September 10, 2018

Sent via E-mail

The Honourable Jody Wilson-Raybould
Minister of Justice and Attorney General of Canada
Department of Justice
284 Wellington Street
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Dear Minister Wilson-Raybould:

Re: Association of Family and Conciliation Courts (AFCC), Ontario Chapter (AFCC-Ontario): Response to Proposed Amendments to the *Divorce Act* and Other Family Law Legislation as Set Out in Bill C-78

We are writing to you on behalf of the Board of Directors of the Ontario Chapter of the Association of Family and Conciliation Courts (AFCC-Ontario) with our commentary upon House of Commons Bill C-78, *An Act to amend the Divorce Act, the Family Orders and Agreements and Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*, which Bill was given first reading on May 22, 2018. We expressly note that the judicial members of the Board of AFCC-Ontario, as well as certain other Board members connected to government, are abstaining from participation in this response.

AFCC-Ontario is an interdisciplinary association of lawyers, mental health professionals, social workers, psychologists, mediators, court administrators, researchers/professors, family law judges, and other professionals working in the family dispute resolution field. AFCC-Ontario has over 400 members in Ontario who are dedicated to the resolution of family conflict. Our members share a strong commitment to education, innovation, research, and collaboration in order to benefit communities, empower families, promote a healthy future for children, and improve access to family justice. Our focus is on the promotion of the interests of children and parents involved in the justice system and family dispute resolution.

We begin this response to Bill C-78 by locating the Bill within the broader context of the phenomena of separation and divorce. We then turn to AFCC-Ontario's views regarding more general aspects of Bill C-78. We conclude with a short discussion of AFCC-Ontario's views regarding select substantive aspects of Bill C-78.

A. Locating Bill C-78 Within the Broader Context of the Phenomena of Separation and Divorce

It is of critical importance, as an overarching matter, to endeavor to locate the proposed legislative changes set out in Bill C-78 within the broader context of the impact upon Canadian families and children of separation and divorce, as that will provide a key "frame" or "lens" through which the proposed legislative reform ought to be considered and judged for its likely efficacy.

Separation and divorce – and the parenting, financial, and other issues that arise as the *sequelae* of those – are some of the most complex human phenomena, involving numerous dimensions, aspects, and considerations: psychological; economic/financial; social; legal; and societal. Making things even more complex is the reality that these multifarious aspects and considerations are, in turn, not infrequently in tension with one another, and they are also often interdependent. Consequently, as a general matter, to be truly effective any remedies and/or legal reforms relating to separation and divorce will typically also have to be complex, multi-faceted, sensitive, and nuanced.

Taking this point further, for many Canadian families going through the processes, separation and divorce are not "legal problems with some social aspects"; rather, they are "social problems with some legal aspects". In fact, taking this point one step further, separation and divorce are not even "just" legal and social problems. Instead, separation and divorce – and laws and practices surrounding them – are also matters of great <u>societal</u> importance, because how families navigate a separation or divorce has an incredible impact upon the members of our society as a whole, and quite acutely upon some of the most vulnerable and important members of Canadian society: our children. It is therefore critical that a multi-disciplinary, broad, holistic, and integrated, approach be seen as <u>the touchstone</u> for finding appropriate and sustainable solutions to family justice problems, including solutions in the form of legislative reform. This is entirely consonant with the mandate of AFCC-Ontario, its research, its education projects, and its values; and AFCC-Ontario believes it has played, and will continue to play, an important role in helping to educate and acculturate professionals in various disciplines in the holistic, nuanced, and inclusive solutions that will be necessary to achieve success for families going through separation and divorce.

B. AFCC-Ontario's Views Regarding More General Aspects of Bill C-78

Viewed within this frame, AFCC-Ontario is very heartened by many of the proposed amendments to the *Divorce Act* as set out in Bill C-78. For a long time now the *Divorce Act* has been in need of amendment so as to "bring it up to speed," to the point where the social science research relating to important post-separation matters, as well as the "modern" approach to dispute resolution in the family justice sphere, have progressed and presently stand. The amendments to the *Divorce Act* set out in Bill C-78 go a significant way in this necessary process of modernization.

Indeed, Bill C-78 moves Canada's federal divorce legislation forward in a holistic way to better reflect where our justice system (broadly defined) presently ought to stand, in terms of the resolution of family law disputes in this country. We expect that this legislative reform, once in place, will have various important and salutary effects. First, and most importantly, to the extent that Bill C-78 changes substantive aspects of family law in a positive way (and, as set out further below, we believe that Bill C-78 does just that on several important dimensions), the families that are affected by separation and divorce will benefit.

Further, apart from the specifics and substance of the amendments that are being proposed in Bill C-78, there is an equally important effect that, we expect, will be realized when the provisions become legislation. Specifically, when viewed in the aggregate or as a matter of "architecture", we believe that the proposed changes set out in Bill C-78 tell a compelling story or narrative, which is the following: "All children are of critical importance to Canadian society, and upon a separation or divorce the state's principal focus will be squarely and surely upon the best interests of the children affected by it". This is critical because children are not only some of the most vulnerable members of society (and thus deserving of loving protection), they are also almost invariably "unwilling participants" in any family law matter; their parents make the choices that lead to their separation and then the children are "along for the ride", as it were, for better or for worse. It is therefore of paramount importance to Canadians that the emphasis in family justice matters affecting children be such that: the matter be focused squarely and unwaveringly on the children's best interests; that it be so in preference to the interests of the parents; that all aspects of children's best interests be considered in a sophisticated way when decisions are being made about them; and that the family justice system be such that appeal to it will result in a fair outcome for all parties in a divorce or separation. While parents invariably want what it is best of their children, too often in the turmoil and distrust arising out of separation, parents lose focus on their children, and the family justice system can have a critical role in helping parents to regain this focus. We believe that Bill C-78 goes a significant way in ensuring that these several touchstones are met.

Implicit in this is another important point; namely, the crucial principle that family law cases are different, in important and essential ways, from other legal matters (civil; criminal, etc.). As a result, the manner in which family law cases are treated, and resolved, becomes of

signal importance. The "differential treatment" of family law cases is a principle about which AFCC-Ontario has been a key and vocal advocate for many years (in contradistinction, we believe, to certain other organizations). The extension of Unified Family Court across the province of Ontario reflects an awareness of this need for distinctive treatment. We believe that various of Bill C-78's provisions are also reflective of this need for differential treatment, and we applaud that move.

As a further consequence of this, we believe that one of the likely further effects of all this is that Bill C-78, once passed, ought to have a salutary impact upon the culture of dispute resolution in the family justice sphere in Canada. When the persons who are the participants and stakeholders in the family justice realm – be they the parties involved in the proceeding, their children who are touched by the proceeding, family court judges, family law lawyers, mediators, mental health professionals providing family justice services (custody assessors, etc.), or others – see that key federal family law legislation puts the emphasis squarely upon the best interests of children, and provides specific rules to ensure fairness in that regard and also to protect spouses, then everyone involved in that system starts to look at matters in a new and better light. Some of us working in the field have undergone that conversion and enlightenment a long time ago; others have yet to catch up. But the point is that this new federal legislation will help make it clear for everybody that the focus on resolution of family law matters must be on the fair and efficient resolution of these disputes, out of court where possible, and always with an eye to the children's best interests when children are involved.

We also believe it is likely that Bill C-78 will help to make positive changes in how the various actors in the justice system, outlined above, will view and engage in family law negotiations, including taking serious consideration of the duties that all the parties and participants in a family law matter owe to the children who are involved. We believe this to be a likely outcome for two principal reasons. First, as a structural matter, Bill C-78 places significant emphasis upon encouraging parties to attempt to resolve their family law disputes using alternative dispute resolution ("ADR") methods, instead of automatically resorting to the court system. Bill C-78 will therefore likely have the effect of having more Canadians entering into ADR processes, which processes tend to result in more satisfactory outcomes for the participants (probably by virtue of the parties having more control over, and "investment in", the outcome of their cases). Second, it is well-established that most negotiations of family law matters that are conducted "out of court" nonetheless take place "in the shadow of the law", meaning that the prevailing law and its principles and rules are, to a large measure, what set the parameters in terms of the outcomes that parties are likely to negotiate. Therefore, to the extent that Bill C-78 changes the substantive aspects of the federal family law in salutary ways, those substantive changes ought to be reflected, in turn, in the content of the consensual agreements the parties make through negotiations and ADR-based resolutions.

In other words, with Bill C-78 we believe that there ought to be a positive change in how the various actors in the justice system, outlined above, will view family law negotiations and

the duties that all the parties and participants in a family law matter owe to the children who are involved.

C. AFCC-Ontario's Views Regarding Certain Select Aspects of Bill C-78

In this final part of AFCC-Ontario's submission, we comment upon certain specific aspects of Bill C-78. This commentary is not intended to be an exhaustive treatment of the changes proposed in Bill C-78. Instead, we focus on aspects of Bill C-78 that we believe to be of particular relevance and importance from the perspective of AFCC-Ontario's mandate and values, and more generally in terms of what this organization has attempted to achieve throughout the years through our research, education, training, collaboration, and other work.

(i) Repeal of the Term "Custody" and its Replacement with the Terms "Parenting Order" and "Parenting Time"

AFCC-Ontario believes that the repeal of the outmoded and antiquated term "custody" (through subsection 1(1), section 12, and subsection 13(1) of Bill C-78) is an unqualifiedly good, and long overdue, development. The legal term "custody" as it applies to family law is a very old one, with an abstruse and confusing meaning that almost no-one these days, in fact, fully understands in all its dimensions. The replacement of that term with the more simple and clear phrase "decision-making responsibility" (subsection 1(7) of Bill C-78) helps bring Canadian federal family law legislation more fully into the modern era. It also puts the focus on the duty (the "responsibility") that the parents owe the child, as opposed to reflecting some right of power or dominion that a parent supposedly has over the child.

Similarly, the use of the phrase "parenting time" in Bill C-78 (subsection 1(7) of Bill C-78), coupled with removal of the antiquated and charged term "access" (through section 12 and subsection 13(1) of Bill C-78) , also serves to bring the *Divorce Act* up-to-speed with language that we at AFCC-Ontario, as well as many others involved in the family justice sphere, have been using in practice for many years now.

The same points as those made immediately above are also made with respect to the new phrases "parenting order", "maximum parenting time", "contact order", and "parenting plan" (section 12 of Bill C-78). All of these phrases are welcome in light of their modern, neutral, and child-focused, connotations.

And, to be clear, these changes are not simply matters of semantics. In the family justice arena, as in all of life, language is extremely powerful, and for the reasons set out next we believe that these changes are ones that are likely to have beneficial consequences.

The terms "custody" and "access", for example, were often (mis-)understood – and indeed often (mis-)used – by some parents as if they were a reflection of who was the "better" parent, who was the "real" parent, and who was the "winner" of the dispute and who the

"loser". This was patently wrong on various dimensions, of course, including because it put the focus on the parents in a separation and divorce rather than on the children; but it persisted, in part because the antiquated terms "custody" and "access" seemed to lend themselves to such a division. The new legislation with its new and modern language will correct this.

(ii) Duties of the Parties to a Proceeding

It is very beneficial in our view that Bill C-78 expressly provides that decision-making responsibility and parenting time must be exercised by parents in a manner consistent with the best interests of the child (section 8 of Bill C-78; in what will be section 7.1 of the *Divorce Act*). Again, while this fact was generally understood by enlightened practitioners and parents in the family justice sphere, the proposed legislation makes it clear for all participants in the family justice system where the emphasis lies on all dimensions: on the children, and on their best interests.

In a similar vein, the provisions that provide that a party to a case must, to the best of their ability, protect children from conflict arising from the proceeding (section 8 of Bill C-78; in what will be subsection 7.2 of the *Divorce Act*) are profoundly important and wise. If there is one single point that all the social science literature in connection with post-separation parenting is in agreement on, it is this: that it is the continued conflict between parents that causes the most harm to children in a separation and divorce scenario – immediately, in the mid-term, and often into the distant future. Unfortunately, protecting their children from the conflict between them is something that unenlightened and/or overly stressed parents engaged in family law disputes regularly fail to do, and so Bill C-78 making this an express duty is beneficial, as it ought to give a parent pause before he or she gives in to the temptation to engage in behaviour that would draw a child into, or expose a child to, the parental conflict. Family court judges are almost invariably well aware of the significant risk of damage to children caused by parents failing to protect children from conflict arising from the family law dispute, and they regularly exhort and admonish in appropriate ways the parents to "stop it", and so these provisions ought to give family court judges even more power and impetus to try to put a stop to this deleterious behaviour.

Bill C-78 also imposes a duty on the parties to a family law proceeding to try to resolve the matters that may be the subject of a court order through a family dispute resolution process to the extent that is appropriate to do so (section 8 of Bill C-78; in what will be subsection 7.3 of the *Divorce Act*); with the phrase "family dispute resolution process" being helpfully defined (subsection 1(4) of Bill C-78, in what will be new subsection 2(1) of the *Divorce Act*) as "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". There are several dimensions to this important provision that are worthy of note.

First, there is the general exhortation that the parties consider trying an alternative dispute resolution process – be that negotiation, mediation, collaborative practice, or some other

means – as a vehicle for resolving their dispute. As noted earlier, the social science evidence on post-separation parenting seems to be robust that parties who resolve their disputes consensually are, in large measure, more satisfied with the outcome than parties who have a decision imposed upon them by a judge. The proposed provision thus nudges the parties to a family law dispute in a process direction that, in many cases, will lead to a more satisfactory outcome for them (and, consequently, for their children, when children are involved).

Second, there is a critical and in our view necessary *caveat* or exception embedded in this provision, which is that parties to a family law matter under the *Divorce Act* are only exhorted to try to resolve the matters in dispute through a family dispute resolution process to the extent that it is appropriate to do so. This language makes it clear that in cases of family violence or insurmountable power imbalance, an alternative dispute resolution process may not be appropriate, for many reasons, including reasons of safety and security (both physical and psychological). We think that Parliament has struck an appropriate and wise balance in choosing this particular wording.

(iii) Duty on Legal Advisers

Similarly important are the duties that Bill C-78 imposes on legal advisers: (a) to encourage clients to attempt to resolve matters through a family dispute resolution process unless the circumstances of the case are of such nature that it would clearly not be appropriate to do so; and (b) to inform the client of family justice services known to the adviser that might assist the person in resolving matters that may be the subject of an order under the *Divorce Act*, and in complying with orders and decisions made (section 8 of Bill C-78; in what will be subsection 7.7(2) of the *Divorce Act*). "Family justice services", in turn, is a new definition, and defined in Bill C-78 as meaning "public or private services intended to help persons deal with issues arising from separation or divorce" (subsection 1(7) of Bill C-78; in what will be part of subsection 2(1) of the *Divorce Act*).

Several points are noteworthy in these provisions. First, they oblige legal advisers to encourage family dispute resolution processes as a means of resolving disputes, unless it is clearly not appropriate to do so. For the reasons set out earlier about the salutary benefits of ADR, we believe this will be helpful. Second, this part of Bill C-78 brings to the fore (and makes a duty) a critical and beneficial aspect that many legal practitioners seem to overlook, being the benefits that can be realized when parties engage in programs and services of various natures and descriptions (*e.g.* ones to improve parenting abilities and help parents make decisions; ones that assist victims of intimate partner violence; ones that help remediate perpetrators of domestic violence; etc.), called in Bill C-78 "family justice services". Finally, this part of Bill C-78 will also assist in ensuring that orders and decisions that have been made under the *Divorce Act* are complied with. It is trite that orders and agreements mean nothing without compliance and respect, so this is an important and welcome aspect.

(iv) The Best Interests of the Child, Including Consideration of Family Violence

Bill C-78 – both expressly and emphatically – keeps the best interests standard as the "only" consideration to be taken into account by the court in making a parenting order or contact order (section 12 of Bill C-78; in what will be new subsection 16(1) of the *Divorce Act*). It also goes beyond the present section 16 of the *Divorce Act*, though, by making it clear (section 12 of Bill C-78, in what will be new subsection 16(2) of the *Divorce Act*) that when considering the factors that go into the best interests analysis the court shall (imperative) give primary consideration to the child's "physical, emotional, and psychological safety, security, and well-being". We believe that this is a useful expansion of the best interests provision found in the current *Divorce Act*, as it underscores what all parenting matters ought to focus on, which is the safety and security and stability of the child in all key dimensions ("physical, emotional, and psychological"). There is benefit, we believe, to the specific enumeration of these key dimensions, in part because it will help the parties, their advisers, the judges, and others involved in the family justice system (custody assessors; mediators; etc.) focused on what are the key categories of child safety, security, and well-being.

Also important are the specific factors set out in Bill C-78 relating to family violence that the court is required to ("shall") consider when determining the best interests of the child (section 12 of Bill C-78), with the (non-exhaustive) list of seven specific, wide-ranging, and in some cases rather "cutting edge" (*e.g.* "psychological abuse" and, perhaps especially, "financial abuse") factors enumerated in the definition of "family violence": (a) physical abuse, including forced confinement but excluding the use of reasonable force to protect themselves or another person; (b) sexual abuse; (c) threats to kill or cause bodily harm to any person; (d) harassment, including stalking; (e) the failure to provide the necessaries of life; (f) psychological abuse; (g) financial abuse; (h) threats to kill or harm an animal or damage property; and (i) the killing or harming of an animal or the damaging of property (subsection 1(7) of Bill C-78). This list of seven factors is a thoughtful and sophisticated one, and it is clearly a reflection of key social science research on the topic of intimate partner violence/family violence. Beyond the definition of "family violence", and as a further example of the same sophistication, in what will be new paragraph 16(4)(b) of the *Divorce Act* the court, in analyzing the child's best interests in making a parenting order or contact order, must take into account "whether there is a pattern of coercive and controlling behaviour in relation to a family member" (section 12 of Bill C-78). This "coercive and controlling" language is directly reflective of one category of what is the most harmful type of intimate partner violence, based on a typology that has been disseminated to family justice practitioners and others through AFCC programming.

Further, the part of the Bill C-78 dealing with family violence in relation to the best interests of the child is also quite nuanced and sophisticated in many other respects, in what will be new paragraph 16(4) of the *Divorce Act* (section 12 of Bill C-78). As just one example, in what will be new paragraph 16(4)(g), the court must also take into account "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" (section 12 of Bill C-78). There is a burgeoning body of social science research relating to the importance of appropriately treating and indeed rehabilitating the perpetrators of intimate partner violence, which includes making them aware of the significant and long-lasting damage their actions cause to their intimate partners and to their children. Some excellent, evidence-based programs have been developed – and indeed have been implemented for years now – for skilled and trained professionals to work with such persons to try to remediate those behaviours (for example, the "Caring Dads" program, which was developed by Dr. Katreena Scott of OISE/University of Toronto). These parts of Bill C-78 will facilitate the court focusing some of its attention in family violence cases upon this element of the problem, which is critical because to be most effective all elements of this difficult and serious problem of family violence really ought to be considered, addressed, and ameliorated to the greatest degree possible.

(v) The Views of the Child

Bill C-78 also modernizes the *Divorce Act* by requiring the court, in determining the best interests of the child, to consider "the child's views and preferences, by giving due weight to the child's age and maturity, unless they cannot be ascertained" (section 12 of Bill C-78; in what will be paragraph 16(3)(e) of the *Divorce Act*). The importance of this addition to the *Divorce Act* cannot be overstated. First, the *United Nations Convention on the Rights of the Child* makes it clear, at Article 12, that contracting states to the Convention "shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child"; and that "for this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law". Even though consideration of the views and preferences of children has already become part of judicially developed doctrine under the applicable case law considering *Divorce Act* applications, this new provision in the *Divorce Act* will expressly square Canada's divorce legislation with the country's clear international obligations to children pursuant to this important United Nations convention.

Further, the recent research work on the views of the child in family law proceedings – including that undertaken by Professors Nicholas Bala of Queen's University (a current Board member of AFCC-Ontario) and Rachel Birnbaum of King's University College of Western University (a Past President of AFCC-Ontario) – not only make abundantly clear the importance of the "voice of the child" to family law matters, but also highlight its complex and, indeed, complicated, aspects: it is a "voice not a choice"; the voice of the child reporter must be highly skilled or else there is a serious risk of a false/incorrect report; etc. Through this sophisticated scholarly work, and through the hard work of family court judges and clinicians and practitioners from various disciplines (and, indeed, the work of AFCC-

Ontario on numerous fronts), the "best practices" for addressing the views and preferences of the child in family law matters continue to be developed and refined. We believe that these proposed amendments to the *Divorce Act* in connection with the views of the child as set out in Bill C-78 will give further imprimatur to this important work.

Yours very truly,

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*This letter is supported by the AFCC-O Board members listed above.

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