

Observations
to the thirty-fourth report of the Standing Senate Committee on Legal and Constitutional Affairs
(Bill C-78)

Introduction

Bill C-78, An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act,¹ was introduced at first reading in the House of Commons on 22 May 2018. On 4 October 2018, it passed second reading and was referred for consideration to the House of Commons Standing Committee on Justice and Human Rights. The committee adopted several amendments on 7 December 2018.² The bill passed third reading in the House of Commons on 6 February 2019.

In the Senate, Bill C-78 received first reading on 19 February 2019 and then received second reading on 11 April 2019 before being referred to the Standing Senate Committee on Legal and Constitutional Affairs (the committee) for study that same day. The committee held three meetings on this bill (with extended sittings; and, including clause-by-clause consideration) on 5, 6 and 12 June 2019 and heard from 10 organizations and 4 individuals as witnesses, including the Minister of Justice and Attorney General of Canada, Department of Justice officials, legal academics and practitioners and representatives from shelters serving women and children affected by violence.

The amendments introduced by Bill C-78 constitute the first legislative update to the *Divorce Act* in more than 20 years. The bill modernizes the Act by replacing the language of custody and access with legal principles focused on the parent-child relationship, providing greater guidance to courts and parents for the determination of the best interests of the child, addressing family violence, providing a framework for the relocation of a child, and simplifying processes for the recalculation and enforcement of family support obligations.

Bill C-78 also brings Canada closer to becoming a party to two international family law conventions:³ the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*⁴ and the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of*

¹ LEGISinfo, [Bill C-78, An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act](#).

² House of Commons Standing Committee on Justice and Human Rights, [Bill C-78, An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act](#), 23rd Report, 1st Session, 42nd Parliament.

³ Department of Justice, [Strengthening and modernizing Canada's family justice system](#).

⁴ Hague Conference on Private International Law [HCCH], [34. Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children](#) [1996 Hague Child Protection Convention]. The text of the Convention can also be found in Schedule 2 of the bill

Family Maintenance.⁵ While Canada has signed these conventions, they cannot be ratified until Canadian laws at the federal, provincial and territorial levels are brought into compliance.

In focussing on the best interests of the child, Bill C-78 reflects the language of the United Nations *Convention on the Rights of the Child*,⁶ which provides that, in all actions concerning children, the best interests of the child will be a primary consideration.⁷ Canada ratified the Convention in 1991.

The committee is mindful that with the pending dissolution of Parliament, there is insufficient time to make the amendments to the bill that would clarify its interpretation. Among these amendments, the committee noted legal concerns in relation to the interpretation of certain parts of proposed new section 16 of the Act. Given the importance of passing this bill into law, and the consensus among witnesses that this should happen as soon as feasible, the committee has chosen to make the observations set out below instead of amending the bill.

Family violence

Bill C-78 addresses a recommendation made by the Special Joint Committee on Child Custody and Access in its December 1998 report titled *For the sake of the Children*: “Recognizing the impact of family violence on children, mediation and other non-litigation methods of decision-making should be structured to screen for and identify family violence.”⁸ Addressing family violence is always in the best interests of children.

The capacity of Canada’s family law systems, in respect of which the *Divorce Act* is foundational, to promote safety and well-being for all family members depends on clear legislative guidance, which must be closely informed by research and experience. Overall, witnesses welcomed the emphasis in the Bill on only taking into consideration the best interests of the child when making parenting or contact orders. They pointed out that violence against women has a clear association in many cases with parenting problems, child harm and the safety of women and their children during and after divorce.

The committee is cognizant of the gendered nature of family violence and notes that the majority of victims of spousal violence – both during the marriage and at the point of separation – are women.⁹ In a letter to the chair of the committee (dated 11 June 2019), the Minister of Justice provided highlights from the Department of Justice’s Gender-Based Analysis Plus (GBA+).¹⁰ Among other findings, the

⁵ HCCH, [38. Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance](#) [2007 Hague Child Support Convention]. The text of the Convention can also be found in Schedule 1 of the bill.

⁶ United Nations, Office of the High Commissioner for Human Rights, [Convention on the Rights of the Child](#), 20 November 1989.

⁷ See the testimony before the committee of Claire Farid, Department of Justice (5 June 2019).

⁸ Special Joint Committee on Child Custody and Access, [For the sake of the Children](#), December 1998.

⁹ See Marta Burczycka and Shana Conroy, [“Family violence in Canada: A statistical profile, 2016,”](#) *Juristat*, Canadian Centre for Justice Statistics, Statistics Canada, Catalogue no. 85-002-X, 17 January 2018, p. 41.); and Luke’s Place Support and Resource Centre, Durham Region, Ontario and National Association of Women and the Law/Association Nationale Femmes et Droit (NAWL/ANFD), *Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs*, 5 June 2019.

¹⁰ Minister of Justice, *Letter to the Chair of the Senate Standing Committee on Legal and Constitutional Affairs*, 11 June 2019, Annex 2.

department's GBA+ determined that, "in comparison to men, women are more likely to suffer more serious types of violence and more serious injuries."¹¹ The GBA+ further noted that "women are substantially more likely to report fearing for their lives as a result of post-separation violence and are more likely to be killed by a former partner."¹²

- 1. The committee observes that the gender-neutral drafting used in Bill C-78 does not obviate the need to take into account the gendered nature of family violence. The committee further observes that the bill requires family law practitioners and those applying the *Divorce Act* to take into consideration the potential consequences of awarding parental responsibilities to a perpetrator of family violence.**
- 2. The committee notes, as several witnesses have stated, that direct or indirect exposure to family violence is child abuse, causing emotional stress and developmental harm to the child. Spousal violence is not only a matter between spouses; it is a form of family violence. This was acknowledged by the Minister of Justice in his letter to the chair in the following terms: "In the case of a child, any exposure to family violence is family violence in and of itself; that is, exposure to family violence is a form of child abuse."¹³**

Ambiguity in the French definition of family violence

The committee stresses the importance of ensuring there is no ambiguity in both versions of federal legislation, especially in statutes like the *Divorce Act* that are of great importance for Canadians. Members of the committee raised questions as to whether the English and French versions of the definition of family violence have the same meaning.

In particular, questions were raised as to whether the words "pattern" in English and "aspect cumulatif" in French convey the same meaning. In addition, concern was expressed that the French wording left doubt with regard to its interpretation as to whether a family member would have to fear for their own safety on more than one occasion to meet the definition of "family violence."

In Annex 1 of his letter to the chair, the Minister of Justice stated that:

The legislative intent of the definition is that the reference to "pattern" in English or "aspect cumulatif" in French applies only to conduct that is coercive and controlling. It is not intended to apply to conduct that is violent or threatening or that causes fear for safety. This intent is important, as it is clear that a single act can constitute family violence if the conduct is violent or threatening or causes fear.

Both the English and French versions of the definition achieve this legislative intent. With respect to the French version, the repeated use of the word "qui" before the different types of

¹¹ Ibid.

¹² Ibid.

¹³ Ibid, Annex 1.

conduct, along with the use of the word “ou” between them, makes it clear the “aspect cumulatif” applies only to coercive and controlling family conduct.¹⁴

The letter from the Minister of Justice further confirmed that the definition of family violence is intentionally broad. It comprises:

Any conduct that is (1) violent; or (2) is threatening; or (3) constitutes a pattern of coercive and controlling behaviour; or (4) causes a family member to fear for their own safety or for the safety of another person....¹⁵

The marginal note for subsection 16(6)

Several witnesses raised concerns with respect to the marginal note for proposed subsection 16(6) of the *Divorce Act* that refers to “Maximum parenting time”. Although the provision itself focuses on the best interests of the child, witnesses expressed a concern that the marginal note could give the impression that it creates a presumption of equal parenting time for each parent.

- 3. The committee takes note of the Minister of Justice’s commitment, in his letter to the chair, to make an administrative change to this marginal note to remove the words “Maximum parenting time” and instead use wording along the lines of “Parenting time consistent with the best interests of child.”¹⁶ The committee believes this note would more closely reflect the language of the subsection and the guiding principle of section 16.**

Family dispute resolution processes

The committee notes that several changes introduced by Bill C-78 aim to encourage the use of family dispute resolution processes. This is a welcome approach.

On the other hand, several witnesses have expressed concern about the use of family dispute resolution processes in situations involving family violence, because abused parents may be forced to cooperate with an abusive spouse and pressured to accept dangerous compromises.

- 4. The committee underscores that, as stated in the 1998 report of the Special Joint Committee on Child Custody and Access,¹⁷ where there has been violence by one parent toward the other or toward the children, alternative forms of dispute resolution should only be used to develop parenting plans if and when the safety of the person who has been the victim of violence is no longer threatened and the risk of violence has passed.**

¹⁴ Ibid, Annex 1.

¹⁵ Ibid, p. 2.

¹⁶ Ibid, p. 3.

¹⁷ Special Joint Committee on Child Custody and Access, [For the sake of the Children](#), December 1998.

Bijuralism of Bill C-78

There were questions raised by some members of the committee with respect to bijuralism and Bill C-78's compliance with the rules, principles and concepts of both the common law and civil law.

- 5. The committee notes that the Minister of Justice's letter to the chair confirms that Bill C-78 in its current form does not raise any legislative bijuralism drafting issues.¹⁸**

Bill C-92

The committee notes the confirmation by Department of Justice officials that the factors relating to the best interests of the child listed in proposed subsection 16(3) are consistent with those listed in the proposed subsection 10(3) of Bill C-92, An Act respecting First Nations, Inuit and Métis children, youth and families,¹⁹ which relates to the best interests of Indigenous children in the decision-making process and in taking action in the context of providing child and family services to an Indigenous child. Department officials noted that Bill C-78 and Bill C-92 were drafted in tandem and that the factors set out in Bill C-92 parallel those found in Bill C-78, although they were adapted for the child protection context.

Education

The committee believes that an awareness campaign aimed at parents and all actors involved in family law (including family law services, courts and legal advisors) is needed. In his letter to the chair, the Minister underscored the importance of training being given specifically for family law and child protection practitioners to screen for family violence in their work.²⁰ He noted that the approach to be taken in this regard aligned with recommendations made by Luke's Place, which were:

- That provincial and territorial law societies implement a requirement for universal family violence screening for family law professionals; and
 - That all family law practitioners receive training in how to administer and score family violence screening tools, including training in the appropriate follow-up where they encounter a positive screen.²¹
- 6. The committee invites the federal government to collaborate with provincial and territorial governments to ensure awareness of the main changes introduced by Bill C-78, including the proper use of family violence screening tools for legal practitioners that the Department of Justice is currently developing in collaboration with key partners such as Luke's place.²²**

¹⁸ Minister of Justice, *Letter to the Chair of the Senate Standing Committee on Legal and Constitutional Affairs*, 11 June 2019, p. 4.

¹⁹ LEGISinfo, [Bill C-92 \(An Act respecting First Nations, Inuit and Métis children, youth and families\)](#).

²⁰ Minister of Justice, *Letter to the Chair of the Senate Standing Committee on Legal and Constitutional Affairs*, 11 June 2019, p. 2-3.

²¹ *Ibid*, p. 3.

²² *Ibid*, p. 2-3.

- 7. Recognizing the importance of dealing with family violence as a crucial factor in allocating parenting time and parental responsibilities and in making a contact order, the committee respectfully invites the Canadian Judicial Council to incorporate issues relating to intimate partner violence, gender-based violence, and the unique circumstances of Indigenous women in the design of its judicial education seminars on family law.**

Review of the *Divorce Act*

The committee is of the view that family law should reflect the reality of family structures in Canadian society. The constant evolution of the family unit requires a periodic review of the *Divorce Act*.

- 8. The committee invites the Minister of Justice to take measures to ensure the next review of the *Divorce Act* occurs within five years of the adoption of Bill C-78.**
- 9. The committee proposes that an independent body of experts be established by the Government of Canada to assist with this proposed legislative review and to provide recommendations for the modernization and reform of the *Divorce Act*.**

In the course of its hearings, the committee heard repeated concerns about the potential for subsections 16(3)(c) and 16(3)(j) to be misinterpreted.

The committee heard concerns that subsection 16(3)(c), which references each spouse's "willingness" to support the child's relationship with the other spouse, could be interpreted as placing more value on assertions of parental willingness than on whether the child in fact has a positive relationship with a parent and on the views of the child. There are many reasons why having a post-divorce relationship with a child may not be in the best interests of the child. Witnesses also expressed concern that the provision may have a silencing effect, because women and children who allege parental behaviour that is not beneficial to the child are, in turn, met with allegations that mothers are poisoning children against fathers, or not facilitating contact with fathers.

For its part, subsection 16(3)(j)(i) requires the court to consider family violence and its impact on, among other things, the ability and willingness of the perpetrator of the violence to care for the child. Again, the inclusion of the "willingness" of a parent who has engaged in family violence to care for and meet the needs of a child elevates a parental assertion over and above the key consideration, which should be what the pattern of family violence behaviour establishes about a perpetrator's parenting ability. "Willingness" can, in other words, be used as a wedge to gain control over a child and as a means of controlling a family.

While the committee appreciates that, when read in its entirety, section 16 establishes that the court is to take into consideration only the best interests of the child in making a parenting order or a contact order, the committee is nonetheless sensitive to witnesses' concerns.

- 10. The committee encourages the Minister of Justice to:**
 - immediately begin monitoring the application of section 16 to ensure that it is interpreted as intended; and**

- **consider - introducing these particular amendments quickly to the law to ensure greater clarity, rather than waiting for the proposed review period of five years.**