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Highlights from Bill C-78: Key Proposed Amendments to the *Divorce Act*

8th Annual Law & Practice Update

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HIGHLIGHTS FROM BILL C-78: KEY PROPOSED AMENDMENTS TO THE *DIVORCE ACT*

INTRODUCTION

Bill C-78 was tabled for first reading in the House of Commons on Tuesday the 22nd of May 2018 by the Minister of Justice. The Bill is still to face a second reading, the Committee process, the Report stage and a Third Reading in the House of Commons, then to the Senate to repeat that journey. There is less than half a year left in the current legislative session during which the Bill must pass both Chambers or it will die on the order table.

It is likely there will be amendment proposals from both the House and Senate Committees and at this time simply represents "the will of Government". But not simple at all.

While the headlines and most government references speak to it having been 20 years since there has been a change to the *Divorce Act,* the changes contemplated in Bill C - 78 are primarily changes to the 1985 legislation, at this time more than 33 years old. Perhaps 33 is the new 20? The changes were foreshadowed, in most respects, in the **May 1999** *Government of Canada's Response to the Report of the Special Joint Committee on Child custody and Access – Strategy for Reform*. Now that's definitely 20 years old.

The changes are heralded equally it seems, as momentous and immaterial. How can that be true? The victor in this debate can only be determined after another couple decades of judicial interpretation and practical application.

It is my perspective that as practitioners who practice in an area that has comparatively little legislation to work with, much can and will be made of both the significant and less significant changes.

The stated intention is to make divorce in Canada less adversarial and more child focused.

DEFINITIONS (SECTION 1)

No longer will the terms "*custody"* or *"access"* be utilized. Instead the reference will be to *"decision-making responsibility"* and *"parenting time"*. There are some other new important terms that are consistently used throughout; *"parenting plan", "family dispute resolution process", "relocation"* and *"family violence".*

JURISDICTION (SECTION 6)

There are a considerable number of changes with respect to provincial jurisdiction over the parties and their divorce. For example, new defaults where two divorce actions are started on the very same day in two different provinces, etc. Outside those unusual cases, the most important jurisdiction-

related change is replacing the "most substantially connected" test with a consideration instead of what province would be considered a child's "habitual residence". As a result, we are not likely to be engaging in a debate over where the parents own more property etc. as helpful in determining what province should make orders surrounding a child's day-to-day life. It will essentially be the province in which they live, "habitually".

DUTIES OF PARTIES AND LAWYERS (SECTION 7)

Parents exercising parenting time and/or have decision-making responsibility are required to act in a manner consistent with the best interests of the child.

The **parents** are **required** to protect children from conflict and are **required** to attempt resolution through a *family dispute resolution process.*

The **parties** must provide complete information, presumably financial.

Lawyers are **required** to not only inform parties of *family dispute resolution processes* but to provide information for accessing said services and encourage clients to make that attempt.

BEST INTERESTS OF THE CHILD AND FAMILY VIOLENCE

Best Interests (Section 16)

The Bill provides a non-exhaustive list of factors to take into account to determine a child's best interests. Best interests of the child continuing to be the only consideration to be applied by the Court. The Bill specifically states "Give primary consideration to the child's physical, emotional and psychological safety, security and well-being.". The enumerated factors are:

(a) the child's needs;

(b) the child's relationship with the spouses, any siblings, grandparents and "any other person who plays an important role in the child's life";

(c) the spouse's willingness to support the child's relationship with the other spouse;

(d) the child's views and preferences;

(e) the child's cultural and linguistic heritage;

(f) the ability of each parent to care for and meet the needs of the child;

(g) the ability of the spouses to communicate and cooperate with each other; and

(h) the presence of family violence.

The maximum contact principle is preserved.

Family Violence (Section 16)

There is a **thorough** definition of family violence:

> *"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. *(violence familiale)"*

To assist the Court in assessing family violence, factors include:

(a) the seriousness and frequency of the family violence;

(b) whether there is a pattern of coercive and controlling behaviour;

(c) the extent to which the family violence is directed to a child, or to which a child is exposed to family violence;

(d) the risk of harm to a child; and

(e) any steps taken by the perpetrator to prevent further family violence and improve their ability to care for the child.