February 22, 2017

VIA EMAIL: attorneygeneral@ontario.ca

The Honourable Yasir Naqvi
Attorney General of Ontario
McMurtry-Scott Building, 11th Floor
720 Bay Street
Toronto, ON M7A 2S9

Dear Attorney General:

RE: Proposed amendment to section 31 of the *Family Law Act*

Thank you for inviting The Advocates' Society (the "Society") to comment on proposed changes to section 31 of the *Family Law Act*.[1] As you know, the Society, founded in 1963, is a not-for-profit association of over 5,500 lawyers throughout Ontario and the rest of Canada. The mandate of the Society includes, amongst other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates.

The Society recommends that the government immediately harmonize the definition of "child" for support purposes with the definition under the federal *Divorce Act*.[2] The current distinction drawn between "legitimate" and "illegitimate" children is very likely unconstitutional and should be changed.

Under the *Divorce Act*, married or divorced parents have the legal obligation to support a child over the age of majority who is ill or disabled and incapable of financial self-sufficiency:

> **Child support order**
>
> 15.1 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to pay for the support of any or all children of the marriage.
>
> **Definitions**
>
> 2. (1) In this Act,

[1] RSO 1990, c. F.3.
[2] R.S.C., 1985, c. 3 (2nd Supp.).

> "child of the marriage" means a child of two spouses or former spouses who, at the material time,
> (a) is under the age of majority and who has not withdrawn from their charge, or
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

Child support for the children of unmarried parents is different. The obligation of an unmarried parent to support a child is set out in section 31(1) of the *Family Law Act*:

> 31. Every parent has an obligation to provide support for his or her unmarried child who is a minor or is enrolled in a full-time program of education, to the extent that the parent is capable of doing so.

In contrast to cases involving married parents argued under the *Divorce Act*, there is no obligation for an unmarried parent to support an adult child who continues to be financially dependent, unless the child is enrolled in a full-time educational program. Some Ontario children receive less protection, and are denied access to child support, due to their parents' marital status.

It has long been recognized as repugnant to treat children whose parents are unmarried differently than children whose parents are married. Under section 31 of the *Family Law Act*, the differential treatment represents a discriminatory disadvantage, without a pressing and substantial objective.

This discriminatory provision is inconsistent with the equality principles animating Ontario family law, and it stands in stark contrast to the recent changes under the *All Families are Equal Act, 2016*. The proposed amendment to section 31 of the *Family Law Act* would further Ontario's effort to ensure that all children should enjoy equal respect and recognition, regardless of the circumstances of their conception.

In substance, section 31 has the impact of disadvantaging children with disabilities, those with unmarried parents, and women, because women as a class tend to be the custodial parents who will bear children's expenses if child support is not paid. Section 31 exacerbates the poverty and historical disadvantage faced by children with disabilities, inequality acutely and disproportionately felt by single-parent families and women.

As you know, courts have repeatedly rejected distinctions between the children of married and unmarried parents.[3] Justice Curtis noted in *Vivian v Courtney*, 2010 ONCJ 768, at paras. 32-33:

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[3] *W (DS) v H (R)*, [1989] 2 WWR 481, 18 RFL (3d) 162 (Sask CA); *A (DM) v K (R)*, [1996] WDFL 1018, 22 RFL (4th) 65 (Sask CA); *D (PA) v G (L)* (1988), 89 NSR (2d) 7, 227 APR 7 (NS Fam Ct); *G (MJ) v M (KT)* (1990), 96 NSR (2d) 366, 253 APR 366 (NS Fam Ct); *K (L) v L (TW)* (1988), 31 BCLR (2d) 41, 1988 CarswellBC 342 (BC Prov Ct); *M (RH) v H (SS)* (1994), 26 Alta LR (3d) 91, 121 DLR (4th) 335 (Alta QB); *Rath v Kemp* (1996), [1996] AWLD 1140, 26 RFL (4th) 152 (Alta CA); *Williams v Haugen*, [1988] 2 WWR 269, 65 Sask R 207 (Sask Unified Fam Ct); *M (N) v British Columbia (Superintendent of Family & Child Services)*, [1987] 3 WWR 176, 34 LR (4th) 488 (BC SC); *P (CE) v V (G)* (1993), 45 RFL (3d) 424, 101 DLR (4th) 726 (Sask QB); *Milne (Doherty) v Alberta (Attorney General)*, [1990] 5 WWR 650, 26 RFL (3d) 389 (Alta QB); *Surette v Harris Estate*, [1989] NSJ No 262,

> Laws in Ontario have changed to eliminate any vestiges of this overt and intentional discrimination. Children are to be treated the same, no matter who their parents are and no matter what the legal status of their parents' relationship.
>
> The continuation of that distinction here for an ill or disabled child of unmarried parents is difficult to justify in the modern era of the *Canadian Charter of Rights and Freedoms*. It is questionable whether those provisions of the *FLA* would survive a challenge to their constitutionality.

The constitutionality of section 31 of the *Family Law Act* is currently being challenged in the case of *Coates v. Watson* in Brampton Superior Court of Justice, File No. 1457/95. The case was covered on the front page of the *Toronto Star* on November 19, 2016. It is also receiving coverage in *The Law Times*. The case is scheduled to proceed to a hearing March 24, 2017.

We urge prompt action on this matter. The change required is narrow and without financial cost to the government. The proposed change would be further evidence that Ontario seeks to advance equality for all children, without discrimination. A substantive approach to equality requires that the law reflect the needs and experiences of all children in Ontario. As currently drafted, the law of child support reflects a discriminatory assumption that all children either become economically self-sufficient by the age of majority or achieve self-sufficiency following full-time study. Instead, to help "close the gap" for children with disabilities and their custodial parents, child support should respond to the needs of all dependent children, not just those who are able to attend full-time educational programs.

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

Yours very truly,

Bradley E. Berg
President

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91 NSR (2d) 418 (NS SC (TD)); *Tighe (Guardian ad litem of) v McGillivray Estate*, [1994] NSJ No 61, 112 DLR (4th) 201 (NS CA); *PT v RB*, [2004] AJ No 803, 2004 ABCA 244; *Massingham-Pearce v Konkolus,* [1995] AJ No 404 at para 38.