

A Brief Overview of Bill C-78, An Act to Amend the Divorce Act and Related Legislation

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Part I: Amendments Other than Those Relating to Interjurisdictional Agreements and Treaties

About the bill

Bill C-78 was tabled for first reading in the House of Commons on Tuesday 22 May 2018 by the Minister of Justice. The bill addresses a variety of outstanding issues that have been accumulating over the past decade or so and represents the first truly significant amendment of the *Divorce Act* since the present act became law in 1985; the Child Support Guidelines, a regulation to the act, were introduced in 1997. The bill must yet endure second reading, the committee process, the report stage and third reading in the House of Commons before proceeding to the Senate to repeat the process. There is about a year left in the current legislative session within which the bill must pass both chambers or die on the order table.

It is possible, but unlikely, that the bill will become law in its current form. Proposals for amendment may be made by both the House and Senate committees and are probable during the report stage. At present, the bill represents the will of government but is subject to change; the final form of any resulting legislation is at present unknown. Although other attempts to amend the *Divorce Act* have been tabled in the past and failed to become law, it is nonetheless important for family law lawyers and judges dealing with family law cases to appreciate the amendments proposed in the present bill.

The bill proposes a number of significant reforms that will reshape family law in Canada. The bill owes much to the legislatures of Alberta and British Columbia. Alberta's *Family Law Act* became law in 2003, repealing the former *Domestic Relations Act*, and replacing language about custody and access with "parenting orders" that allowed the court to allocate or share the "powers, responsibilities and entitlements of guardianship" among guardians, allocate "parenting time" to guardians and allowed persons other than guardians to apply for "contact" with a child. This was the same approach to terminology taken in British Columbia's 2011 *Family Law Act*, which also added a lengthy list of factors, including family violence, to be considered in determining the "parenting arrangements" that are in the best interests of the child, a test to assist the court in determining relocation applications, and a number of admonitions designed to

encourage parties and counsel to pursue dispute resolution options other than litigation. The case developing in these provinces, British Columbia in particular, may be of assistance in interpreting whatever changes may eventually be made to the *Divorce Act*.

Definitions

The bill would repeal the definitions of *custody* and *access* in section 2(1) of the *Divorce Act*, add definitions of a number of important new terms and make a consequential amendment of the definitions of *corollary relief proceeding* and *divorce proceeding*:

- a) a “contact order” is an order providing access to a child for a person other than a spouse under section 16.5(1);
- b) “decision-making responsibility” is a power akin to guardianship, formerly subsumed in the broad interpretation given to custody under the *Divorce Act*;
- c) “family dispute resolution process” means an out of court dispute resolution process, including negotiation, collaborative negotiation and mediation, all of which are identified in the definition, as well as arbitration;
- d) “family justice services” means public or private services in relation to separation or divorce;
- e) “family violence” is a broadly-defined term that bears a strong resemblance to the definition provided in British Columbia’s *Family Law Act* and includes physical abuse, sexual abuse, threats of harm to persons, pets and property, harassment, psychological abuse and financial abuse;
- f) “parenting order” is an order under section 16.1(1) allocating decision-making responsibility and parenting time;
- g) “parenting time” is the allocation of access to a spouse and includes, under section 16.2(3), the exclusive authority to make day-to-day decisions affecting a child; and,
- h) “relocation” means a change in the residence of a child or spouse that may have a “significant impact” on the child’s relationship with a spouse or a person with contact.

“Parenting plan” is defined at section 16.6(2) as a written agreement concerning parenting time, decision-making responsibility and contact.

Jurisdiction

The bill would provide modest updates to the jurisdictional requirements currently set out in sections 3 (divorce), 4 (corollary relief) and 5 (variation of orders for corollary relief) and the

transfer of divorce, corollary relief and variation proceedings under section 6 where a child is most substantially connected to another province. The most significant updates are that:

- a) the federal court will no longer have jurisdiction where spouses commence proceedings on the same date in different provinces, but will determine the court of the province that is the “most appropriate” to hear the matter; and,
- b) the “most substantially connected” test is replaced by a determination of the province that is the child’s “habitual residence.”

New provisions will provide tests for jurisdiction where:

- a) contact orders are sought, under section 6.1;
- b) a child is wrongfully removed from a province, under section 6.2; and,
- c) a child is not habitually resident in Canada, under section 6.3.

Duties of parties and counsel

The bill would impose a number of new duties on parties under sections 7.1, 7.2, 7.3 and 7.4:

- a) persons with parenting time, decision-making responsibility or contact are required to exercise the right in a manner consistent with the best interests of the child;
- b) parties are required to protect children from conflict arising from the *Divorce Act* proceeding;
- c) parties are required to try to resolve a matter that could be the subject of a *Divorce Act* order through family dispute resolution processes; and,
- d) parties must provide complete, accurate and up-to-date information, presumably financial information where support is at issue.

Lawyers would be required to inform of, and encourage parties to attempt, to resolve disputes through family dispute resolution processes and to inform parties of any family justice services that may help a party to resolve a dispute or comply with an order, under section 7.7(2).

Parties would be required to, as lawyers are a present, sign a certificate that they are aware of their duties under the act under section 7.6 when commencing or responding to a proceeding.

Duties of the court

The bill would require the court to consider certain other proceedings in corollary relief proceedings, under section 7.8(2):

- a) any civil protection orders;
- b) any child protection proceedings or orders; and,
- c) and criminal proceedings, undertakings, recognizances or orders.

Collusion

The definition of *collusion* at section 11(4) is amended to exclude agreements between the parties relating to support, the division of property and parenting orders.

Best interests of the child and family violence

The best interests of the child will continue to be the only consideration applied by the court in making a parenting order or contact order, however the bill would provide a non-exhaustive list of factors to be taken into account in determining a child's best interests, of which the court would be required to "give primary consideration to the child's physical, emotional and psychological safety, security and well-being" under section 16(2). The enumerated factors are provided at section 16(3) and include:

- a) the child's needs;
- b) the child's relationship with the spouses, any siblings, grandparents and "any other person who plays an important role in the child's life;"
- c) the spouses' willingness to support the child's relationship with the other spouse;
- d) the child's views and preferences;
- e) the child's cultural and linguistic heritage;
- f) the ability of each person to care for and meet the needs of the child;
- g) the ability of the spouses to communicate and cooperate with each other; and,
- h) the presence of family violence.

As is the case with British Columbia's *Family Law Act*, a list of factors is provided at section 16(4) to assist the court in assessing the impact of family violence under section 16(3). The factors include:

- a) the serious and frequency of the family violence;
- b) whether there is a pattern of coercive and controlling behaviour;
- c) the extent to which the family violence is directed to a child, or to which a child is exposed to family violence;
- d) the risk of harm to a child; and,
- e) any steps taken by the perpetrator to prevent further family violence and improve their ability to care for the child.

Parenting orders

"Parenting orders" may be made under section 16.1 on the request of:

- a) a spouse; and,
- b) with leave, non-spouses who are parents, stand in the place of a parent for a child or intend on standing on the place of a child.

Parenting orders may, under section 16.1(4), include orders:

- a) allocating parenting time;
- b) allocating or sharing decision-making responsibility, under section 16.3; and,
- c) specify how communication is to occur between persons with parenting time,

as well as:

- d) orders requiring the parties to attend family dispute resolution, under section 16.1(6);
- e) orders requiring supervision, under section 16.1(8); and,
- f) orders prohibiting the relocation of a child or the relocation of a child without consent, under section 16.1(7) and (9).

Parenting plans may be included in parenting orders under section 16.6(1).

The maximum contact principle is preserved at section 16.2(1). The right of spouses with access to information about the health, wellbeing and education of children is preserved at section 16.4.

Contact orders

Contact orders are excluded from the definition of “parenting orders.”

A person other than a spouse may apply for a contact order with leave under section 16.5(3). Contact orders may include:

- a) orders for visits and means of communication between the person and the child, under section 16.5(5);
- b) orders prohibiting the removal of a child without consent, under section 16.5(8).

Parenting plans may be included in contact orders under section 16.6(1).

Changes of residence other than relocations

A “person,” not a *spouse*, with parenting time or decision-making responsibility who intends to move, with or without a child, must give notice to other persons with parenting time, decision-making responsibility or contact under section 16.8(1). Under section 16.8(2), the notice must:

- a) be in writing;
- b) state the date of the move; and,
- c) state the address of the new place of residence and any other contact information for the person and the child.

Relocation

A “person,” not a *spouse*, with parenting time or decision-making responsibility who intends to relocate, with or without a child, must give at least 60 days’ notice to other persons with parenting time, decision-making responsibility or contact under section 16.9(1). Under section 16.9(2), the notice must:

- a) be in writing;
- b) state the date of the proposed relocation;
- c) state the address of the proposed new place of residence and any other contact information for the person and the child; and,

- d) provide a proposal as to how parenting time, decision-making responsibility or contact may be exercised.

A person with parenting time or decision-making responsibilities receiving notice may object to a proposed relocation, and must do so by filing an application within 30 days after the day on which notice is received, under section 6.91(b)(i). The court may make orders prohibiting the relocation of a child under section 16.1(7).

A person with contact is not entitled to object to a proposed relocation.

The person delivering the notice may relocate on the date specified in the notice if:

- a) the court authorizes the relocation; or,
- b) no objection is filed and there is no order prohibiting relocation.

A list of factors is provided at section 16.92 to guide the court's decision to authorize a relocation, or not, including:

- a) the reasons for the relocation;
- b) the impact of the relocation on the child;
- c) the time the child has with each person with parenting time;
- d) whether the relocating party has complied with the notice requirement;
- e) whether each party has complied with any obligations under "family law legislation," an award or an order; and,
- f) the reasonableness of the proposal as to how parenting time, decision-making responsibility or contact may be exercised made by the relocating party.

Under section 16.93(2), the court may *not* consider whether the relocating party would relocate without the child.

Section 16.93 establishes a shifting burden of proof:

- a) if the parties have "substantially equal" time with the child, the relocating party bears the burden of establishing that the relocation is in the best interests of the child;
- b) if the relocating party has the child for "the vast majority of [the child's] time," the burden of establishing that the relocation is *not* in the best interests of the child lies on the objecting party; and,

- c) in cases falling in the mid-range between these extremes, both parties have the burden of proof.

However, under section 16.94, the court may determine that both parties have the burden of proof if the authorizing order sought is an interim order.

Where the court authorizes a relocation, the court may make an order apportioning the cost of exercising parenting time between the parties, under section 16.95

Change of residence or relocation by persons with contact

Under section 16.96, a person with contact with a child is required to notify persons with parenting time or decision-making responsibility of their intention to change their place of residence. The notice must:

- a) be in writing;
- b) state the date of the move; and,
- c) state the address of the new place of residence and any other contact information for the person,

but where the change may have a significant impact on the child's relationship with the person, the notice must also:

- d) be delivered at least 60 days before the move; and,
- e) provide a proposal as to how contact may be exercised.

Variation applications

The bill would amend section 17 to distinguish between the variation of support orders, parenting orders and contact orders. Although a change in circumstances affecting the child will continue to be the threshold test for variation applications:

- a) the relocation of a child is deemed to constitute such a change, under section 17(5.2);
but,
- b) the prohibition of a proposed relocation does *not* constitute such a change, under section 17(5.3).

Interjurisdictional variation of support orders

The bill would repeal sections 17.1 (variation orders by affidavit where spouses live in different provinces, 18 (provisional orders) and 19 (confirmation orders) and replace those provisions with a new regime that bears some resemblance to the provincial *Interjurisdictional Support Orders Acts* currently in place throughout Canada.

Under section 18.1, If former spouses live in different provinces, either may apply to vary a support order or recalculate a child support order by sending the application to the province's designated authority, which in turn sends the application to the authority in the other spouse's province. The authority receiving the application must serve the other spouse and the application is heard in that province.

Section 19 provides a process where the applicant spouse lives outside of Canada in country to be specified by regulation. (The countries identified in the schedule attached to the regulations to the *Interjurisdictional Support Orders Acts* seem an obvious potential starting point.) The applicant sends the variation application to the country's designated authority which in turn sends the application to the authority in the other spouse's province. The authority receiving the application must serve the other spouse and the application is heard in that province.

Under section 19.1, a similar process is provided where the applicant spouse lives in Canada and the other spouse lives outside of Canada in country to be specified by regulation. The application is heard in the other country, and the decision made in that country may be registered in Canada under the law of the applicant spouse's province.

Legal effect of *Divorce Act* orders

The bill would amend section 20(2) of the act to provide that the decisions of child support recalculation services also have legal effect throughout Canada.

Recognition of foreign divorces

The will would amend section 22 of the act to replace the "ordinary residence" test with a determination of the spouse's "habitual residence" in the foreign jurisdiction for at least one year.

Recognition of foreign parenting orders and contact orders

The bill would add section 22.1 to provide that the courts of a province with a "sufficient connection" to a matter must recognize foreign orders varying or suspending parenting orders and contact orders. The court need not recognize the foreign variation order if:

- a) the child is not "habitually resident" in the foreign jurisdiction;

- b) the decision was made without the child being provided with the opportunity to be heard;
- c) a person whose parenting time, decision-making responsibility or contact was impacted by the decision was not provided with the opportunity to be heard;
- d) the decision is contrary to public policy in Canada; or,
- e) the decision cannot be reconciled with a later decision qualifying for recognition.

Child support calculation services

New sections 25.01 and 25.1 would allow the federal government to work with provincial governments to create child support calculation and recalculation services intended to determine the amount of child support payable under the Guidelines through an administrative process. Provisions are made for the appeal of such orders by spouses disagreeing with the services' calculations and recalculations.

Part II of this overview will concern the portions of Bill C-78 touching on the Convention on the International recovery of Child Support and Other Forms of Family Maintenance, the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act.