



## Submission Regarding Amendments to the *Divorce Act*

Date: November 2019

Submitted to: Office of the Attorney General of  
Ontario

Submitted by: Ontario Bar Association



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A Branch of the  
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## Introduction

The Ontario Bar Association (“OBA”) appreciates the opportunity to provide additional advice 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**”).

We thank you for meeting with us on October 10, 2019, where we discussed our earlier submission<sup>1</sup> and the specific measures the Province can take to ensure that provincial legislation is consistent with federal legislation once the majority of Bill C-78 comes into effect on July 1, 2020.

## 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 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. Significant submissions

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<sup>1</sup> Ontario Bar Association’s Submission Regarding 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*, <https://www.oba.org/CMSPages/GetFile.aspx?guid=2bedae8d-5c9d-4b34-ad7b-9e67cd17cfec>, July 2019.



and debate went into Bill C-78. In the House of Commons, the Standing Committee on Justice and Human Rights heard from 54 witnesses and considered 53 briefs submitted by a variety of organizations and individuals.<sup>2</sup> In the Senate, the Standing Senate Committee on Legal and Constitutional Affairs also considered briefs and heard from numerous witnesses from various organizations and individuals, including the Minister of Justice and the Attorney General of Canada, the Ontario Chapter of the Association of Family and Conciliation Courts, legal academics and practitioners, and representatives from shelters serving women and children affected by violence.<sup>3</sup>

The House made relatively minor amendments and the Senate made no amendments after hearing from the witnesses and considering the views from a diverse range of interested organizations and individuals on how various groups would be impacted by the Bill.

The OBA's position is that Bill C-78 represents a fair balance of the numerous and sometimes competing interests advanced by the various stakeholders.

The changes to the federal *Divorce Act*, which will mostly come into force on July 1, 2020, will help to modernize that Act by providing further clarity around and promoting the best interests of the child, updating parenting terminology, better addressing family violence, and encouraging the use of family dispute resolution processes where appropriate.

We suggest that the changes to the *Divorce Act* should be largely incorporated into the Ontario *Children's Law Reform Act*. We take this position based on: (1) our general support for the Bill C-78 amendments; and (2) our strongly held view that inconsistencies between federal and provincial law on these issues are not in the best interests of families. The benefits of having consistent provincial and federal legislation relate primarily to:

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<sup>2</sup> House of Commons, *Standing Committee on Justice and Human Rights: Work: 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*, available online at: <http://www.ourcommons.ca/Committees/en/JUST/StudyActivity?studyActivityId=10292072> (click on "Briefs (53)" or "Witnesses (54)" to expand and access the briefs and transcript of testimony).

<sup>3</sup> Senate of Canada, *Standing Committee on Legal and Constitutional Affairs: Briefs: 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*, available online at: [https://sencanada.ca/en/committees/LCJC/Briefs/42-1?oor\\_id=521768](https://sencanada.ca/en/committees/LCJC/Briefs/42-1?oor_id=521768).



- Ensuring that the same laws apply to children of married spouses (generally guided by federal law) and to children of non-married spouses (guided by provincial law); and
- Creating clarity for the public, the legal profession, and third parties who are involved and affected by family law.

Prior to getting into the specific recommendations set out below, the OBA strongly recommends that, along with any amendments the province makes in response to Bill C-78, it includes a clause that the coming into force of these amendments “does not constitute a material change in circumstances” pursuant to s. 29 of the *Children’s Law Reform Act* (the variation provision).

Similarly, for clarity, it would be useful to have a clause that the coming into force of these amendments “does not constitute a material change or change in circumstances” pursuant to ss. 37(2) and (2.1) of the *Family Law Act* (application for variation of support).

The addition of these proposed clauses will prevent parties from attempting to re-litigate issues that had been finalized prior to the coming into force of Bill C-78 simply based on amendments the province may make. This will result in savings in the court system and taxpayer dollars in re-litigating matters previously resolved and also reduce the likelihood of increased conflict among separated parties.

## Recommendations

In addition to our earlier submission on Bill C-78, and in response to our discussion regarding same, please find below further recommendations regarding: the best interests of the child, how to better address family violence, relocation, updating parenting terminology, and encouraging the use of family dispute resolution processes where appropriate. Should there be an opportunity for us to assist with further educational programming regarding the impact of Bill C-78 on provincial legislation, we are happy to discuss this with you and welcome the opportunity to discuss other impacts of Bill C-78 on provincial legislation.



## 1. Best Interests of the Child

The OBA recommends that the province adopt the “Best Interests of the Child” section, namely ss. 16(1) to (7) in the new *Divorce Act*. This should replace the language contained in ss. 24(1) to (5) of the *Children’s Law Reform Act*, with the exception that references to “child of the marriage” in s. 16(1) of the *Divorce Act* should just read “child” in the *Children’s Law Reform Act*.

Previously, the *Children’s Law Reform Act* provided more detailed guidance on the non-exhaustive list of factors to be considered in determining the best interests of the child. However, the *Divorce Act* amendments provide an even more comprehensive non-exhaustive list of factors (s. 16(3)), set out a primary consideration to assist in considering the various factors (s. 16(2)), while remaining committed to the best interests of the child test (s. 16(1)). Subsection (4) provides new guidance on how the court should consider the impact of any family violence. Subsections (5) to (7) are less noteworthy, but still important for consistency and to ensure the best interests test is the same for all children, regardless of the legal status of their parents (i.e., married or unmarried).<sup>4</sup>

## 2. Family Violence

The OBA recommends that the province adopt the definitions of “family violence” and “family member” (in s. 2 of the *Divorce Act*) into s. 18(1) of the *Children’s Law Reform Act*.

## 3. Relocation and Change in Place of Residence

The OBA recommends that the province adopt the new Change in Place of Residence and Relocation sections of the *Divorce Act* (ss. 16.7 to 16.96) by adding them to the *Children’s Law Reform Act*. Of note is that the Relocation sections refer to “forms”. The OBA recommends that the Family Law Rules Committee incorporate the necessary forms into the regulations.

In addition, the OBA recommends that the province adopt the exceptions or modification to the providing of notice as it relates to a change in place of residence or relocation in the event there is the risk of family violence (ss. 16.8(3) and (4), 16.9(3) and (4) and ss. 16.96(3) and (4)).

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<sup>4</sup> On this basis, the Ontario courts have largely imported provisions from federal legislation into provincial legislation and vice-versa (e.g. the list of best interests factors set out in the *Children’s Law Reform Act* was often used in *Divorce Act* cases; and s. 16(10) of the current *Divorce Act*, which will be replaced by new s. 16(6) of the *Divorce Act*, was often used in *Children’s Law Reform Act* cases).



#### **4. Parenting Terminology and Parenting Orders**

The OBA also recommends that the province adopt the updated parenting terminology, namely, the definitions of “parenting order”, “parenting time”, “decision-making responsibility”, and “contact order” (in s. 2 of the *Divorce Act*). Again, any references to “child of the marriage” should just read “child”.

##### *Children’s Law Reform Act*

In the *Children’s Law Reform Act*, the new definitions should be added to the definitions under s. 18(1), which applies to Part III of the Act. The heading to Part III and references to “custody” and “access” in various sections would also need to be correspondingly amended to reflect the new terminology (e.g. ss. 20 to 23 and ss. 25 to 30).

However, s. 20(5) of the *Children’s Law Reform Act* deals with entitlement to information and is dealt with separately, below.

##### Other Provincial Legislation

In addition, all other provincial legislation that references the existing terms of “custody” and/or “access” should also be amended just to update the terminology (e.g. the *Family Law Act*).

##### Parenting Orders

The updated parenting terminology definitions must be read in the context of new ss. 16.1 to 16.5 of the *Divorce Act*, which specify how a court should make parenting orders and contact orders.

With one exception, we recommend largely adopting these sections of the *Divorce Act* to the *Children’s Law Reform Act*, possibly by adding a new s. 28.1. The part of the new s. 16.1 in the *Divorce Act* that specifies who may apply for a parenting order may be more appropriately adopted in s. 21(1) of the *Children’s Law Reform Act*. Further, instead of referring to a “spouse” it should refer to a “parent” being able to apply without leave. If a person other than a parent wishes to apply, they should be required to seek leave as this would be consistent with the *Divorce Act*. Note that the addition of a new “contact order” section for non-spouses in the *Divorce Act* (s. 16.6) can be adapted to apply for a person other than a parent in the *Children’s Law Reform Act*.



The section that the OBA recommends against adopting is s. 16.1(6) that refers to an order directing the parties to attend a family dispute resolution process, which is subject to provincial law. The OBA encourages the use of family dispute resolution processes (as further set out below). However, provincial law does not require parties to attend a family dispute resolution process, and changing the law has wide-ranging implications for cases of family violence, where financial resources are limited, rural and remote areas where access to such services may be difficult, etc.

### Entitlement to Information

The OBA recommends that the province adopt the language contained in the new s. 16.4 of the *Divorce Act* regarding a parent's ability to access information by incorporating it into s. 20(5) of the *Children's Law Reform Act*.

### Parenting Plans

The OBA recommends that the province adopt the language contained in the new s. 16.6 of the *Divorce Act* regarding parenting plans by adding it into the *Children's Law Reform Act*.

## **5. Duties and Family Dispute Resolution Process**

The OBA recommends that the province adopt ss. 7.1 to 7.6 (setting out the duties of parties to a proceeding) and s. 7.8 (setting out the duties of the court) under the *Divorce Act*. All of these sections should be adopted into the *Children's Law Reform Act*. Sections 7.3 to 7.6 and 7.8 should also be adopted into the *Family Law Act*. Sections 7.1 and 7.2 may not be applicable under the *Family Law Act* so the province may wish to consider whether any similar wording should be included or these sections simply omitted from the *Family Law Act*.

Section 7.3 refers to, where appropriate, use of a "family dispute resolution process". This is a defined term (in s. 2 of the *Divorce Act*) that should also be adopted in the *Children's Law Reform Act* and the *Family Law Act*.

The *Child, Youth and Family Services Act* already has a section on alternative dispute resolution (s. 17) and prescribed methods of alternative dispute resolution that were drafted relatively recently and respond to concerns unique to the child protection context. We would not recommend revisions to this part of the *Act* as a result of Bill C-78.



The OBA also recommends that no action be taken by the province with regards to s. 7.7, which largely applies to reconciliation of spouses and should be restricted to the *Divorce Act*. Subsection 7.7(2) refers to the duty to encourage the use of a family dispute resolution process and to inform of family justice services. However, this duty is largely already mandated by Rule 3.2-4 of the Law Society of Ontario's *Rules of Professional Conduct*. The OBA supports additional resources for provincially funded services to assist families going through a separation or other family law issues.

### **Third Party Outreach/Education**

The changes made by Bill C-78 in the *Divorce Act*, and any changes that the Ontario government chooses to make to provincial legislation, will require third party outreach / education. Specifically, the changes away from more traditional parenting terminology will affect those involved with parents and children, such as teachers, school boards, and medical professionals. The OBA has already held a Continuing Professional Development program aimed at preparing these third parties for the changes to come. We are happy to discuss any assistance the OBA may be able to provide in helping with further educational opportunities to ensure a smooth transition and to reduce any confusion about the law.

### **Other Acts Included in Bill C-78**

In addition to amendments to the *Divorce Act*, Bill C-78 also amends the *Family Orders and Agreements Enforcement Assistance Act* and the *Garnishment, Attachment and Pension Diversion Act*. Some of these amendments came into force upon Bill C-78 receiving Royal Assent on June 21, 2019, but the remaining amendments and regulatory changes will come into force later, likely by July 2021.

The OBA welcomes the opportunity to make additional submission on these other two *Acts* in due course.

## **Conclusion**

The OBA's priority is to assist in ensuring that provincial legislation is consistent with federal legislation by July 1, 2020 to minimize inconsistencies and confusion for parents, children, and other members of the public who are impacted by these changes.



The changes we have recommended aim to provide clarity, simplicity, and consistency in the treatment of all children in Ontario. Having identical or very similar legislative amendments also reduces potential litigation in the future over differences. We only suggest slight deviations from the wording to the *Divorce Act* amendments that are necessary to take into account Ontario-specific concerns and in the usual context of parents, and not spouses, applying under the *Children's Law Reform Act*.

We look forward to continuing to work with you on this important issue in the months ahead.