Bill 177, the *Stronger, Fairer Ontario Act (Budget Measures), 2017*

Proposed Amendments to the *Family Law Act*

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Submitted to: Standing Committee on Finance and Economic Affairs

Submitted by: Ontario Bar Association

ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

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

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Introduction

The Ontario Bar Association (the "OBA") appreciates the opportunity to make this submission to the Standing Committee on Finance and Economic Affairs (the "Committee") in respect of Bill 177, the *Stronger, Fairer Ontario Act (Budget Measures), 2017*. This submission is specifically organized around one of the Bill's proposed Schedules: Schedule 15, which will amend child support obligations under s. 31 of the *Family Law Act*.

The OBA

Founded in 1907, the OBA is the largest legal advocacy organization in the province, representing approximately 16,000 lawyers, judges, law professors and students. OBA members are on the frontlines of our justice system in no fewer than 40 different sectors and in every region of the province. In addition to providing legal education for its members, the OBA assists legislators with many policy initiatives each year – both in the interest of the profession and in the interest of the public.

This submission has been developed by the OBA's Family Law section with input from the Child and Youth Law section. OBA members participating in this submission include lawyers who represent a wide range of clients within the family justice with significant expertise in provincial and federal family law legislation.

Schedule 15 – *Family Law Act* Amendments

The Current *Family Law Act* and *Charter* Challenge

Separated and divorced parents have a legal obligation to provide support for their children, including their adult children, under the provincial *Family Law Act* and the federal *Divorce Act*. However, the extent of the obligation differs depending on which statute is applied.

The federal *Divorce Act* extends the legal child support obligation to children who are, at the material time,

> (a) under the age of majority and who have not withdrawn from their charge, or
>
> (b) 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 necessaries of life [emphasis added].[1]

[1] *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 2 ("child of the marriage").

However, the *Divorce Act* applies only in those limited situations where the parents are divorced or divorcing.

In contrast, the current *Family Law Act* – which applies regardless of whether the parents were ever married or not – makes no explicit reference to "illness, disability or other cause." The support obligations for adult children in the *Family Law Act* are limited to unmarried children who are minors or who are enrolled in full-time education, to the extent that the parent is capable of providing support.[2]

The result of the different entitlements under the *Divorce Act* and *Family Law Act* provisions is that some adult children are entitled to support because their parents are divorced or divorcing, but others – in almost exactly parallel circumstances – are statute-barred from receiving support simply by virtue of the fact that their parents are unmarried or married but separated.

The relevant provision of the *Family Law Act*, s. 31(1), was recently the subject of a constitutional challenge in the Ontario Court of Justice. In that case, *Coates v. Watson*,[3] the applicant mother's adult son Joshua had a rare genetic disorder that prevents him from living independently. The mother argued that s. 31(1) was in violation of s. 15 of the *Charter of Rights and Freedoms* because it precluded Joshua from receiving support from his father that would otherwise be available under the provisions of the *Divorce Act* if Joshua's parents had been married. Because Joshua's parents never married, the more expansive support entitlements under the *Divorce Act* were not available to him.

The Court found that s. 31(1) of the *Family Law Act* is discriminatory and violates s. 15 of the *Charter*. As remedy, the Court ordered that the language from the *Divorce Act* be read in to s. 31(1) of the *Family Law Act* for the purpose of determining Joshua's entitlement to child support.

Significance of "Other Cause"

Schedule 15 of Bill 177 is designed to address this discrepancy between the child support entitlements under the *Divorce Act* and the *Family Law Act*. It proposes to repeal s. 31(1) of the *Family Law Act* and replace it with the following:

> (1) Every parent has an obligation to provide support, to the extent that the parent is capable of doing so, for his or her unmarried child who,
>
> (a) is a minor;
>
> (b) is enrolled in a full-time program of education; or

[2] *Family Law Act*, R.S.O. 1990, c. F.3, s. 31(1).
[3] *Coates v. Watson*, 2017 ONCJ 454.

(c) is unable by reason of illness or disability to withdraw from the charge of his or her parents.

The OBA has long supported broadening the child support entitlements under the *Family Law Act* to include the more expansive entitlements under the *Divorce Act*. We have stated previously that the discrepancy between the two regimes has serious discriminatory effects and constitutional implications. We are therefore pleased to see the proposed extension of support obligations under the *Family Law Act* to children with illness and disability.

However, the proposed amendments do not completely resolve the discrepancy between the *Divorce Act* and the *Family Law Act* entitlements. In our view, some adult children will continue to experience discrimination under the proposed legislation. These are children who would be entitled to support under the *Divorce Act* by reason of being unable, by reason of some "other cause," to withdraw from the charge of their parents or to obtain the necessaries of life.

Although a significant number of federal child support cases based on "other cause" involve an adult who is in school full-time, a ground that is captured under s. 31(1) of the *Family Law Act*,[4] not *all* of the federal child support cases under "other cause" relate to full-time education. There are cases that under the *Divorce Act* in which "other cause" was found to exist, but was not related to an "illness or disability" or to full-time education. This fact necessarily implies that some cases – albeit a minority – may not be captured in the proposed *Family Law Act* language. As just one example, in a 2011 decision, the Ontario Court of Appeal allowed an order of support under "other cause" for an adult child who had just graduated from university and was diligently searching for employment.[5] These facts would not be caught by the amended *Family Law Act* language.

In our view, failing to import the language of "other cause" from the *Divorce Act* will result in further challenges to the proposed *Family Law Act* provisions by adult children who are not enrolled in full-time education but who are nevertheless unable to withdraw from the charge of their parents by reason other than illness or disability. Indeed, the constitutionality of the *Family Law Act* provisions is currently being challenged in at least two more cases before Ontario courts. Including "other cause" would ensure that the two pieces of legislation properly mirror one another, thereby avoiding future challenges.

In light of the decision in *Coates*, the wording in the *Family Law Act* should reflect the wording in the *Divorce Act* to ensure that there is no discrimination against children whose parents are not

[4] Laurie Monsebraaten, "Province to include adult children with disabilities in child support law," *Toronto Star*, November 15, 2017.
[5] *S.P. v. R.P.*, 2011 ONCA 336.

divorced or divorcing.

Conclusion

There is no principled reason to exclude some children from financial support simply because their parents cannot, or choose not to, apply for divorce. All children should be equally entitled to support, no matter the spousal status of their parents.

Once again, the OBA appreciates the opportunity to provide these comments. We commend the attention the Legislature has provided to this important matter.