



THE CANADIAN  
BAR ASSOCIATION  
L'ASSOCIATION DU  
BARREAU CANADIEN

## ***Bill C-78, Divorce Act amendments***

**CANADIAN BAR ASSOCIATION  
FAMILY AND CHILD AND YOUTH LAW SECTIONS**

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## **PREFACE**

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the Family Law and Child and Youth Law Sections, with input from the Constitutional and Human Rights Law, French Speaking Common Law Members, and Alternative Dispute Resolution Sections, and assistance from the Law Reform Subcommittee at the CBA office.

The submission has been reviewed by the Policy Committee and approved as a public statement of the Family Law and Child and Youth Law Sections.

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# Bill C-78, *Divorce Act* amendments

## I. INTRODUCTION

The Canadian Bar Association's Family Law and Child and Youth Law Sections (CBA Sections), with input from the CBA's Alternative Dispute Resolution, Constitutional and Human Rights, and French Speaking Common Law Members Sections, supports the federal government's decision to amend and improve the *Divorce Act*, and other Acts. The Family Law Section consists of lawyers from across Canada who specialize in family law, and act for all parties in family law disputes. The Child and Youth Law Section coordinates activities, provides advice and responds to law, policy and legal research developments on matters affecting Canadian children.

In particular, the CBA Sections agree with the increased use of plain language in the Bill and proposals to:

- Eliminate the legal concepts of “custody and access” and replace them with concepts that relate to parenting;
- Maintain a child-centred focus and increase the recognition of the role of children, in keeping with the United Nations *Convention on the Rights of the Child* (UNCRC);
- Adopt a list of relevant factors in the determination of what is in a child's best interests;
- Encourage the use of alternative (or family) dispute resolution processes in matters where a court has the authority to make an order;
- Recognize the role and impact of family violence against a parent, child or family member, acknowledging the complexities of family violence; and
- Add provisions on relocation that include a child-focused definition and a framework to apply in relocation cases.

Bill C-78 will assist Canadians in better and timelier resolution of family law problems, which are among the type of legal problems they are most likely to confront at some point in their lives.<sup>1</sup> We express this general support for the Bill and emphasize that our comments throughout the submission are offered with the intention of improving the Bill.

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<sup>1</sup> Trevor Farrow, et al, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (Canadian Forum of Civil Justice: Toronto Ottawa, 2016) at 7.

## II. UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

A child rights approach to family law focuses on children’s best interests — their safety, security and well-being, informed by their meaningful participation. Many provisions in Bill C-78 are consistent with that approach, although we suggest some revisions to make them stronger and more effective. In particular, we suggest that Bill C-78 explicitly refer to the UNCRC. There is limited knowledge even among many legal professionals about the UNCRC and its requirements, and it is infrequently referred to in legal arguments or in court decisions. These problems are not addressed by a statement outside the four corners of the Bill stating that it is in compliance, adding to the risk that its provisions will be interpreted inconsistently with the UNCRC.

## III. DEFINITIONS

### “Child of the marriage”

This term would continue to mean “a child of two spouses or former spouses” under Bill C-78. However, at various places, the Bill refers to someone who is not a spouse, but is a parent of the child. We appreciate that this would address the wide variety of families in society today, like blended second or third families, where more than solely biological parents have a parental relationship with a child. While it is necessary to recognize that the face of families has changed since the *Divorce Act* was last amended, we believe that the proposed language may generate confusion.

### RECOMMENDATION:

1. **The CBA Sections recommend that definitions and terms in Bill C-78 be reviewed for consistency and to ensure they remain appropriate in light of the changes proposed in the Bill.**

### “Decision-making responsibility”

This definition in Bill C-78 refers to “significant decisions” and “significant extra-curricular activities”. These concepts are ambiguous and seem at odds with case law and the Child Support Guidelines (Guidelines). The use of “significant” extra-curricular activities also leaves uncertainty about how “insignificant” activities would be treated.

Given the time commitments and potential costs of any extra-curricular activities a child may participate in, good practice would be to ensure all people with parenting responsibilities and parenting time are involved in deciding whether and what extra-curricular activities will occur.

**RECOMMENDATIONS:**

2. **To the extent possible, the CBA Sections recommend that the definitions in Bill C-78 be consistent with those in the federal Child Support Guidelines, given existing experience and case law around the Guidelines.**
3. **The CBA Sections recommend that “significant decisions” be defined with greater certainty about which decisions require consultation and agreement between people sharing decision-making responsibilities.**
4. **The CBA Sections recommend that the definition be amended to delete “significant” before “extra-curricular activities”, so all such activities are included in the definition of decision-making responsibility.**

Another issue that requires consultation and agreement between parents who share decision-making responsibility is international travel.

**RECOMMENDATION:**

5. **The CBA Sections recommend that “international travel” be added to the definition of decision-making responsibility as a new subsection (e).**

**“Spouse”**

Sections 1(4) and 1(5) of the Bill both repeal and replace the definition of “spouse” at section 2(1) of the *Divorce Act*. The only difference between the two sections is that section 1(5) adds a reference to section 30.7 of the *Divorce Act*. This duplication appears to be an error, but should be remedied. In our view, it would also be preferable to address this using plain language so that rather than including a new definition in section 2 of the Act, amend each relevant section to reflect that reference to a spouse includes a former spouse.

**RECOMMENDATIONS:**

6. **The CBA Sections recommend that section 1(4) be deleted and section 1(5) be amended to note that the definition of “spouse” is deleted.**
7. **The CBA Sections recommend that use of “spouse” in sections 6(1) and sections 15.1 to 16.96, 21.1, 25.01, 25.1 and 30.7 of the *Divorce Act* be amended to read “a spouse or former spouse.”**

**“Family dispute resolution processes and Family justice services”**

The definitions for these terms are vague and not well defined, with no guidance on appropriate training or qualifications for those offering these services. Families may be vulnerable when seeking help from unskilled practitioners ill-equipped to assist in effective resolution of the legal issues at stake.

**RECOMMENDATION:**

- 8. The CBA Sections recommend that the definitions of “Family dispute resolution processes” and “Family justice services” refer to appropriate qualifications and training, for example, “process outside of a court process offered to parties by professionals trained in family dispute resolution to assist the parties to resolve matters without litigation, including mediation and collaborative law.”**

**“Family member”**

There can be situations where violence is perpetrated by or against a new dating partner in a way that could harm a child, or relate to another issue relevant in a divorce. The definition of family violence in the Bill is broad enough to include those situations, without the need to include “dating partner” in the definition of family member.

**RECOMMENDATION:**

- 9. The CBA Sections recommend deleting “as well as a dating partner of a spouse or former spouse who participates in the activities of the household”.**

**“Family violence”**

The proposed definition of family violence is similar to those in some provincial and territorial domestic violence protection legislation. We have identified some gaps in the enumerated list that we believe should be addressed.

While the definition of “family violence” suggests the violence must be committed against a “family member”, one form (at (c) of the definition) includes situations where threats are made against “any person”. There can be good reason to recognize that a spouse can inflict harm on their ex-spouse by targeting those outside a family household, including new dating partners, friends, extended family members, colleagues or others thought to be supporters of the spouse or child. If the Bill intends to show that violence against others can be a means of intimidating, harassing or threatening a spouse or ex-spouse, it should be included in the definition.



**RECOMMENDATIONS:**

10. **The CBA Sections recommend the definition of “family violence” be amended to read: family violence means any conduct, act or omission by a family member towards another family member or someone who is connected in a meaningful way to that family member, including, but not limited to:...”.**
11. **The CBA Sections recommend the following changes to the list of types of family violence:**

**Add:**

- **attempts to cause physical, sexual, psychological, emotional abuse**
- **intimidation**
- **threats of other personal harm beyond bodily harm**
- **depriving a family member of food, clothing, medical attention, shelter, or transportation, and**
- **violence committed by a person on behalf of a family member that seeks to target and control or coerce a spouse or child<sup>2</sup>.**

**Revise (c) and (h) to include “a threat to kill or...”**

**State that a single act of violence or emotional intimidation can be classified as part of a pattern of family violence if it causes lingering fear or is associated with a pattern of coercive control in the relationship.<sup>3</sup>**

Psychological and financial abuse are included in the Bill as examples of family violence, but are not defined. Without a definition, it may be unclear how this non-physically violent behaviour fits within the spectrum of family violence. Newfoundland and Labrador’s legislation provides greater clarity on this front, and similar clarity would be helpful in Bill C-78.

**RECOMMENDATIONS:**

12. **The CBA Sections recommend adding the following definition for psychological abuse:**
  - **conduct that causes psychological or emotional harm or a reasonable fear of that harm, including a pattern of behaviour intended to undermine the psychological or emotional well-being of the applicant or a child.**

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<sup>2</sup> For example, Nfld and Labrador’s *Protection Against Family Violence Act*, section 3(3) says:

*For the purpose of this Act, a respondent who encourages or solicits another person to do an act which, if done by the respondent, would constitute family violence against the applicant, is considered to have done that act personally.*

<sup>3</sup> Linda C. Neilson, *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (criminal, family, child protection): A Family Law, Domestic Violence Perspective* (Justice Canada: Ottawa, 2013 Edition) at 32.

**13. The CBA Sections recommend adding the following definition for financial abuse:**

- **conduct that controls, exploits or limits a family member’s access to financial resources, including cash, credit or other financial support in a way that could reasonably harm the family member.**

Bill C-78 says that family violence can include behavior that causes fear. In applying this aspect of the Bill, judges will need to assess that fear. However, the Bill is silent on how that is to be done and does not even provide that a person’s fear must be reasonable. Without that language, a court could, for example, find family violence has occurred if a person legitimately felt fear, even if the court thought the fear was unreasonable. Courts may look to other case law for direction and still confront uncertainties. In civil cases, the normal standard would be to apply the “reasonable person” test, a purely objective assessment that does not consider the particular person’s thought process, individual characteristics or personal sense of danger. We suggest that family violence requires a more contextualized approach when assessing reasonableness.<sup>4</sup>

**RECOMMENDATION:**

- 14. The CBA Sections recommend adding language to require a person’s fear be reasonable and that reasonableness be based on a person who has been subjected to the pattern of family violence and the psychological effects of the violence as experienced by the target.<sup>5</sup>**

#### **IV. PARENTING TIME, DECISION-MAKING AND CONTACT**

Under the headings of parenting time, decision-making and contact, we suggest other changes that would improve the revised *Divorce Act*.

We appreciate that Bill C-78 omits any presumption of equal shared parenting, a presumption that the CBA has consistently opposed.<sup>6</sup> However, Bill C-78 section 16.2(1), formerly known as

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<sup>4</sup> The Supreme Court of Canada’s decision in *R. v. Lavallee*, [1990] 1 S.C.R. 852, 1990 CanLII 95 (S.C.C.) showed that a battered woman’s reality can be different than someone who has not been battered and that the broader circumstances need to be weighted in assessing reasonableness.

<sup>5</sup> This would be consistent with the decision in *R. v. Lavallee*, *ibid.* and the Ontario Court of Appeal decision in *R. v. Craig*, 2011 ONCA. 142 (CanLII). See also Linda C. Neilson, *Enhancing Civil Protection in Domestic Violence Cases: Cross Canada Checkup*, University of New Brunswick, March 31, 2015 at 94.

<sup>6</sup> See previous CBA Family Law Section submissions, for example, Letter to Justice Minister Wilson Raybould, *Amending the Divorce Act* (Ottawa: CBA, 2017); *Submission on Bill S-202, Shared Parenting Act* (Ottawa: CBA, 2017); *In the Interests of Children: Response to Bill C-560* (Ottawa: CBA, 2014); and *In the Interests of Children* (Ottawa: CBA, 2010).

the “maximum contact principle” under section 16(10), could be misinterpreted to suggest such a presumption. Under the new heading, “Maximum Parenting Time”, it states:

In allocating parenting time under paragraph 16.1(4)(a) [which simply allows the court to allocate parenting time, including doing so in a schedule] the court shall give effect to the principle that a child should have *as much time* with each parent as is consistent with the best interests of the child.

Any principle calling for maximum contact, considered alone, is clearly inconsistent with this requirement of an individual best interests’ assessment. Simply saying “as is consistent with the best interests of the child” does not address the concern and could be confusing, as it would simply refer back to the section 16 factors that require an individual assessment. Based on experience with the current maximum contact principle, we know that some lawyers and judges tend to focus exclusively on the heading, ignoring the best interests of the child aspect of the section.

#### **RECOMMENDATIONS:**

- 15. The CBA Sections recommend that the heading of section 16.2(1) be amended to “Allocating Parenting Time”, to ensure there are no inferred presumptions about parenting time being equal under the Bill.**
- 16. The CBA Sections recommend that section 16.2(1) be amended to read: “the court shall give effect to the principle that a child should have as much time with each spouse in whatever amount consistent with the best interests of the child.”**
- 17. The CBA Sections recommend a new section be added to section 16.2, titled “No Presumptions” to read: “in the making of parenting and contact orders, no particular arrangement for parenting time, decision-making or contact is presumed to be in the best interests of the child.”**

Section 16.2(3) of Bill C-78, “day-to-day decisions”, states that:

Unless the court orders otherwise, a person to whom parenting time is allocated under paragraphs 16.1(4)(a) has exclusive authority to make, during that time, day-to-day decisions affecting the child.

Day-to-day decisions are not defined in Bill C-78 and people with parenting time could be confused as to how their decisions should be reconciled with those made pursuant to “decision-making responsibility”. As an example, giving medication to a child is a daily activity, but health related decisions fall in the scope of “decision-making responsibility”.

We also suggest further consideration be given to ensure Bill C-78 is consistent with the Supreme Court of Canada's decision in *Young v. Young*<sup>7</sup> for parties wishing to share religious discussions and attendance with their children while in their care.

**RECOMMENDATION:**

- 18. The CBA Sections recommend that Bill C-78 define “day to day decisions” in section 16.2(3) to clearly distinguish them from “significant decisions” (for example, adopting language similar to section 41 of the BC *Family Law Act*).**

Section 16.4 provides that a person who has parenting time or decision-making responsibilities is entitled to information from any other person who has parenting time or decision-making responsibilities, or *from any other person who is likely to have such information*. The section should be narrowed to avoid an overly broad application.

**RECOMMENDATION:**

- 19. The CBA Sections recommend that section 16.4 be revised to limit the obligation to provide information about a child’s “well-being, education or health” to those with parenting time or decision-making responsibilities, health care providers and educational professionals.**

Under the current *Divorce Act*, section 17(5.1) states:

For the purposes of subsection (5), a former spouse's terminal illness or critical condition shall be considered a change of circumstances of the child of the marriage, and the court shall make a variation order in respect of access *that is in the best interests of the child*. (emphasis added)

This would remain in Bill C-78, but would eliminate the “custody” terminology and also the reference to “best interests of the child”. The new section would allow variation of a parenting order as it relates to the allocation of parenting time. There may, however, need to be revisions of decision-making responsibilities in a parenting order, and amendments to contact orders.

**RECOMMENDATIONS:**

- 20. The CBA Sections recommend that section 17(5.1) be amended to allow variation of decision-making responsibility in a “parenting order” and variation of a contact order when a parent has a terminal illness;**

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<sup>7</sup> *Young v. Young*, [1993] 4 SCR 3.

- 21. The CBA Sections recommend that section 17(5.1) be amended to allow others who are parties to a parenting or contact order to apply for variation (not just past spouses, as currently worded); and**
- 22. The CBA Sections recommend that section 17(5.1) be amended to retain the phrase “that is in the best interests of the child”, as in the current *Divorce Act*.**

Section 22.1 of Bill C-78 deals with the recognition of a foreign order that varies a parenting or contact order. An application can be made by “an interested person”. That term is not defined or used elsewhere in the Bill. It could refer to a party, a person with rights under the foreign order, or any other person. Some consistency of terminology or a further definition of an “interested party” would be helpful.

**RECOMMENDATION:**

- 23. The CBA Sections recommend that section 22.1(1) be amended to define “an interested person”. In the alternative, the section should be amended to use existing terminology from the *Divorce Act* or Bill C-78.**

## **V. ENCOURAGING DISPUTE RESOLUTION**

The CBA Sections believe that duties of lawyers and legal advisers in Bill C-78 are too vague to have meaningful impact, and sections 7.7(2)(a) and (b) are confusing when read together.

Section 7.7(2)(a) requires lawyers to “encourage” their client to attempt to resolve matters through a “family dispute resolution process”, and section 7.7(2)(b) imposes on lawyers the duty to “inform” their clients of the “family justice services “ known to the legal advisor. In combination, these would require lawyers to encourage one thing and inform clients of another. The phrase “such a nature that it would clearly not be appropriate to do so” is not defined in section 7.7(2)(a) of Bill C-78, which may lead to inconsistent application by legal advisers.

**RECOMMENDATION**

- 24. The CBA Sections recommend that lawyers’ duties be combined, to both inform and encourage processes that will assist parties to achieve an informed and equitable settlement outside of the court litigation process.**

This section should be expanded to include a duty on lawyers to advise parents and guardians to specifically consider children’s interests (section 7(1)), as exists in section 16(3)(e), including the right to have their views considered and given due weight in out of court dispute resolution processes. Many legal advisors are unaware of the availability and methodology of out of court dispute resolution processes, and would not be able to provide complete advice to

their clients about those processes. The duty imposed by Bill C-78 on legal advisers should include a duty to inform and encourage clients, and also require legal advisers to inform themselves of out-of-court dispute resolution processes available in their region.

The language in section 7.7(2) is framed in terms of court and court orders, which could suggest that resolution will continue to be associated with litigation and the court system. This may contradict the underlying message of encouraging the use of out-of-court consensual dispute resolution options.

We generally support the provision to encourage use of alternative dispute resolution processes, but recognize that there are circumstances (such as family violence cases), where those processes may be inappropriate. Section 7.7(2)(a) creating duties for lawyers does not align with section 7.3, which creates the duties for parties. Section 7.3 only requires parties to attempt to resolve issues using family dispute resolutions “if it is appropriate to do so.” The term appropriate to do so is undefined, which may lead to confusion, especially since it is the parties’ duty to comply.

Section 16.1(6) on parenting orders seems disconnected, as a court may order parties to attend a “family dispute resolution process”, but there is no provision for the court to order parties to attend a “family justice service”. As the intention behind the reference to “family justice services” in Bill C-78 is unclear, it is difficult to comment on this proposal.

## **VI. BEST INTERESTS OF THE CHILD FACTORS**

For decades, the CBA has advocated that the best interests of the child must remain the fundamental consideration in all custody and access determinations. Bill C-78 clearly demonstrates continued support for the best interests of the child as the pivotal test in matters involving parenting and decision-making.

Section 16 of the Bill also complies with the child-rights approach mandated by the UNCRC: it provides for an individual assessment of the best interests of each child about whom the court will make a best interests decision. Those factors include important considerations for the child’s safety, security and well-being, including the impact of violence, the history of child care, the strength of the relationship with each parent, and the views and preferences of the child. In fact, section 16(1) states that “This Court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.”

The CBA Section supports incorporating the list of factors relevant to determining what is in the child's best interests under section 16(3). We offer some suggestions to further improve and clarify these factors.

**RECOMMENDATIONS:**

25. **The CBA Sections recommend amending section 16(3)(c) to include “ability and” before “willingness” to mirror the language in subsections (h) and (i).**
26. **The CBA Sections recommend consolidating and amending sections 16(3)(h) and (i) to read:**
  - (h) the ability and willingness of each person who would be subject to an order or parenting plan to:**
    - (i) care for and meet the needs of the child,**
    - (ii) communicate and cooperate with one another, on matters affecting the child**
27. **The CBA Sections recommend adding the following to 16(3)(h-i):**
  - (i) protect a child from exposure to or involvement in parenting conflict.**
28. **The CBA Sections recommend replacing 16(3)(j) with the following, more direct language to protect a child who has been exposed to family violence:**
  - (j) any family violence and its impact on any relevant factor, including:**
    - (i) A child's physical, emotional and psychological safety, security and well-being;**
    - (ii) whether the conduct of a person responsible for family violence indicates that person may be impaired in his or her ability to care for the child and meet the child's needs; and**
    - (iii) the appropriateness of an order or parenting plan that would require cooperation on issues affecting the child that might create a risk to the safety, security or well-being of the child or other family member.**

In addition, we believe that the wording of section 16(3)(e) could be improved. Article 12 of the UNCRC says that “states parties 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.*” (emphasis added) However, the wording in section 16(3)(e) is awkward, with “due weight”

appearing to qualify the child's age and maturity, rather than the child's views in accordance with the child's age and maturity.

The General Comment to the UNCRC Article notes<sup>8</sup>:

The child has the right to express their views freely. This means that the child should be permitted to express their views without pressure and can choose whether or not they want to exercise their right to be heard. It also means that the child must not be manipulated or subjected to undue influence or pressure.

This passage illustrates the concerns that may be at play in divorce proceedings, and in section 16(3)(e) in particular. The CBA's Family Law and Child and Youth Law Sections have differing views on that section of Bill C-78.

The Child and Youth Law Section is encouraged by the inclusion of children's views as a mandatory consideration in the determination of their best interests. This is consistent with Canada's obligations under the UNCRC, which links the best interests of all children, without discrimination, to their ability to choose to participate and to have their views taken seriously when decisions are being made that impact their lives, if they are capable of forming their own views. By including all children and not just those involved in non-contentious cases, the UNCRC recognizes that hearing from children benefits them, that not doing so can be harmful, and that their participation can lead to better decisions. The widely accepted international legal principle adopted by the UNCRC is that it is in the best interests of all children to have this right, even in the most challenging family law cases, so long as it is done in a sensitive child-focused way that is attune to the potential for improper influence. The Child and Youth Law Section would remove the caveat "unless they cannot be ascertained" from this section of Bill C-78, to ensure that children's participatory rights are not unnecessarily excluded. Affording children the opportunity to participate will not harm them or expose them to further conflict, provided it is done in a manner that is sensitive to the child's particular circumstances. Efforts should be made in all cases to enable children to share their views, although the court may have to determine the weight to be assigned to those views.

The Family Law Section takes a different view. It is concerns that the proposed wording in Bill C-78, "unless [these views and preferences] cannot be ascertained", would seem to imply that unless it is impossible, the child's views and preferences must *always* be obtained by the use of a formal "hear the child" interview or otherwise. The Family Law Section's experience is

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<sup>8</sup> Excerpts from General Comment No. 12 (2009), CRC/C/GC/12.



that there are situations where involving the child in their parents' separation to obtain these views can be damaging to the child, for example in cases where there has been family violence, including coercive behaviour, or when a child is under pressure from one or both parties to take a side. The Family Law Section believes that clarifying some discretion as to how, or if the child's views and preferences are ascertained, can help protect children from exposure to conflict in certain cases. If the final phrase of this section was changed to "unless it would be inappropriate to do so", consideration of the child's views and preferences would remain the default, but courts would clearly retain discretion in extraordinary cases.

### **A. Parenting Plans**

Section 16.6 requires courts to review Parenting Plans agreed on by the parents. We acknowledge the need for orders to clarify who has decision-making responsibilities, parenting time and contact. However, requiring Parenting Plans in all cases would increase cost and uncertainty for parents and the courts. This is in part because Parenting Plans are not commonly used by all courts or in general practice across the country. Requiring that Parenting Plans be submitted may increase the burden upon parties and upon court processes.

It is unclear how a court should assess a Parenting Plan, particularly when it is submitted as part of a consent divorce and no hearing is held. It is unclear if there is a responsibility to inquire or to investigate the legitimacy of a Parenting Plan, and what, if any, additional evidence may be required from parties to substantiate that the Parenting Plan meets the child's best interests.

#### **RECOMMENDATIONS:**

- 29. The CBA Sections recommend amending section 16.6 to replace "shall" with "may" so that preparing and filing Parenting Plans is not mandatory.**
- 30. The CBA Sections recommend amending section 16(3)(g) to include the phrase "any proposed arrangements for the child's care" to ensure there is no perceived obligation to prepare or file a Parenting Plan.**
- 31. The CBA Sections recommend amending section 6(1) by adding that parties will have the opportunity to respond to a court's concerns before an order that varies the Parenting Plan is made.**

## **VII. FAMILY VIOLENCE**

We have reviewed Bill C-78 with several factors in mind. Given the scope and purpose of the *Divorce Act*, family violence is relevant to determinations of the best interests of a child, the

contact and care arrangements for children, appropriate parenting and decision-making models, and of course the safety of a household and its members during and after a divorce.

Other laws and procedures are already in place to address family violence prior to and throughout a divorce, including proceedings under the *Criminal Code*, child protection legislation and specific provincial and territorial domestic violence legislation. Each plays a different role in responding to and attempting to prevent further family violence and can be triggered at any time in the divorce process. The *Divorce Act* does not replace other relevant legislation, and should not compete with, or contradict that legislation.

Children can be harmed in various ways when exposed to family violence, whether they witness or experience direct acts, or are exposed to indirect or other consequences of violence (like observing injuries, overhearing conversations about the abuse or watching police interventions). Research shows that children exposed to this violence can have emotional, social, cognitive, physical and behavioural problems, including lower levels of social competence, higher rates of depression, worry, frustration and anxiety, increased likelihood of developing stress-related disorders, decreased levels of empathy, developmental regression, complaints of physical ailments, and aggressive behavior.<sup>9</sup> Children who witness spousal violence are also more likely to become a part of a generational cycle of violence.

In light of these realities, the *Divorce Act* should clearly reflect the overarching priority of a child's physical, emotional and psychological safety, security and well-being and the need for adult family members to protect a child from the risk of future exposure to family violence. Including the existence of family violence in the factors to be considered when assessing a child's best interests is important for that reason. The following recommendations are intended to add strength and consistency to the existing proposals.

#### **RECOMMENDATIONS:**

- 32. The CBA Sections recommend that section 16(5) be revised to clarify that past conduct is relevant to assess future risk of harm to a child, parent or other person and to predict a parent's ability to put the child's best**

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<sup>9</sup> Statistics Canada (Canadian Centre for Justice Statistics), *Juristat: Children Witnessing Family Violence*, (Vol. 21, no. 6) at 2, as in "Final Report of the Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation, circa 2002-2003". See also, *Family Violence in Canada, A Statistical Profile 2010* at: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2012001/article/11643/11643-3-eng.htm>, citing Holt, et al. 2008; Kitzmann, et al. 2003; Zuckerman et al. 1995. See also: D. Finkelhor, H. Turner, R. Ormrod, S. Hamby, and K. Kracke. 2009, *Children's Exposure to Violence: A Comprehensive National Survey*, Bulletin. Washington, DC: U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention.

**interests ahead of their own and maintain a safe and healthy home environment. In particular, section 16(5) should include:**

**the court shall consider a person's conduct to the extent that it has or may affect a factor related to the best interests of the child (section 16(3)) or family violence (section 16(4)).**

**33. The CBA Sections recommend that sections 16.8(3), 16.9(3) and 16.96 (3) should be revised to clarify that the requirement to give notice of a change of residence may not apply or may be varied "where there is evidence that family violence has occurred and the notice may create a further risk of family violence".**

**34. The CBA Sections recommend that section 15.2(5) should be revised to recognize that evidence of family violence can be relevant in assessing entitlement to spousal support as it may affect a spouses' ability to be or become self-sufficient. In particular, section 15.2(5) could include:**

**In making a spousal support order, the court shall not consider past conduct of a spouse except where the conduct is relevant to the factors in section (4) and the objectives in section (6).**

#### **A. Civil protection orders and family violence**

Section 7.8 of Bill C-78 provides that the court has a duty to consider whether a protection order exists to avoid conflicting provisions in orders under the *Divorce Act*. The court must also "facilitate ... the coordination of proceedings", make inquiries of the parties or review information that is readily available and has been obtained through a search carried out in accordance with provincial and territorial law, including the rules made under section 25(2).

Different rules and processes exist across the country to recognize and register orders from other courts and other parts of the country. Some jurisdictions have created registries, while others have no process to facilitate this type of information-sharing. Ensuring a common approach would require a national court tracking mechanism or registry. This may also be necessary to avoid relying on parties to disclose these orders when some may not have access to the materials or may have reason to wish not to disclose them. It would likely require procedures or mechanisms in court registries to ensure appropriate cross-referencing of files within and between civil and criminal courts.

A national registry of civil and criminal protection orders would ensure those orders are filed and made accessible to police, courts, and designated service providers.

Any explanatory or training materials created to explain this provision should emphasize that the existence of a protection order in another forum does not foreclose further protective steps

in the divorce. The goal is to provide additional, complementary protections and ensure there is no conflict between the terms of various orders.

Explanatory or training materials should also emphasize that information-sharing can enable accurate and consistent assessment of risk of harm and the potential for lethal outcomes. It can facilitate coordinated and consistent use of community services and resources and discourage litigation harassment such as the filing of frivolous claims in multiple courts.

## **VIII. RELOCATION**

Relocation of a child has been one of the most difficult situations for families to address during and after a divorce. We support the creation of a framework in the Bill that will provide more clarity and consistency in the law. Clearer guidance about the “best interests test” and how it applies to relocation cases will facilitate earlier resolution, promote settlements and reduce costs for litigants and enhance fairness and predictability.

The CBA Section supports the creation of a list of factors to be considered in assessing applications for or against relocation. This list could be further enhanced with additions to section 16.92(1).

### **RECOMMENDATION:**

**35. The CBA Sections recommend that the following be added to section 16.92(1):**

**Any evidence that a parent is motivated by capriciousness or bad faith, including an intention to sever or damage the relationship between a child and the other person who has a parenting relationship with the child;**

**Any evidence that family violence has occurred or is occurring and whether a relocation will or may reduce the risk of future harm to a child, a party or another family member;**

**Whether a proposed move is to a country that is not a signatory to the Hague convention.**

### **A. Notice of relocation**

When assessing the requirement in Bill C-78 for notice of relocation, we raise the following concerns:

- How will notice be effected?

- Is 60 days an appropriate timeframe to give notice, and is 30 days an appropriate time to respond?
- What is an appropriate response to the receipt of notice?

### **Form of Notice**

At present, the Bill does not determine the form of written notice required to commence a request for relocation. In our experience, this lack of detail is likely to lead to problems as parties and courts struggle with various possible interpretations. We suggest that written notice be required, and a simple, optional form be created to ensure that proper information is routinely included in the notice. This must include the place of the move, the intended date of the move, the number of days for the other parent to respond and the fact that consent will be deemed, absent a response to the contrary in the appropriate time. The form could also include a section for the responding party to easily complete and return, indicating their consent or objection to the relocation.

It is important that the form of the response required is consistent with the form of notice the responding party would receive. It would be unfair to require a party wishing to relocate to give only a simple form of notice, but then require an objecting party to quickly commence formal court action, within just 30 days.

### **RECOMMENDATION:**

- 36. The CBA Sections recommend that Bill C-78 should specify what form of notice of relocation will be considered sufficient, and offer a simple, optional form to ensure that appropriate information is included.**

There are competing concerns when assessing whether the notice and response should be filed in court, or a registry of some sort, or whether an initial filing should be required at all. An initial filing process may increase the need for court involvement or create new administrative burdens. However, some protections may be required to ensure reasonable notice and a fair opportunity to respond for the respective parties, as a principle of fundamental justice.

Consider the following scenario:

- a) the caregiver or parent wishing to relocate must serve the other parent with a notice specifying the date, place and reasons for the proposed relocation, and the deadline for the other parent's response (perhaps by using an optional form in the Regulations)
- b) the response period begins on service of the notice;

- c) the caregiver or parent opposing the move must respond in writing within the prescribed number of days of being served. The response protocol should have the same degree of formality as the initial notice;
- d) failure to respond within the prescribed number of days of being served is deemed to be consent to the relocation;
- e) after expiry of the response period, the party wishing to move must provide proof of service and
  - i. if consent or deemed consent has been obtained, they may obtain a variation order confirming the move. This could be done on request, without following a formal court procedure to vary the order; or
  - ii. if an objection is made, the matter must proceed to a dispute resolution process, whether that is mediation or a court hearing.

This scenario would formalize the notice and objection process, and minimize the possibility of mischief by either party while avoiding unnecessary litigation. If an objection is filed, the parties may attempt to work cooperatively to address the proposed relocation, or may then choose to litigate the matter.

### **Timelines**

If an existing order prohibits relocation, a new order will be required before a party can move (see section 16.91(b)(ii)). If an existing order does *not* prohibit relocation, the Bill permits relocation if no one has filed an application to a court objecting to the move. An application noting objection to the relocation must be filed within 30 days of receiving notice (section 16.91(b)(i)). These timelines may be insufficient, particularly where a party wishes to seek legal advice before responding. A longer response period, may also give parties an opportunity to discuss and come to an agreement on the proposed move, including revisions to their parenting arrangements or plan to address necessary changes to accommodate the move.

Some Canadian jurisdictions have employed a 60-day notice period, but we support 90 days' notice, subject to a court or arbitrator/adjudicator decreasing or increasing that time when it may be appropriate to do so.

There are many advantages to extending the period from 60 to 90 days:

- People need sufficient time to consider the proposal, have the opportunity to discuss it, make inquiries and decide if legal advice is required to understand the implications of the request to move.
- People may attempt a mediated or negotiated resolution (with the assistance of counsel or otherwise) which can reduce litigation and improve the fairness of this process.

- People can consult with psychologists and other experts to ensure that information about the move is properly shared between caregivers and the children.
- Where the move will result in a change in province/territory or country, more time will be required to understand the implications for the child's access to health care, education, family supports, and international protections.
- People in rural or remote regions may have more adequate time to find a lawyer or to access mediation services.

**RECOMMENDATION:**

- 37. The CBA Sections recommend that section 16.9(2) be amended to say notice must be provided no less than 90 days prior to the intended move, and that the response time within section 16.92(b)(i) be extended to 60 days from the effective date of notice being received.**

**Factors**

Currently, section 16.92(1)(d) requires a court to consider several factors that relate to the child's best interests.

Other factors may arise in cases relevant to a determination on relocation that are not in this list of factors, or in the factors related to a child's best interests in section 16. This might include situations where a parent relocates in the face of opposition without awaiting a court determination, or where a parent registers an opposition but takes no further steps to have the matter mediated or adjudicated. We recommend expanding section 16.92(1) to allow consideration of any other relevant factors as may arise.

**RECOMMENDATION:**

- 38. The CBA Sections recommend that section 16.92(1) be amended to include "and any other factors that are relevant to assessing the impact of a relocation on a child's best interests".**

Section 16.92(3) indicates that the court shall not consider whether the relocating parent would relocate without the child if the child's relocation was prohibited. It does not address the converse: whether a person would stay if the child's relocation was prohibited.

**RECOMMENDATION:**

- 39. The CBA Sections recommend that section 16.92(3) be amended to confirm that the court shall not consider what the parent requesting relocation will do if the court prohibits the child's relocation.**

## B. Burden of Proof

Currently the Bill provides that:

- When a child lives with parents where they have “substantially equal” [parenting time], the person seeking to relocate must prove the relocation is in the child’s best interests. “Substantially equal time” is not defined.
- When a child lives “the vast majority of time” with one parent, if that parent’s request to relocate is opposed by the other parent, the opposing parent must prove the relocation is *not* in the best interests of the child. “The vast majority of time” is not defined.
- Where neither of those situations exist, both people have the burden of proof.

We support a shifting burden of proof, but have some concerns about the determination of when the burden should fall to one parent (or person with parenting time or decision-making responsibilities).

We accept that a relocation should be presumed to be in the child’s best interests where the child has little contact with the non-relocating parent because the relocation is likely to have little or no impact on the child’s relationship with the other parent. In these cases, we support the onus being on the parent with little parenting time to demonstrate that the move would not be in the child’s best interests. We recommend the concept of the “vast majority of time” be defined.

We do not, however, see it as appropriate to limit the burden of proof on the relocating parent to situations where a child is cared for in an arrangement of “substantially equal time”. In our view, this is too narrow.

Relocation can have a significant impact on a child’s relationship with the non-relocating parent, even when that parent has less parenting time than the relocating parent. To recognize that relationship only when the child enjoys a “substantially equal” amount of time with the parent inadequately addresses the fact that children and parents have important relationships that should not be easily disrupted, even when one parent has less than equal parenting time. The standard of “substantially equal time” or even shared care is too high. It would be too easy to sever or damage a child’s relationship with a parent or caregiver where there is a strong attachment, without addressing the child’s best interests. A presumption that relocation is not in the child’s best interests is most appropriate when the relocation would likely disrupt, damage or sever the attachments a child has to the non-relocating parent.



We recognize the difficulty in identifying concrete factors beyond the level of parenting time that should trigger the onus placed on the relocating parent. Imposing a presumption against relocation when there is a strong and positive bond between a child and the non-relocating parent may be appropriate to protect that relationship.

**RECOMMENDATIONS:**

- 40. The CBA Sections recommend that section 16.93(1) be amended to require the relocating parent to prove the relation is in the child's best interests when the relocation would create significant changes in the child's relationship with the non-relocating parent.**
- 41. The CBA Sections recommend that the concept of "vast majority of time" within section 16.93(2) is defined.**

Both sections 16.93(1) and (2) require finding that the parties "substantially comply with an order, arbitral award or agreement". Compliance is already a relevant factor to assessing relocation in a child's best interests in section 16.92(1)(g). It need not be included again as a condition precedent to bring the matter to court.

**RECOMMENDATION:**

- 42. The CBA Sections recommend that section 16.93(1) and section 16.93(2) be amended to delete "substantially comply with an order, arbitral award or agreement".**

**IX. CHILD SUPPORT**

Section 171 of the BC *Family Law Act* provides that a child support order will continue after the death of the payor to avoid any situation where an order not binding on the estate of the payor leaves the children without support. While the rights of dependents may be addressed in some provincial and territorial legislation, the *Divorce Act* should also protect a child's right to support, when they remain entitled, at and after the death of a parent with an obligation to pay support.

**RECOMMENDATION**

- 43. The CBA Sections recommend incorporating a provision similar to section 171 of the BC *Family Law Act* into Bill C-78.**

## A. Enforcement Provisions

The current Act does not specify a method for validating and enforcing support orders in jurisdictions other than the one where the order was originally granted. The current system gives a high level of discretion to Maintenance Enforcement Programs, and support recipients must depend on how those programs exercise their discretion as to whether a support order is enforceable in the other jurisdiction.

With the current system, even when enforced elsewhere, any applications to vary the terms of the order are brought either through a provisional order or an application before the courts of the granting jurisdiction. Both processes are difficult for self-represented individuals with limited understanding of the processes to manage, and either often involves significant delays before a change in the amount of support payable is actually implemented. This becomes particularly challenging if a stay of enforcement is necessary for the payor of support to avoid prejudice when there may be a dispute regarding child support arrears.

## B. Proposed Changes

Section 19.1 of Bill C-78 would include a specified process to apply for enforcement of support orders in other jurisdictions. It would confirm that any order enforced through this process is deemed an order made under section 17. Section 20(2) would also provide:

An order made under this Act in respect of support, parenting time, decision-making responsibility or contact and a provincial child support service decision that calculates or recalculates the amount of child support under section 25.01 or 25.1 have legal effect throughout Canada.

Permitting enforcement measures to be taken outside of the *Interjurisdictional Support Orders Act* (ISO) process may provide a benefit to litigants. It could also add certainty and more consistent application of enforcement than the current system.

Section 19.1(2) of Bill C-78 goes beyond just enforcement of support applications to confirm other aspects of an order – including police assistance clauses or other forms of mandatory relief. Clear enforcement of police assistance clauses across the country would provide a more unified system to assist with the efficient return of children when they have been unlawfully or improperly removed from their habitual residence.

The current regime does not provide specific requirements for notice of applications for registration and recognition brought under section 19.1(2). Notice remains an important

factor, especially when spouses no longer reside in the same province or territory. It is not uncommon for parties to lose touch with one another when a former spouse relocates and parenting time decreases. Applicants should have a responsibility to attempt to provide notice of enforcement to the payor. This would ensure that all affected individuals have notice of the application and if a former spouse is unaware of an order for support or has otherwise ignored it, it puts that person on notice about any financial obligations towards a child. In that way it would act as a catalyst for alternative resolution between the parties in some circumstances.

**RECOMMENDATION:**

- 44. The CBA Sections recommend that applicants be responsible for making reasonable attempts to provide notice of enforcement to the payor.**

**X. ENSURING ADEQUATE RESOURCES AND SERVICES**

There will be costs to facilitate communication between all levels of court to ensure that the court deciding on a parenting arrangement in a child's best interests is aware of all other relevant proceedings, as provided in section 16(3)(k). Further, the requirement to consider of the views and preferences of children may have associated costs, especially in areas without an Office of the Children's Lawyer. With increasing recognition of the importance of obtaining children's views and preferences, resources are extremely limited for appropriate and safe ways for children to share their views and have their interests protected. There are few established programs to allow children to provide views and to have legal representation in court processes to advance their interests and assist parents and the court in decision-making. Access to affordable and skilled neutral advocates to obtain children's views and preferences is central to the effective application of this principle. Governments must take steps, including the allotment of necessary budgetary resources, to make children's effective participation in family justice processes meaningful.

Protecting children from violence and conflict also requires programs and services to assist families in conflict. Guidelines for counsel and courts would also help in cases where there has been family violence, a risk of future family violence, or high conflict in the divorce process.

For meaningful change to flow, funding for these and other initiatives to advance the objectives of Bill C-78 will be necessary.

**RECOMMENDATION:**

- 45. The CBA Sections recommend that the federal, provincial and territorial governments negotiate to ensure adequate funding is available to provide the services required under Bill C-78, including mediation services, supervised access services and supervisory resources for high conflict families.**

**XI. INTERJURISDICTIONAL SUPPORT ORDERS ACT**

Recently, the Federal/Provincial/Territorial Working Group on Inter-Jurisdictional Support Orders surveyed stakeholders across Canadian jurisdictions to determine how to encourage more efficient use of the ISO, primarily by use of technology. The survey found that although the technology is available in most judicial centres in Canada, most jurisdictions are underutilizing it, if they are using it at all. This has led to inefficiencies as parties rarely participate in the process. Among other things, it also means that when judges have questions (eg. arising from the material filed), they must go back to the parties, sometimes multiple times, to obtain the necessary information to render a decision. This leads to delays that clog the court system.

The provisions in Bill C-78 would simply implement key aspects of treaties already signed by Canada. Many jurisdictions have pointed to a lack of enabling legislation and court rules as the reason for inefficiencies in the process. Bill C-78's amendments would help parties to use the process more efficiently and effectively, and provide clear guidance about a process that has previously been unclear and endlessly complicated. Changes to ISO forms that have now been adopted by many jurisdictions, combined with the changes proposed in Bill C-78, would assist both unrepresented litigants and lawyers in dealing with ISO matters. Additionally, the Bill represents an effort to allow both international or interprovincial processes to be made more uniform when dealing with support matters when parties are in different jurisdictions.

**XII. LANGUAGE RIGHTS AND BILL C-78**

The *Divorce Act* does not currently recognize language rights. As a result, French-speaking Canadians in several provinces, such as Newfoundland and Labrador, British Columbia and Nova Scotia, are not entitled under the *Divorce Act* to bring proceedings or file pleadings or exhibits in French, or even to speak French during hearings. In concrete terms, this means that in certain Canadian jurisdictions, a Francophone couple seeking a divorce or corollary relief has no choice but to proceed before the competent court in English. This is true even if the

proceedings are brought under the *Divorce Act*, a federal statute, and despite the fact that divorce falls under federal jurisdiction.

Bill C-78 contains no provisions on language rights, and would not address these problems. The legal framework established by the *Divorce Act* applies not only to divorce, but also corollary matters such as child support, access and custody.

Family law affects the lives of many people in Canada, and in a direct and intimate way, considering the high rate of divorce and its significant financial and emotional implications on children and families. The critical nature of this area of the law for many Canadians, including newcomers, calls for language rights to be recognized and added to Bill C-78. There is precedent for such an addition; federal lawmakers have already set out in Part XVII of the *Criminal Code* that any person accused of a criminal offence in Canada has a right to be tried in the official language of their choice, no matter their province or territory.<sup>10</sup>

The federal government has put into place systems and resources to ensure an accused person's right to a criminal trial in the official language of their choice. This existing infrastructure could assist to some extent with the implementation of language rights to be provided in any amended divorce legislation.<sup>11</sup>

We suggest that Bill C-78 should provide for explicit recognition of language rights in any proceeding under the *Divorce Act*, including:

- The right to file pleadings and exhibits written in either of Canada's official languages
- The right to use English or French and be understood in the official language of one's choice by the judge or officer of the court tasked with initiating the proceedings, without the assistance of an interpreter
- The right of witnesses to use the official language of their choice and, if necessary, to have access to an interpreter

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<sup>10</sup> In its 2002 [report](#), "Environmental Scan: Access to Justice in Both Official Languages" (chapter 1), the Justice department indicated that Parliament can impose language obligations on provincial courts if it "decides to delegate [to the courts] the enforcement of those laws".

<sup>11</sup> In 1998, the Special Joint Committee on Child Custody and Access recommended an amendment to the *Divorce Act* "to ensure that parties to proceedings under the *Divorce Act* can choose to have such proceedings conducted in either of Canada's official languages." The Committee recommended that this amendment be based on section 530.1 of the *Criminal Code*: "Th[e] Committee recommends that the *Divorce Act* be amended to ensure that parties to proceedings under the *Divorce Act* can choose to have such proceedings conducted in either of Canada's official languages." (Special Joint Committee on Child Custody and Access, For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access (December 1998, 36th Legis., 1st Session), at 105) ([www.parl.ca/DocumentViewer/en/36-1/SJCA/report-2/page-105#divorce2](http://www.parl.ca/DocumentViewer/en/36-1/SJCA/report-2/page-105#divorce2)).

- The right to give evidence or make submissions in English or French;
- The right to have evidence and submissions received, recorded and transcribed in the official language in which they are given
- The right to decisions, orders and judgments issued in the official language(s) chosen by the parties
- The right to demand that any appeal be heard by one or more judges who understand English and French without the assistance of an interpreter

We suggest that the language rights listed above could be inserted after section 21 of the *Divorce Act*. By recognizing language rights in Bill C-78, Canada would honour its commitment to fostering the use of French in Canadian society, in accordance with section 41 of Canada's *Official Languages Act*.

### **XIII. CONCLUSION**

We are pleased to have this opportunity to contribute our views with the intent of improving Bill C-78, and look forward to elaborating further on any of the points raised in this submission.