October 15, 2020

VIA EMAIL: comm-justicepolicy@ola.org

Mr. Roman Baber, M.P.P.
Chair of the Standing Committee on Justice Policy
c/o Ms. Thushitha Kobikrishna, Committee Clerk
99 Wellesley Street West
Room 1405, Whitney Block
Queen's Park
Toronto, ON M7A 1A2

Dear Mr. Baber and Members of the Standing Committee on Justice Policy:

RE: Bill 207, *Moving Ontario Family Law Forward Act, 2020*

The Advocates' Society (the "Society"), established in 1963, is a not-for-profit association of more than 6,000 members throughout Canada, including approximately 5,000 in Ontario. The mandate of the Society includes, among other things, making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates.

The Society is writing to provide the Standing Committee on Justice Policy with comments on Bill 207, the *Moving Ontario Family Law Forward Act, 2020*. The Society was previously consulted by the Ministry of the Attorney General on how best to align Ontario's family laws with the amendments to the federal *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), generated by Bill C-78. The Society's submission to the Ministry of the Attorney General, dated January 22, 2020, is attached to this letter for your reference. The Society emphasized the crucial need for Ontario to harmonize its provincial family legislation with federal legislation to avoid the creation of a two-tier system.

Schedule 1: *Children's Law Reform Act*, R.S.O. 1990, c. C.12

The Society is appreciative of the significant efforts made by the Attorney General in Bill 207 to harmonize Ontario's *Children's Law Reform Act* (*CLRA*) with the changes being made to the *Divorce Act* by Bill C-78. The amendments to the federal *Divorce Act* introduced in Bill C-78 are scheduled to come into force in March 2021. As stated in the preamble to Bill C-78, the amendments:

(a) replace terminology related to custody and access with terminology related to parenting;
(b) establish a non-exhaustive list of criteria with respect to the best interests of the child;
(c) create duties for parties and legal advisers to encourage the use of family dispute resolution processes;
(d) introduce measures to assist the courts in addressing family violence;
(e) establish a framework for the relocation of a child; and
(f) simplify certain processes, including those related to family support obligations.

As set out in our letter to the Attorney General of January 22, 2020, the Society's view is that it is important for Ontario to mirror, as closely as possible, changes being made to the *Divorce Act* by Bill C-78 in changes in the provincial legislation to ensure that a two-tiered system does not exist once the amendments to the *Divorce Act* take effect. The Society is pleased to see that this has been done in Bill 207.

In addition, the Society supports the two amendments to Bill 207 proposed by the Ontario Bar Association in its submission on Bill 207 dated October 13, 2020. The first proposed amendment concerns the expansion of the definition of "child" in the proposed section 18(3) of the *CLRA* to include children who are no longer minors who are "unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents":

> Child
> (3) A reference in this Part to a child is a reference to the child <u>who:</u>
> <u>(a) is</u> a minor<u>; or</u>
> <u>(b) is unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents.</u>

The second proposed amendment concerns section 28(3) of Schedule 1, which replaces the language in section 47 of the *Family Law Act*, R.S.O. 1990, c. F.3, to ensure that the court is permitted to direct that a support application be stood over until a determination has been made for parenting time and not only decision-making responsibility:

> (3) Section 47 of the Act is repealed and the following substituted:
>
> Application under Children's Law Reform Act
>
> 47 The court may direct that an application for support stand over until an application under the *Children's Law Reform Act* for a parenting order ~~respecting decision making responsibility~~ has been determined.

<u>Schedule 2: *Courts of Justice Act*, R.S.O. 1990, c. C.43</u>

The Society has serious concerns about the proposed changes to family law appeal routes.

While the Society agrees that family law appeal routes would benefit from simplification, we respectfully submit that the specific changes proposed will not simplify matters in practice.

In particular, the proposed changes to appeal routes are inconsistent with the main overarching goal of Bill 207, namely to ensure that a two-tiered system does not exist in Ontario for married and unmarried spouses once the amendments to the *Divorce Act* take effect in 2021.

To provide some context, it is helpful to consider the current legislative framework and how it has led to confusion. With some exceptions that are not relevant for our focus here, the current appeal routes for final family law orders are as follows:

a) appeals from final orders of the Ontario Court of Justice go to the Superior Court of Justice;

b) appeals from family law arbitrations go to the Superior Court of Justice;

c) appeals from some final orders of the Family Court of the Superior Court of Justice under provincial acts (including final orders relating to child support, spousal support, and child custody) go to the Divisional Court;

d) appeals from other final orders of the Family Court of the Superior Court of Justice under provincial acts (including final orders relating to property equalization) and under federal acts (including the *Divorce Act*) go to the Court of Appeal; and

e) appeals from most final orders of the Superior Court of Justice go to the Court of Appeal.

The main source of confusion in the current regime is the distinction between appeals from final orders of the Family Court of the Superior Court of Justice versus the Superior Court of Justice (non-Family Court).[1]

Currently, appeals from most final orders of the Family Court (a division of the Superior Court of Justice) go to the Divisional Court (pursuant to current section 21.9.1 of the *Courts of Justice Act*, which Bill 207 proposes to repeal) rather than to the Court of Appeal. This creates confusion because the Family Court and the Superior Court of Justice deal with the same claims. The difference between the two courts is largely one of geography – some areas do not have a Family Court. For example, a party appealing a final child custody order of the Superior Court of Justice in Newmarket (which has a Family Court) would have a right of appeal to the Divisional Court, whereas a party appealing that same final child custody order of the Superior Court of Justice in Toronto (which does not have a Family Court) would have a right of appeal to the Court of Appeal.

The Society recognizes that the Court of Appeal for Ontario has commented on the need for reform of section 21.9.1 of the *Courts of Justice Act* on several occasions. For example, in *Christodoulou v. Christodoulou* (2010 ONCA 93, at paras. 32-36), the Court of Appeal for Ontario stated:

> [35] The inconsistency in current appeal routes can be confusing for the public, for counsel and for institutional litigants. It can also create an inequality in access to justice between litigants whose disputes at first instance are heard in provincial courts versus superior courts – the former must incur the costs and delays of two appeals in order to reach the Court of Appeal while the latter must incur the cost and delay of only one. The inconsistency may also encourage forum shopping among litigants. In addition, under the current appeal route structure, the allocation of time dedicated to the development of the jurisprudence through judicial decisions is unequal, with a greater focus and opportunity for clarification of the law for cases that have an appeal route directly to the Court of Appeal. For example, given current appeal routes, fewer decisions involving child protection matters that are heard at first instance at the Ontario Court of Justice will receive Court of Appeal consideration because they must first be appealed to the Superior Court of Justice. On the other hand, cases involving the division of property are appealed

[1] The Family Court (also known as the Unified Family Court) is a division of the Superior Court of Justice that hears all family law matters, whether under provincial or federal legislation. In areas that do not have Family Courts, family law matters are heard by the Ontario Court of Justice (which hears most provincial matters, with property matters as a significant exception) or by the Superior Court of Justice (which hears virtually all family law matters, provincial or federal, with the significant exception of child protection matters).

> from the Superior Court of Justice directly to the Court of Appeal, resulting in a higher focus on family law property divisions than on child protection issues at the Court of Appeal.
>
> [36] The arbitrariness of geographical limitations is accordingly a serious concern, but one that extends far beyond the scope of this case. Legislative reform in this area would be welcome. In particular, it seems to me that, given the tremendous importance of custody matters and the desirability of resolving these matters quickly and finally, careful consideration should be given to providing a single direct appeal to the Court of Appeal, no matter which court makes the initial custody decision. [emphasis added]

It appears that Bill 207 intends to address this issue with the proposed repeal of section 21.9.1 of the *Courts of Justice Act* and the related proposed amendments. Respectfully, the Society submits that the proposed amendments do not solve the geographic problem, but rather exacerbate it.

Bill 207 proposes two separate appeal routes for Family Court appeals: one route for final orders under provincial jurisdiction and another route for final orders under federal jurisdiction. This would mean that appeals of Family Court final orders on child support, spousal support, and child custody for *married* spouses would go to the Court of Appeal (as claims under the federal *Divorce Act*), while appeals of Family Court final orders on child support, spousal support, and child custody for *unmarried* spouses would go to the Divisional Court (as claims under the provincial *Family Law Act* and *CLRA*). There is no rational basis for treating appeals of these issues differently for married and unmarried spouses, and we query whether such a distinction would even be constitutional. Why should unmarried spouses be denied a right of appeal of their final orders to the Court of Appeal, when married spouses are afforded that right?

In addition to the issue of different appeal routes for married versus unmarried spouses, the Society is concerned that appeal routes in a particular case will be unclear, because they will vary by issue. In most family law cases, there are various types of relief sought – under federal legislation, under provincial legislation, and under the common law. For example:

(a) A "typical" family law case with married spouses seeking parenting, spousal support, and child support claims, and property equalization relief before the Family Court would have different appeal routes for different issues:

- appeals of final orders relating to parenting, spousal support, and child support would be to the Court of Appeal; and
- appeals of final orders relating to property equalization would be to the Divisional Court.

(Adding to the confusion, if the case were before the Superior Court of Justice (non-Family Court), for example in Toronto, all of the appeals of final orders would be to the Court of Appeal.)

(b) A "typical" case with unmarried spouses seeking parenting, spousal support, and child support claims, and equitable property relief by way of a claim for joint family venture would also have different appeal routes for different issues:

- appeals of final orders relating to parenting, spousal support, and child support would be to the Divisional Court; and

- appeals of final orders relating to a finding of a joint family venture would be (arguably) to the Court of Appeal (in fact, Bill 207 does not provide adequate clarity on which appellate court would adjudicate on common law claims).

(As above, adding to the confusion, if the case were before the Superior Court of Justice (non-Family Court), for example in Toronto, all of the appeals of final orders would be to the Court of Appeal.)

The examples above demonstrate that not only does the geographic problem remain an issue despite the proposed amendments in Bill 207, but there is the added confusion of different appeal routes in the same case depending on the issues.

If all of the courts in Ontario dealing with family law matters ultimately become "Family Courts", then the geographic issue will become moot. In this regard, we acknowledge the commitment of the federal and Ontario governments to complete the expansion of Unified Family Court across Ontario by 2025. However, the confusion caused by the various issue-driven appeal routes in any given case will remain.

A simple solution that would provide the greatest clarity is to have all appeals from final orders of the Family Court heard by the Court of Appeal. In addition to providing clarity to litigants and lawyers regarding appeal routes and providing equal treatment of litigants, there are further significant reasons why appeals of final family law orders should be heard by the Court of Appeal:

- **The Interests of Justice**. Family law matters can be deceptively complicated — legally and factually. Respectfully, sometimes a trial judge gets it wrong. The Court of Appeal's role as a court of purely appellate jurisdiction is to correct such errors. This serves the interests of justice not only for the parties involved, but for other parties who will be bound by legal precedent.

- **Development of Family Law Jurisprudence in Ontario.** As mentioned above, family law is complex; it has the potential to intersect with various other areas of law (for example, corporate oppression, trusts, and estates). Ontario family law litigants benefit from clear and binding appellate jurisprudence from the Court of Appeal, which reduces uncertainty and therefore costs.

- **Public Confidence in the Administration of Justice.** Public confidence in the administration of justice depends on justice not only being done, but also being *seen* to be done. It is no doubt difficult for Ontarians involved in the family justice system to understand why an appeal of an identical issue would go to a different court depending on where one lives or depending on one's marital status. It is important for public confidence in the administration of justice for there to be consistency in the appeal court that decides particular types of appeals. In addition, litigants may have concerns about justice being served if their court of last instance is comprised of judges sitting amongst the judge of first instance.

- **Avoiding the Costs of a Second Level of Appeal.** Having appeals of final family law orders go directly to the Court of Appeal avoids the delay and expense created by an intermediate appeal to the Divisional Court, followed by a possible appeal to the Court of Appeal.

- **Capacity.** The amendments proposed by Bill 207 could result in additional work for the Divisional Court in the future. As currently structured, the Divisional Court has limited capacity because the judges of the Divisional Court are judges of the Superior Court of Justice. The capacity of the Divisional Court cannot be expanded without impacting the judicial resources available to the Superior Court of Justice to do its crucial work as a court of first instance. By contrast, the Court of Appeal for Ontario has a dedicated judicial complement and does not currently have a significant backlog of cases. The Court of Appeal generally commits to hear family law appeals within 3 to 4 months.

- **Timing and Access to Justice.** In regions outside of Toronto, the Divisional Court holds one-week sittings two to four times per year. The Society is concerned that family law litigants in these regions could be waiting much longer for their appeals to be heard given the limited sittings. This is especially troubling because family law decisions have such significant impact on individuals, including on children. Waiting for the next sitting (or for multiple sittings, depending on capacity) may create harm for families.

  Moreover, custody, access, and mobility matters are all time-sensitive. Some child-related decisions are emergencies, including in instances of child abduction. Currently, appeals of child abduction matters are afforded expedited hearings and case management at the Court of Appeal. The Society queries whether there will be capacity or ability to accommodate expedited family law appeals from regions outside Toronto at the Divisional Court.

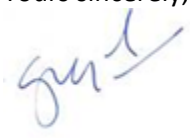
- **Remote Hearings.** Prior to the COVID-19 pandemic, one factor that may have supported appeals going before the Divisional Court was location. Because the Court of Appeal for Ontario sits only in Toronto, it could create a barrier to appeals for residents of Ontario who do not live in Toronto. However the Court of Appeal has been very adept at hearing appeals by video-conference, and this need not be a barrier to pursuing appeals. Moreover, the Divisional Court sits only in limited geographic areas of the province.

The Society is concerned that the changes to appeal routes proposed by Bill 207 do not take into account the above considerations, and have been proposed without consultation or opportunity for the Bar to respond meaningfully. In particular, it appears that many family lawyers are not aware of the nature or extent of these proposed amendments, as the media coverage of Bill 207 has focused almost exclusively on the changes that conform the provincial statutes to the amended *Divorce Act*. The Society is concerned that the majority of the submissions to the Standing Committee are not addressing the appeal route changes, notwithstanding their significance. The Society submits that this is due to a lack of visibility on the issues and not due to tacit approval of the changes.

As mentioned above, a simple solution to the concerns identified by the Society is to amend Bill 207 to have all appeals from final orders of the Family Court heard by the Court of Appeal. Alternatively, as the proposed appeal route changes are significant, they may merit removal from Bill 207 so they can be the subject of further analysis, consultation, and discussion with justice system stakeholders.

Thank you for providing the Society with the opportunity to make these submissions. We would be pleased to answer any questions you may have.

Yours sincerely,



Guy J. Pratte
President

Attachments:

1. The Advocates' Society Letter re: Harmonization of Ontario Family Law with Federal Bill C-78, dated January 22, 2020

CC: The Hon. Doug Downey, M.P.P., Attorney General of Ontario
Amanda Iarusso, Director of Policy and Legal Affairs to the Attorney General of Ontario
Vicki White, Chief Executive Officer, The Advocates' Society

The Advocates' Society Task Force
Katherine N. Batycky, *Stoner & Company Family Law Associates*
Andrea L. Burke, *Davies Ward Phillips & Vineberg LLP*
Rachael L. Eynon, *Rachael Eynon Professional Corporation*
Sheila Gibb, *Epstein Cole LLP*
Peter W. Kryworuk, *Lerners LLP*
Ann L. Stoner, *Stoner & Company Family Law Associates*

January 22, 2020

VIA EMAIL

The Honourable Doug Downey, M.P.P.
Attorney General of Ontario
Ministry of the Attorney General
720 Bay St., 11th Floor
Toronto, ON M7A 2S9

Dear Attorney General:

RE: Harmonization of Ontario Family Law with Federal Bill C-78

Thank you for consulting with The Advocates' Society on how to update Ontario's laws to reflect the changes made to the federal *Divorce Act*[1] by Bill C-78.[2]

The Advocates' Society, established in 1963, is a not-for-profit association of more than 6,000 members throughout Canada, including approximately 5,000 in Ontario. The mandate of The Advocates' Society includes, among other things, making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates.

I. The Benefits of Harmonization

The purpose of Bill C-78's amendments to the *Divorce Act* are identified in the bill's summary: among other things, the amendments

(a) replace terminology related to custody and access with terminology related to parenting;
(b) establish a non-exhaustive list of criteria with respect to the best interests of the child;
(c) create duties for parties and legal advisers to encourage the use of family dispute resolution processes;
(d) introduce measures to assist the courts in addressing family violence;
(e) establish a framework for the relocation of a child; and
(f) simplify certain processes, including those related to family support obligations.

Many of the amendments – particularly those that replace terminology, introduce measures to assist the court in addressing family violence, and establish a framework for the relocation of the child – drastically change the framework for family law across Canada and may assist in increasing access to justice for children and their families.

It is our view that it is important for Ontario to mirror, as closely as possible, Bill C-78's changes in provincial legislation to ensure that a two-tiered system does not exist once the amendments to the *Divorce Act* take effect on July 1, 2020.

With this in mind, The Advocates' Society wholly supports the proposals advanced by the Ontario Bar Association ("OBA") that the amendments to the *Divorce Act* be incorporated in the Ontario *Children's Law Reform Act*,[3] as outlined in the OBA's letters to the government dated July 2019 and November 2019.

In particular, in order to ensure that Ontario does not have two different regimes affecting children, depending on whether parents proceed to resolve their disputes under federal legislation or provincial legislation, we join the OBA in urging the Ontario government to adopt the following:

(1) Changes to parenting terminology, including eliminating the use of the legal terms "custody" and "access", and replacing those terms with "decision-making responsibility" and "parenting time", as well as "parenting orders"; introducing the concept of a "contact order" for parties who are not parents; and adopting the language contained in the new s. 16.6 of the *Divorce Act* regarding the implementation of parenting plans.

(2) Amend the "best interests of the child" factors to include the expanded factors contained in Bill C-78, including the introduction of the expansive definition for "family violence", and the obligation of the court to take into account the factors related to family violence when considering its impact on the family when determining what is in the child's best interests, as particularly set out in the new ss. 16(4), 16.8(3) and (4), and 16.96(3) and (4) of the *Divorce Act*.

(3) Introduce and include in the provincial statute the comprehensive provisions in Bill C-78 related to the relocation of the child.

(4) Introduce and encourage the use of family dispute resolution processes where appropriate, and include in the provincial statute(s) the obligation of legal advisers to encourage parties to explore alternative routes for dispute resolution.

We strongly suggest that these changes to the *Divorce Act* be incorporated into the provincial *Children's Law Reform Act* before the federal changes take effect on July 1, 2020 to ensure there is no inconsistency between the provincial legislation and the federal legislation that would cause unnecessary confusion to the public, and may impede access to justice.

For ease of reference, we attach several key statutory provisions from Bill C-78 below in Appendix 1. We concur with the OBA that these are the most important provisions to be mirrored in the provincial legislation.

II. Best Interests of the Child and Family Violence

Bill C-78 maintains the best interests of the child as the only consideration for parenting decisions under the *Divorce Act.* The amendments include various measures to promote the best interests of the child. The Supreme Court of Canada has referred to the best interests of the child as a child's "positive right to the best possible arrangements in the circumstances."[4] The best interests of the child is also a significant principle internationally. It forms the basis of Article 3 of the United Nations *Convention on the Rights of the Child*,[5] which calls for the child's best interests to be a primary consideration in all actions involving children. Attempts to codify a legal presumption of children spending an equal amount of time with both parents and for joint decision-making responsibility gave way to the reinforcement of the best interests of the child being the test, rather than a focus on parenting matters.[6] This decision was made in part

because the federal government specifically considered that if there has been family violence, sharing responsibilities may be dangerous to the child and other family members.[7]

Bill C-78 amends the *Divorce Act* to set out a non-exhaustive list of criteria to consider in determining the best interests of the child, which provides consistency and clarity and assists in guiding parents, family justice professionals, lawyers, and courts.[8] These criteria are different from and more encompassing than the current list of enumerated criteria under s. 24 of the *Children's Law Reform Act*. The amended *Divorce Act* criteria reflect that parenting decisions made by the court for children need to reflect parenting responsibilities rather than parenting rights.[9]

In addition to an expanded list of criteria, the changes identify as the "primary consideration" that a child's physical, emotional, and psychological safety, security, and well-being are the most important factors to consider. When other criteria conflict, the primary consideration should resolve any such conflicts by emphasizing that the child's safety, security, and well-being must always come first.

The amendments to the *Divorce Act* concerning family violence reflect the greater understanding within Canadian society about the impact of family violence in determining parenting responsibilities and the long-term ramifications of experiencing family violence for children,[10] and reinforce Canadian values in the care of children. Family violence is not just defined but categorized, furthering understanding of the kinds of violence and their impact on families and children. The family violence provisions set out how and when considerations of family violence should be applied, and impact determinations in relation to parenting responsibilities, contact orders, and relocation.

The federal government saw the need to provide consistency and clarity to guide parents, family justice professionals, lawyers, and courts, in cases of married or formerly married persons that share a child; this consistency and clarity should be equally applicable to unmarried persons that share a child, *especially* in instances where family violence exists. Research regarding the rationale for people who are not married sharing a child seldom show a considered choice, but rather that the relationship often evolved with little planning.

In 2004, Justice L'Heureux-Dube wrote that:

> I believe it to be highly problematic to conceive of marriage as a type of arrangement people enter into with the legal consequences of its demise taken into account. In the first place, most people are not lawyers. They are often not aware of the state of the law. Worse, many maintain positive misconceptions as to what obligations and rights exist in association with marriage and other relationships: Law Reform Commission of Canada, Studies on Family Property Law, supra, at p. 267.[11]

and

> …the choice to not marry is not a matter belonging to each individual alone. The ability to marry is inhibited whenever one of the two partners wishes to marry and the other does not. In this situation, it can hardly be said that the person who wishes to marry but must cohabit in order to obey the wishes of his or her partner chooses to cohabit. This results in a situation where one of the parties to the cohabitation relationship preserves his or her autonomy at the expense of the other… Under these circumstances, stating that both members of the relationship chose to avoid the legal consequences of marriage is patently absurd.[12]

Children are by their very nature a vulnerable group within Canadian society that require special protection and consideration. Children impacted by family violence in Ontario should not have different

rights, especially lesser rights, as a result of the legal marital status of their parents, including lacking access to the greater understanding of the impact of family violence for their living arrangements. Children have no say in their parents' decisions to marry, cohabit, separate, or procreate. It is patently unfair to restrict access to the most progressive understanding of children's needs and the impact of family violence on children to children born within a marriage relationship, in situations where their own parents cannot agree on what is best for them. Such a distinction would likely be subject to a *Charter* challenge.

As such, any differences, real or apparent, between the amended *Divorce Act* and the *Children's Law Reform Act* must be remedied to give all vulnerable children the same level of protection. With respect to family violence, three main categories must be considered: (1) Definitions of Family Violence, (2) Coordination of Proceedings, (3) Alternative Dispute Resolution, Duties of Legal Adviser, and Family Violence.

1) Inconsistent Definitions of Family Violence in the *Divorce Act* vs. the *Children's Law Reform Act*

The current version of the *Divorce Act* does not contain a definition of "family violence". The legislature has recognized that family violence is highly relevant in the family law context, and particularly relevant to determinations regarding parenting and contact.[13] Children who are exposed to violence are at risk for emotional and behavioural problems throughout their lifespans, which include post-traumatic stress disorder, depression, low educational achievement, difficulties regulating emotions, and chronic physical diseases.[14]

Accordingly, Bill C-78 proposes a definition of family violence: it means

> any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person — and in the case of a child, the direct or indirect exposure to such conduct.[15]

The definition goes on to provide a non-exhaustive list of types of family violence. The definition clarifies that the behaviour does not have to be a criminal offence or meet the criminal threshold of "proof beyond a reasonable doubt" to be considered family violence under the *Divorce Act*.

Section 24 of the *Children's Law Reform Act* contains a definition of "violence and abuse" to be considered when making a parenting order, as follows:

> 24(4) In assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against,
>
> (a) his or her spouse;
>
> (b) a parent of the child to whom the application relates;
>
> (c) a member of the person's household; or
>
> (d) any child.
>
> (5) For the purposes of subsection (4), anything done in self-defence or to protect another person shall not be considered violence or abuse.[16]

Given the importance of the consideration of family violence in family law matters, the pervasiveness of family violence, and the serious repercussions for children, there is no reasonable basis upon which children of unmarried persons should not be afforded the same protections and same considerations given to those of married persons. If the inconsistencies are not remedied, it would produce two different sets of 'tests' upon which family violence is considered in matters.

The Advocates' Society agrees with and commends the OBA's suggestion that the province adopt the definitions of "family violence" and "family member" (in s. 2 of the amended *Divorce Act*) into s. 18(1) of the *Children's Law Reform Act*.

2) Coordination of Proceedings

The *Divorce Act* amendments include the coordination of proceedings, such that the courts have a duty to consider the existence of any civil protection, child protection, or criminal proceedings or orders that involve either party and are pending or in effect. To fulfill this duty, the court may inquire of the parties, or refer to information that has been obtained in accordance with a search provided for under provincial law. Section 7.8 of the amended *Divorce Act* reads in part as follows:

> 7.8(2) In a proceeding for corollary relief and in relation to any party to that proceeding, the court has a duty to consider if any of the following are pending or in effect, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so:
>
> (a) a civil protection order or a proceeding in relation to such an order;
>
> (b) a child protection order, proceeding, agreement or measure; or
>
> (c) an order, proceeding, undertaking or recognizance in relation to any matter of a criminal nature.
>
> In order to carry out the duty, the court may make inquiries of the parties or review information that is readily available and that has been obtained through a search carried out in accordance with provincial law, including the rules made under subsection 25(2).[17]

The change recognizes that a family may be undergoing multiple proceedings at the same time. If there is family violence, there may be criminal court proceedings, child welfare court proceedings, as well as family law proceedings. If a family court is not aware of a civil protection order or a criminal order that prohibits contact or communication between the parties, an inconsistent order may be issued, which can create problems in terms of enforcement of the orders, confusion for the parties, and potential safety issues. It is not possible to coordinate the various proceedings unless the courts are aware that the other proceedings exist.[18]

The *Children's Law Reform Act* has a "self-reporting" requirement that parties seeking custody of or access to a child must provide an affidavit (Form 35.1 Affidavit in Support of a Claim for Custody and Access) wherein they provide, among other things, information respecting the person's current or previous involvement in any family proceedings, including proceedings under Part V of the *Child, Youth and Family Services Act, 2017* (Child Protection), or in any criminal proceedings.[19] The *Children's Law Reform Act* only requires that non-parents who are seeking responsibilities from a court for a child must provide a copy of their criminal background check, including their vulnerable sector check, and authorize all child welfare agencies in jurisdictions where they have resided to release any records to the court.[20]

Unlike the *Children's Law Reform Act*, under the amended *Divorce Act*, the requirement applies to any corollary relief proceeding (not just custody or access), includes a more comprehensive investigation into the other "proceedings" (i.e. not only considers charges, but also any type of measures or agreements), and permits courts to undertake the investigations themselves rather than rely on self-reporting.

Vulnerable children of unmarried parents must be afforded the same protections as children of married or formerly married parents, and these inconsistencies must be remedied. Within the Ontario justice system, it should be a requirement that if a party wishes to have the benefit of a court order, then that individual's right to privacy should be considered, but only after ensuring that the court has the best information upon which to make its decision. Thus, similarly, just as the federal government is able to release income information to the court to ensure that the best information is available for determining support, other proceedings – including criminal, civil, or child welfare – must be disclosed from the most reliable source, the independent and neutral third parties that hold such records. Not only would such information be the most useful to the court, it would reduce litigation about whether such records exist and the unreliability associated with any self-reporting that may go against self-interest. There is no reason that these important protections should not be afforded to all children.

The Advocates' Society therefore suggests that the *Children's Law Reform Act* adopt the provisions regarding coordination of proceedings in s. 7.8 of the amended *Divorce Act*.

3) Alternative Dispute Resolution, Duties of Legal Adviser, and Family Violence

The amended *Divorce Act* contains a requirement that legal advisers must inform their clients of the possibility of reconciliation, family dispute resolution processes ("ADR processes"), and of any family justice services that may be of assistance to them and to certify they have done so.[21] Furthermore, where a party is seeking a parenting order, Bill C-78 gives the courts the power to direct those parties to attend mediation:

> 16(6) Subject to provincial law, the order may direct the parties to attend a family dispute resolution process.[22]

There are no similar provisions in the *Children's Law Reform Act*. The Advocates' Society echoes the OBA's view that it is equally important to minimize the burden on the courts and increase access to justice for family law parties regardless of their marital status.

The amendments recognize the increasing popularity of ADR processes, the financial incentives to parties of using them, the relative timeliness of ADR processes as compared to court proceedings, and the importance of the parties retaining control over their outcomes through ADR.[23] In cases involving children, there are particular advantages to reaching an agreement through a non-adversarial process (i.e. children may benefit from seeing their parents work together).[24]

Furthermore, the *Divorce Act* requires that these recommendations be made unless "it would clearly not be appropriate to do so". Although dispute resolution processes such as mediation may be preferable in some cases, they may not always be appropriate, as may be the case if there has been family violence or a significant power imbalance.[25]

The expansion of the legal adviser's duty to make a person aware of their options, including those associated with dispute resolution, and the consequences of litigation is appropriate. However, where family violence exists, it may be unclear whether an ADR process is appropriate. Lawyers are not currently trained in a standardized manner on identifying or dealing with family violence. Without a general standard to be applied, or additional training, it is a requirement that is, at best, unhelpful to the court and to the parties. Furthermore, properly trained legal advocates should and do ensure that a litigant is aware of the cost of litigation (both emotional and financial) and of the other options available to them outside of traditional litigation. However, among legal advisers who are not lawyers and litigants who are self-represented, the understanding of the options and implications will vary greatly.

The Advocates' Society recommends first and foremost that there be greater clarity and standardized training for lawyers, legal advisers, ADR providers, and judges with respect to family violence, given the broadened requirements under the amended *Divorce Act*. Lawyers (or other legal advisers as the case may be), judges, and parties must be able to understand when it may not be "appropriate" to send a matter to ADR processes. Secondly, these requirements must be uniformly applicable to cases of unmarried parties, as they are to married or formerly married parties.

III. Language of Proceedings

We further note that the new s. 23.2 of the *Divorce Act*, which comes into force in Ontario on a day to be fixed by order of the Governor in Council, provides that a proceeding under the *Divorce Act* may be conducted in English or French, or in both official languages. The section also provides language rights to persons involved in proceedings under the *Divorce Act*, which include the right to file documents, give evidence, or make submissions in either official language; to request simultaneous interpretation from one official language into the other; and to request a judgment or order be made available in the party's official language of choice. The Government of Ontario may wish to consider whether any consequent changes are necessary to s. 126 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

IV. Unified Family Court

In regards to your request for additional ideas for family law reform, The Advocates' Society reiterates its longstanding support for the province-wide implementation of Unified Family Courts ("UFCs").

Canada's federal system means that court jurisdiction over family law matters is divided in Ontario: Ontario's Superior Court of Justice may adjudicate on property matters, divorce and corollary issues, such as child and spousal support, while the Ontario Court of Justice may decide matters related to custody, access, child and spousal support, adoption, and child protection applications. Therefore, families in the midst of legal disputes must often avail themselves of two different forums unless their region is serviced by a UFC.

Starting in the late 1970s, UFCs were introduced in certain Canadian provinces, including Ontario, to provide a "one stop" court to address all family law issues. In sites where a UFC exists, the UFC has exclusive jurisdiction over all family law related areas. There are currently 25 UFCs in Ontario: Barrie, Belleville, Bracebridge, Brockville, Cayuga, Cobourg, Cornwall, Hamilton, Kingston, Kitchener, Lindsay, London, L'Orignal, Napanee, Newmarket, Oshawa/Whitby, Ottawa, Pembroke, Perth, Peterborough, Picton, Simcoe, St. Catharines, St. Thomas, and Welland. However, in sites that do not have a UFC, including the Greater Toronto Area, family law remains bifurcated between the two levels of court.

This “two-tiered” or “divided-jurisdiction” court process takes an unnecessary additional financial and emotional toll on families, including children. This process is particularly difficult to navigate for self-represented litigants, of which there are many in family actions. The duplication of effort, increased procedural complexity, and associated costs can create significant barriers for those seeking to resolve family disputes through the courts. The expansion of UFC to ensure that more Ontarians have a single court to handle all of their family law matters will make the process easier on a significant number of families while optimizing judicial time and resources. Expanding UFCs would significantly reduce the financial burden on middle and low-income families as they navigate the justice system and thereby improve access to justice.

We generally urge the Government of Ontario to commit to a plan for UFC in all court infrastructure planning presently and in the future. In particular, we urge the Government of Ontario to ensure that sites across Ontario are ready to receive federally-appointed judges who are allocated to UFCs.

Harmonization between federal and provincial family law, and the province-wide implementation of a single court that can decide all family law issues, will go hand in hand to improve the experience of Ontarians in the family justice system.

We thank you for your consideration and are pleased to work with you and your Ministry to advance justice for all Ontario families. I would be pleased to discuss these submissions with you at your convenience.

Yours sincerely,

Scott Maidment
President

The Advocates’ Society Task Force
Kathy Batycky, *Stoner & Company Family Law*
Isabella Buckley, *Blaney McMurtry LLP*
Rachael L. Eynon, *Rachael Eynon Professional Corporation*
Ann Stoner, *Stoner & Company Family Law*

[1] *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), as am.
[2] 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*, 1st Sess., 42nd Parl., 2019 (assented to June 21, 2019).
[3] *Children's Law Reform Act*, R.S.O. 1990, c. C.12.
[4] *Young v. Young*, [1993] 4 S.C.R. 3 at 10.
[5] United Nations, Convention on the Rights of the Child, 20 November 1989, Art. 3 (entered into force 2 September 1990).
[6] Parliament of Canada, Special Joint Committee on Child Custody and Access, For the Sake of the Children (December 1998) at 44.
[7] Parliament, "Legislative Background: An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act (Bill C-78 in the 42nd Parliament)", online: https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/c78/03.html#secB at para. 6 [Legislative Background].
[8] *Ibid.* at para. 8.
[9] The move from terminology such as "custody" and "access" to "parenting order" and "contact order" prioritizes the role of the parent in their responsibilities to their children as the court provides specific direction on the care of a child, setting out who is responsible for what and what contact the child should have with a parent or caregiver.
[10] Children exposed to violence are at risk for emotional and behavioural problems throughout their lifespans, and these impacts are similar to direct abuse: Canada, Department of Justice, *Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce* by Peter Jaffe et al. (Ottawa: Department of Justice, 2014).
[11] *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83 at para. 143, [2002] 4 S.C.R. 325.
[12] *Ibid.* at para. 152.
[13] Legislative Background, *supra* note 7.
[14] *Ibid*.
[15] Bill C-78, *supra* note 2.
[16] *Children's Law Reform Act*, *supra* note 3, s. 24(4).
[17] Bill C-78, *supra* note 2, s. 7.8(2).
[18] Legislative Background, *supra* note 7.
[19] *Children's Law Reform Act*, *supra* note 3, s. 21(2).
[20] *Ibid.,* s. 21.3(2).
[21] Bill C-78, *supra* note 2, s. 7.7.
[22] *Ibid.*, s. 16(6).
[23] Legislative Background, *supra* note 7.
[24] *Ibid*.
[25] *Ibid.*

Appendix 1 – Key Provisions of Bill C-78

DEFINITIONS

decision-making responsibility means the responsibility for making significant decisions about a child's well-being, including in respect of

(a) health;
(b) education;
(c) culture, language, religion and spirituality; and
(d) significant extra-curricular activities;

family member includes a member of the household of a child of the marriage or of a spouse or former spouse as well as a dating partner of a spouse or former spouse who participates in the activities of the household;

family violence means any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person — and in the case of a child, the direct or indirect exposure to such conduct — and includes

(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;

parenting time means the time that a child of the marriage spends in the care of a person referred to in subsection 16.1(1), whether or not the child is physically with that person during that entire time;

PARENTING ORDER, PARENTING TIME, DECISION-MAKING RESPONSIBILITY

Parenting order

16.1(1) A court of competent jurisdiction may make an order providing for the exercise of parenting time or decision-making responsibility in respect of any child of the marriage, on application by

(a) either or both spouses; or
(b) a person, other than a spouse, who is a parent of the child, stands in the place of a parent or intends to stand in the place of a parent.

Contents of parenting order

(4) The court may, in the order,

(a) allocate parenting time in accordance with section 16.2;
(b) allocate decision-making responsibility in accordance with section 16.3;

(c) include requirements with respect to any means of communication, that is to occur during the parenting time allocated to a person, between a child and another person to whom parenting time or decision-making responsibility is allocated; and
(d) provide for any other matter that the court considers appropriate.

COMPREHENSIVE TEST FOR BEST INTERESTS OF THE CHILD

Factors to be considered

16(3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

(a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
(b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
(c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
(d) the history of care of the child;
(e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
(f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
(g) any plans for the child's care;
(h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;
(i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
(j) any family violence and its impact on, among other things,
    (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
    (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and
(k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

Factors relating to family violence

(4) In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account:

(a) the nature, seriousness and frequency of the family violence and when it occurred;
(b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;
(c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
(d) the physical, emotional and psychological harm or risk of harm to the child;
(e) any compromise to the safety of the child or other family member;
(f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;

(g) 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; and
(h) any other relevant factor.

KEY EXCERPTS PERTAINING TO RELOCATION

Notice
16.9(1) A person who has parenting time or decision-making responsibility in respect of a child of the marriage and who intends to undertake a relocation shall notify, at least 60 days before the expected date of the proposed relocation and in the form prescribed by the regulations, any other person who has parenting time, decision-making responsibility or contact under a contact order in respect of that child of their intention.

Content of notice
(2) The notice must set out
(a) the expected date of the relocation;
(b) the address of the new place of residence and contact information of the person or child, as the case may be;
(c) a proposal as to how parenting time, decision-making responsibility or contact, as the case may be, could be exercised; and
(d) any other information prescribed by the regulations.

Exception
(3) Despite subsections (1) and (2), the court may, on application, provide that the requirements in those subsections, or in the regulations made for the purposes of those subsections, do not apply or may modify them, including where there is a risk of family violence.

Application without notice
(4) An application referred to in subsection (3) may be made without notice to any other party.

Relocation authorized
16.91(1) A person who has given notice under section 16.9 and who intends to relocate a child may do so as of the date referred to in the notice if
(a) the relocation is authorized by a court; or
(b) the following conditions are satisfied:
(i) the person with parenting time or decision-making responsibility in respect of the child who has received a notice under subsection 16.9(1) does not object to the relocation within 30 days after the day on which the notice is received, by setting out their objection in
(A) a form prescribed by the regulations, or
(B) an application made under subsection 16.1(1) or paragraph 17(1)(b), and
(ii) there is no order prohibiting the relocation.

Content of form
(2) The form must set out
(a) a statement that the person objects to the proposed relocation;
(b) the reasons for the objection;

(c) the person's views on the proposal for the exercise of parenting time, decision-making responsibility or contact, as the case may be, that is set out in the notice referred to in subsection 16.9(1); and
(d) any other information prescribed by the regulations.

Best interests of child — additional factors to be considered
16.92(1) In deciding whether to authorize a relocation of a child of the marriage, the court shall, in order to determine what is in the best interests of the child, take into consideration, in addition to the factors referred to in section 16,

(a) the reasons for the relocation;
(b) the impact of the relocation on the child;
(c) the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;
(d) whether the person who intends to relocate the child complied with any applicable notice requirement under section 16.9, provincial family law legislation, an order, arbitral award, or agreement;
(e) the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;
(f) the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and
(g) whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

Factor not to be considered
(2) In deciding whether to authorize a relocation of the child, the court shall not consider, if the child's relocation was prohibited, whether the person who intends to relocate the child would relocate without the child or not relocate.

Burden of proof — person who intends to relocate child
16.93(1) If the parties to the proceeding substantially comply with an order, arbitral award, or agreement that provides that a child of the marriage spend substantially equal time in the care of each party, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child.

Burden of proof — person who objects to relocation
(2) If the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child of the marriage spends the vast majority of their time in the care of the party who intends to relocate the child, the party opposing the relocation has the burden of proving that the relocation would not be in the best interests of the child.

Burden of proof — other cases
(3) In any other case, the parties to the proceeding have the burden of proving whether the relocation is in the best interests of the child.

Power of court — interim order
16.94 A court may decide not to apply subsections 16.93(1) and (2) if the order referred to in those subsections is an interim order.

Costs relating to exercise of parenting time
16.95 If a court authorizes the relocation of a child of the marriage, it may provide for the apportionment of costs relating to the exercise of parenting time by a person who is not relocating between that person and the person who is relocating the child.

Notice — persons with contact
16.96(1) A person who has contact with a child of the marriage under a contact order shall notify, in writing, any person with parenting time or decision-making responsibility in respect of that child of their intention to change their place of residence, the date on which the change is expected to occur, the address of their new place of residence and their contact information.

Notice — significant impact
(2) If the change is likely to have a significant impact on the child's relationship with the person, the notice shall be given at least 60 days before the change in place of residence, in the form prescribed by the regulations, and shall set out, in addition to the information required in subsection (1), a proposal as to how contact could be exercised in light of the change and any other information prescribed by the regulations.

Exception
(3) Despite subsections (1) and (2), the court may, on application, order that the requirements in those subsections, or in the regulations made for the purposes of those subsections, do not apply or modify them, if the court is of the opinion that it is appropriate to do so, including where there is a risk of family violence.

Application without notice
(4) An application referred to in subsection (3) may be made without notice to any other party.

PROVISIONS REGARDING DISPUTE RESOLUTION / DUTY OF LEGAL ADVISER

family dispute resolution process means 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;

Family dispute resolution process
7.3 To the extent that it is appropriate to do so, the parties to a proceeding shall try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process.

Duty to discuss and inform
7.7(2) It is also the duty of every legal adviser who undertakes to act on a person's behalf in any proceeding under this Act

(a) to encourage the person to attempt to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so;

Certification
7.7(3) Every document that formally commences a proceeding under this Act, or that responds to such a document, that is filed with a court by a legal adviser shall contain a statement by the legal adviser certifying that they have complied with this section.

Family dispute resolution process
16.1(6) Subject to provincial law, the order may direct the parties to attend a family dispute resolution process.