "at the time of separation" uses similar wording to s. 18 of the *Family Law Act* that defines a matrimonial home; also, residency in Ontario "at the time of separation" has been found by Ontario courts to be a "connecting factor" to Ontario under the common law "real and substantial" connection test, discussed further below); or

(c) both former spouses accept the jurisdiction of the court (consent-based jurisdiction similar to ss. 4(1) and 5(1) of the *Divorce Act*, for corollary relief proceedings and variation proceedings, respectively).

If no residency requirement is added (resulting in the absence of a statutory rule), a spouse or former spouse's ability to claim spousal support would be subject to the current common law "real and substantial" connection test.[31] This test provides less certainty than a statutory test. However, case law has held that even if the claimant spouse does not meet the *Divorce Act* residency requirement, the court could still grant spousal support under the *FLA* based on the claimant's residency in Ontario (even if the potential payor lives outside of Ontario) at the time of separation, meeting the "real and substantial connection" test.[32]

Conclusion

Amending the definition of spouse under the *Family Law Act* is an essential step for Ontario's family law system. Establishing an unambiguous residency requirement would also assist. By making these changes, Ontario would provide clarity, consistency, and fairness for individuals seeking support. The result will be fewer costly and protracted legal battles, a significant reduction in hardship for vulnerable former spouses, and a more efficient, equitable justice system.

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[31] *Li v. Li,* 2021 ONCA 669 (CanLII), at para 31, citing *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 (CanLII).

[32] *Boland v. Boland*, 2016 ONSC 4390 (CanLII), at paras 28 & 37-39 & *Knowles v. Lindstrom,* 2014 ONCA 116 (CanLII), at para 35; leave to appeal dismissed 2014 CanLII 45834 (SCC).

See also *Simons v. Crow*, 2020 ONSC 5940 (CanLII), at para 44, citing various cases [asserting jurisdiction against an out-of-province payor for a claim for child support]; *Cawdrey v. Cawdrey*, 2011 ONSC 669 (CanLII), at paras 7-8 [the same principles apply to a claim for spousal support]; *Muscutt v. Courcelles*, 2002 CanLII 44957 (ON CA), at para 19 [three ways in which jurisdiction may be asserted against an out-of-province defendant].