LIBRARY of PARLIAMENT
BIBLIOTHÈQUE du PARLEMENT

LEGISLATIVE SUMMARY

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

Publication No. 42-1-C78-E
5 October 2018
Revised 19 April 2019

Karine Azoulay
Alexandra Smith
Nicole Sweeney

Legal and Social Affairs Division
Parliamentary Information and Research Service

Library of Parliament ***Legislative Summaries*** summarize bills currently before Parliament and provide background about them in an objective and impartial manner. They are prepared by the Parliamentary Information and Research Service, which carries out research for and provides information and analysis to parliamentarians and Senate and House of Commons committees and parliamentary associations. Legislative Summaries are revised as needed to reflect amendments made to bills as they move through the legislative process.

Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

Legislative Summary of Bill C-78
(Legislative Summary)

Publication No. 42-1-C78-E

Ce document est également publié en français.

CONTENTS

LEGISLATIVE SUMMARY OF 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 BACKGROUND

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, was introduced in the House of Commons on 22 May 2018 by the Honourable Jody Wilson-Raybould, **then** Minister of Justice and Attorney General of Canada.[1] It was read a second time and referred to the House of Commons Standing Committee on Justice and Human Rights **(the committee)** on 4 October 2018. **The committee reported the bill with amendments to the House of Commons on 7 December 2018. The bill passed third reading in the House of Commons, as amended, on 6 February 2019. The bill received first reading in the Senate on 19 February 2019. On 11 April 2019, the bill passed second reading in the Senate and was referred to the Standing Senate Committee on Legal and Constitutional Affairs.**

According to the Department of Justice, the bill's four key objectives are "to promote the best interests of the child, address family violence, reduce child poverty, and make Canada's family justice system more accessible and efficient" in the context of family breakdown.[2] The bill is the first substantial revision of Canada's federal family law–related legislation in 20 years.[3]

As well as introducing substantive amendments to the three federal statutes named in the title of the bill, Bill C-78 **would "bring Canada closer to becoming a party to two international family law conventions":** 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] (1996 Hague Child Protection Convention) and the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*[5] (2007 Hague Child Support Convention).[6]

Frequently described as "fragmented,"[7] jurisdiction over family law is shared between the federal and provincial/territorial governments. For example, while section 91(26) of the *Constitution Act, 1867*[8] grants Parliament the power to make laws in relation to "marriage and divorce," section 92(13) grants the provincial legislatures jurisdiction with respect to property and civil rights. In addition, section 92(12) gives the provinces authority over the solemnization of marriage, while section 92(14) confers power on the provinces for the administration of justice. This shared jurisdiction means that Parliament has exclusive jurisdiction to legislate

in the area of substantive divorce law (including support and custody) while provincial/territorial legislatures have jurisdiction to enact laws on such matters as division of property, enforcement of support and other obligations, as well as matters related to the administration of the courts.

In addition, issues related to the separation of unmarried couples and the separation of married couples where no divorce is sought fall under provincial jurisdiction. As a result, Canada has a "dual system of support and custody," whereby claims for support and custody arising in divorce proceedings are governed by the *Divorce Act*,[9] and claims arising independently of divorce are governed by provincial and territorial legislation.[10]

This shared jurisdiction means that the federal government works closely with the provinces and territories on family law issues. Indeed, many of the changes introduced by the bill are similar to reforms recently enacted in Alberta, British Columbia and Nova Scotia.[11]

1.1 *Divorce Act*

The introduction of the *Divorce Act* in 1968 was a pivotal moment in Canadian family law. Before that time, divorce law differed from province to province. In some provinces, there was no divorce legislation and parties had to seek the passage of a private Act of Parliament to end their marriages; in other provinces, divorce could be obtained where limited acts of "wrongdoing" were established.[12]

The 1968 *Divorce Act* was replaced by the 1985 *Divorce Act*, which remains in force today. As well as regulating the breakdown of the spousal relationship, the *Divorce Act* governs certain aspects of post-divorce parenting, including financial support and custody and access. While many of the 1985 reforms focused on the spousal relationship,[13] the majority of the reforms contained in Bill C-78 address the parent-child relationship.

The reforms to the *Divorce Act* seek to protect families, particularly children, from negative outcomes related to separation and divorce.[14] Among other measures, Bill C-78 creates new rules for parents who wish to relocate a child after a divorce, introduces child-focused terminology, encourages alternative dispute resolution and sets out factors to help the courts assess the extent to which family violence could affect future parenting.

1.2 *Family Orders and Agreements Enforcement Assistance Act*

The *Family Orders and Agreements Enforcement Assistance Act* (FOAEAA)[15] provides for federal cooperation with provincial courts, provincial enforcement services and peace officers investigating child abductions to enforce support provisions, custody provisions, or access rights, known collectively as family orders and agreements. The operational aspects of the FOAEAA are the responsibility of the Family Law Assistance Service unit (FLAS) of the Department of Justice.

Part I of the FOAEAA governs the search for, and confidential release of, the addresses of individuals, including children, and the names and addresses of their employers, held in nine prescribed databases ("information banks") administered by Employment and Social Development Canada, the Canada Revenue Agency, and the Canada Employment Insurance Commission.[16]

Part II of the FOAEAA provides for the garnishment of federal payments in accordance with provincial garnishment law. This includes tax refunds and funds payable under the *Employment Insurance Act*, *Old Age Security Act* or the Canada Pension Plan (CPP). Part III of the FOAEAA allows provincial enforcement services to apply for the denial or suspension of the passports and aeronautics- and shipping-related licences of individuals who are in persistent arrears of support having failed to make full payments for three payment periods, or having accumulated arrears of over $3,000.

According to the Department of Justice, the amendments to the FOAEAA contained in Bill C-78 "are aimed at reducing poverty by ensuring that accurate financial information is available for the purpose of determining family support, and by promoting compliance with family support obligations."[17] Among other measures, the bill expands the circumstances in which information held in federal databases can be searched and released, and establishes safeguards to prevent abuse of these measures. The bill allows information to be searched and released to establish or vary a support order. It also expands the group of provincial family justice organizations or services that can request that information be searched and released. In addition, federal payments may now be garnisheed for support arrears for 12 years instead of five years and can also be garnisheed for expenses related to the failure to respect a family law order.

1.3 *Garnishment, Attachment and Pension Diversion Act*

The *Garnishment, Attachment and Pension Diversion Act* (GAPDA)[18] provides for the garnishment of certain monies payable by the federal government (referred to as "Her Majesty in right of Canada" or "Her Majesty" in the legislation). Part I of the GAPDA allows for the garnishment of the salaries and remuneration of certain federal employees and payments to individuals under federal contract. Part II of the GAPDA relates to diverting federal pension benefits to satisfy financial support, alimony or maintenance orders.

In addition to being responsible for the operation of the FOAEAA, FLAS is charged with the administration of the GAPDA. In 2015–2016, FLAS processed 556 applications for garnishment under the GAPDA.[19]

According to the summary contained in Bill C-78, the amendments to the GAPDA are designed to "give priority to family support obligations" and "simplify the processes under the Act." These changes will have the effect of prioritizing family support obligation garnishment orders over all other garnishment orders and involving provincial enforcement services in the diversion of federal pension benefits to satisfy financial support orders.

1.4 Hague Conventions

The Hague Conference on Private International Law (Hague Conference) is an international intergovernmental organization mandated to promote international cooperation by harmonizing global law rules through "the preparation, negotiation and adoption" of multilateral treaties known as Hague Conventions.[20] Canada is one of the Hague Conference's 83 members.[21]

Hague Conventions address a wide range of matters, including family law. Increased global mobility means that recent years have seen a rise in the number of children "caught in the turmoil of broken relationships within transnational families."[22] These families can face ongoing problems maintaining contact between the child and both parents, and enforcing cross-border child support.[23]

In response to these difficulties, the Hague Conference has developed four family law conventions in recent decades, commonly referred to as the Hague Children's Conventions. Together, these conventions provide the "practical machinery to enable States to work together where they have a shared responsibility to protect children."[24] The four conventions are

- the *Convention of 25 October 1980 on the Civil Aspects of International Abduction* (1980 Hague Child Abduction Convention);[25]
- the *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption* (1993 Hague Intercountry Adoption Convention);[26]
- 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* (1996 Hague Child Protection Convention); and
- the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (2007 Hague Child Support Convention).

Canada signed both the 1996 Hague Child Protection Convention and the 2007 Hague Child Support Convention on 23 May 2017.[27] Bill C-78 incorporates into Canadian law the text of both conventions**, paving the way for Canada to ratify them**. According to the Department of Justice, "being a party to the Convention[s] would make it easier to resolve some family law issues when one or more parties lives in another country."[28]

1.5 The Road to Reform

Although the *Divorce Act* has remained largely unchanged since 1985, there has long been a broad consensus on the need for reform. Indeed, a number of prominent voices have suggested that there is a great deal of common ground among family law practitioners and academics regarding priorities for reform.

In 2013, the Action Committee on Access to Justice in Civil and Family Matters (the "Cromwell Committee") published its final report, which called for meaningful change in the family justice system.[29] The report focused on access to justice, cost reduction and improved outcomes, with a "particular emphasis on increasing use of consensual dispute resolution methods."[30]

In addition, the final report of the Cromwell Committee's Family Justice Working Group recommended that the language of "custody" and "access" be replaced by the language of "parental responsibility," "contact," "time" and "schedules."[31]

In more recent years, similar suggestions have been made by other stakeholders, including the Canadian Bar Association Family Law Section[32] and family law scholar Professor Nicholas Bala.[33]

1.5.1 Federal Initiatives

Introduced in 2009, the Department of Justice Canada's five-year *Supporting Families Experiencing Separation and Divorce Initiative* (SFI) sought to "strengthen the family justice response to the needs of families experiencing separation and divorce."[34] In its final report on the SFI, the Department of Justice Canada highlighted several issues that are reflected in Bill C-78. For example, the report noted that the federal government's ability to improve maintenance enforcement during the SFI was hampered by the need for legislative amendments to the FOAEAA and the GAPDA.[35] In addition, the report observed that the federal government is out of step with jurisdictions that have already moved away from "custody and access" terminology in favour of "parenting order" terminology.[36]

2 DESCRIPTION AND ANALYSIS

The bill contains 126 clauses and proposes substantial amendments to three Acts. The following description highlights selected aspects of the bill; it does not review every clause.

2.1 Amendments to the *Divorce Act* (Clauses 1 to 41)

2.1.1 Definitions (Clause 1)

Clause 1 replaces or repeals a number of the definitions set out in section 2(1) of the current *Divorce Act*. Of note, the definitions of "custody" and "custody order" are repealed. The bill also repeals the definition of "accès" [access], a term that, although used widely in both the French and English versions of the *Divorce Act*, is defined only in the French version.

The decision to repeal the terms “custody” and “access” reflects concern that they fan conflict and undermine collaboration.[37] While the terms are central to the *Divorce Act*, they are widely considered to have negative connotations:

> The word *custody* has clear proprietary and penal undertones that might suggest that the child is confined to the care and control of one parent. *Access* suggests that a parent has a limited role and relationship with his or her child, again with proprietary implications. … For parents and children familiar with the terms, the words connote *winners* and *losers*, with the winner being awarded custody and the loser being awarded access.[38]

Clause 1 also adds several new definitions to section 2(1) of the *Divorce Act*. Notable examples include the terms “parenting time,” “decision-making responsibility,” “parenting order” and “contact order.”

“Parenting time” refers to the time a child spends in the care of either or both spouses,[39] or 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. The child does not have to be physically with that spouse or other person for the entire period for the time to qualify as parenting time.

“Decision-making responsibility” is defined in the bill as

> the responsibility for making significant decisions about a child’s well-being, including [decisions relating to the child’s]
>
> (a) health;
>
> (b) education;
>
> (c) culture, language, religion and spirituality; and
>
> (d) significant extra-curricular activities. [40]

Like parenting time, decision-making responsibility can be granted to either or both spouses, or to 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. Decision-making responsibility is currently “subsumed in the broad interpretation given to custody in the *Divorce Act*.”[41]

A “parenting order” is a court order granting decision-making responsibility or parenting time, whereas a “contact order” is an order allowing a person other than a spouse to have contact with a child.

Bill C-78 also introduces definitions of “relocation,” “family dispute resolution process” and “family violence,” which address key gaps in the current legislation. Relocation relates to a change in the place of residence of either the child, or a person who has parenting time or decision-making responsibility. However, for the purposes of the bill, a change of residence counts as “relocation” only where the change is likely to have a “significant impact” on the child’s relationship with a person who has parenting time or decision-making responsibility under a parenting order or contact under a contact order.

A family dispute resolution process is defined as a process held "outside of court" to resolve any matters related to a family law dispute. Examples include negotiation, mediation[42] and collaborative law.[43]

Finally, family violence is broadly defined and "includes physical abuse, sexual abuse, threats of harm to persons, pets and property, harassment, psychological abuse and financial abuse."[44] It has been noted that the definition bears a "strong resemblance" to the definition set out in British Columbia's *Family Law Act*.[45]

2.1.2 Jurisdiction (Clauses 2 to 7)

Bill C-78 introduces a series of updates to the jurisdictional requirements currently set out in sections 3 to 6 of the *Divorce Act*.[46] For example, clause 2 amends section 3(3) so that the Federal Court no longer has exclusive jurisdiction where spouses commence divorce proceedings on the same date in different provinces.[47] Instead, the Federal Court will determine which court retains jurisdiction by applying one of three rules:

- If at least one of the proceedings includes an application for a parenting order, the court in the province in which the child is "habitually resident" retains jurisdiction.
- If there is no application for a parenting order, the court in the province in which the spouses last lived together retains jurisdiction, if one of the spouses continues to habitually reside in that province.
- In any other case, the Federal Court determines which court is the "most appropriate" to hear the matter.

Amended sections 4(3) and 5(3) introduce similar rules for corollary relief and variation proceedings (clauses 3 and 4, respectively).

In addition, new section 6.2 sets out the rules relating to jurisdiction where a child is removed from (or kept in) a province contrary to new sections 16.9 to 16.96 or to provincial law. Broadly speaking, a court in the province in which the child was habitually resident prior to the removal or retention has jurisdiction to determine an application, unless certain exceptions apply.

2.1.3 Duties (Clause 8)

Clause 8 adds new sections 7.1 to 7.8 to the *Divorce Act* to address the duties imposed on the parties to a proceeding, legal advisers and the court.

2.1.3.1 Protecting Children from Conflict and Avoiding Harm

Although the current *Divorce Act* requires the court to determine applications for custody and access by reference "only to the best interests of the child,"[48] it does not explicitly impose a duty on separating spouses (or other relevant adults) to act in the "best interests of the child."

Bill C-78 strives to place the best interests of the child front and centre of the new Canadian divorce regime. New section 7.1 expressly states that a person who has been allocated parenting time or decision-making responsibility under a parenting order, or contact under a contact order, must exercise that time or responsibility "in a manner that is consistent with the best interests of the child." Further, new section 7.2 provides that parties to a proceeding must strive to protect children from conflict arising from the proceeding.

These are two of several provisions in the bill intended to "impress upon parents and professionals the harm done to children by exposing them to [divorce-related] conflict … [and] to help parents move towards a constructive co-parenting relationship."[49]

2.1.3.2 Promoting Family Dispute Resolution Processes

Family law cases make up a significant share of cases in the civil court system, and can be costly, time-consuming and highly fraught.[50] According to the Department of Justice Canada,

> [d]ivorce and other family-breakdown cases involving children (particularly with access and child support issues) remain in the family court longer than cases without issues involving children; 32% of divorce cases involving both access and support issues remained in the family court system for at least four years. … By providing alternatives to court processes, families can seek options that would resolve their issues faster, as well as divert a set of cases that would otherwise consume court resources.[51]

New section 7.3 requires parties to a proceeding to try to resolve matters through a family dispute resolution process, "to the extent that it is appropriate to do so." New section 7.7(2)(a) places a similar duty on legal advisers, requiring them to encourage people to attempt to resolve matters through a family dispute resolution process, unless it "would clearly not be appropriate to do so."

The caveats relating to the "appropriateness" of family dispute resolution recognize that family dispute resolution processes are not appropriate in all circumstances, particularly where there is a history of domestic violence.[52] In spite of these caveats, advocates for victims of family violence "have expressed concerns that the [bill's] encouragement to reach out of court settlements could force victims of family violence into accepting improvident settlements or dangerous situations."[53]

In addition, Bill C-78 preserves the requirement for legal advisers to discuss the possibility of reconciliation with the spouses, and to draw their attention to the provisions in the Act that relate to reconciliation (new section 7.7(1)). The bill does not maintain the existing section 10(1) requirement for the court to ascertain that reconciliation is not possible before considering the evidence in a divorce proceeding.

2.1.3.3 Enforcing Family Support

Bill C-78 seeks to reduce child poverty, in part by enforcing family support obligations. Having accurate information, including up-to-date contact and income information, helps the court and other entities to locate debtors and set fair family support payments.[54]

New section 7.4 requires a party to a proceeding under the *Divorce Act* to provide "complete, accurate and up-to-date information" where required to do so.

2.1.3.4 Reducing the Risk of Family Violence

New section 7.8(2) imposes a duty on the court to consider whether any civil protection orders, child protection orders or orders relating to criminal matters are pending or in effect when examining proceedings for corollary relief (financial support and parenting time), unless it would "clearly not be appropriate to do so."

For the purposes of this section, a "civil protection order" means an order that is made to protect a person's safety (new section 7.8(3)), for example, an order prohibiting a person from engaging in family violence or harassing or threatening behaviour, or from occupying a family home.

2.1.4 Court Orders (Clause 12)

Existing section 16 of the *Divorce Act* sets out provisions relating to custody and access. Clause 12 of the bill replaces existing section 16 with a new, more expansive series of provisions. As well as providing for parenting orders and contact orders, the new provisions address such matters as the best interests of the child, parenting plans and relocation.

2.1.4.1 Best Interests of the Child

The "best interest of the child test is a central concept for resolution of post-separation parenting disputes" around the world,[55] and is endorsed by the United Nations *Convention on the Rights of the Child*,[56] which Canada ratified in 1991. In broad terms, the test requires that "decisions must be made based on an assessment of the needs of the individual child and must be focused on the child's interests rather than parental rights."[57]

Although the "best interests of the child" principle is well-established in Canadian family law, it remains a concept of "inherent indeterminacy and elasticity."[58] While this elasticity allows the court to be responsive to the facts of individual cases, it can also generate uncertainty. Consequently, a number of commentators have called for a clearer articulation of the principles or factors that the courts should take into consideration when making decisions based on the best interests of the child.[59]

New section 16 begins by reaffirming that the court must take into consideration "only the best interests of the child" in making a parenting order or a contact order (new section 16(1)). Primary consideration must be given to the "child's physical, emotional and psychological safety, security and well-being" (new section 16(2)).

New section 16(3) requires the court to consider "all factors" related to the child's circumstances. Many, if not all, of the factors listed appear to be drawn from case law and provincial statues.[60] Examples include the following:

- the child's needs;
- the nature and strength of the child's relationship with the spouses and other family members;
- the child's views and preferences;
- the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage; and
- family violence.

In considering the impact of family violence, the court must take into account eight factors, including the "nature, seriousness and frequency of the family violence and when it occurred" and "any compromise to the safety of the child or other family member" (new section 16(4)).

New section 16(6) introduces the "maximum parenting time" principle, which appears to be very similar to the maximum contact principle set out in the existing *Divorce Act*. The maximum parenting time principle requires the court to ensure that the child has as much time with each spouse as is consistent with the best interests of the child when allocating parenting time.[61]

2.1.4.2 Parenting Orders

New section 16.1(1) of the *Divorce Act* provides that the court can grant a parenting order for the exercise of parenting time or decision-making responsibility, while new section 16.1(4) sets out the possible contents of the order. Of note, new section 16.1(4)(c) recognizes the importance of communication between a child and a person with parenting time or decision-making responsibility who is not currently with the child.

Other matters related to parenting orders are addressed in new sections 16.1(5) to 16.1(9). For example, new section 16.1(6) provides that an order may direct the parties to attend a family dispute resolution process, while new section 16.1(7) provides that an order may authorize or prohibit the relocation of the child.

Further information on parenting time and decision-making responsibility is set out in new sections 16.2 and 16.3. New section 16.2(**1**) notes that parenting time may be allocated by way of a schedule, while new section 16.2(**2**) confirms that, unless the court orders otherwise, a person with parenting time has exclusive authority to make day-to-day decisions affecting the child during that time.

Finally, new section 16.4 provides that, unless the court orders otherwise, any person with parenting time or decision-making responsibility may request information about the child's health, well-being and education from anyone likely to have such information, including another person with parenting time or decision-making responsibility.

These measures are consistent with the objectives of reducing conflict and promoting "significant meaningful relationships" with both parents.[62] However, although the bill creates "an important place for various forms of shared parenting,"[63] it is noteworthy that it does not introduce a presumption of equal parenting. While this has attracted criticism from Canadian equal parenting groups, experience in other jurisdictions suggests that legal presumptions in favour of equal parenting "may encourage parental feelings of entitlement rather than benefits for children."[64]

2.1.4.3 Contact Orders

As mentioned above, a contact order provides for contact between a person other than a spouse (grandparents, for example) and a child of the marriage. New section 16.5(5) grants the court broad powers in relation to contact orders: a contact order may provide for contact in the form of visits or by any means of communication, as well as any other matter the court considers appropriate.

When determining whether to make a contact order, the court must consider all relevant factors, including whether contact could occur at another time, for example, during the parenting time of another person.

2.1.4.4 Parenting Plans

Although parenting plans may be included in an order made under the existing *Divorce Act*,[65] no specific reference in the Act is made to their use.

Bill C-78 gives a prominent role to parenting plans, which encourage parties to reflect on issues on which they may disagree and attempt to find a solution before conflict arises.[66]

New section 16.6(1) provides that a court must include any parenting plan submitted by the parties in a parenting order or a contact order, unless it is not in the best interests of the child to do so. If the court believes that the parenting plan is not in the best interests of the child, it may amend it in a manner it sees fit.

2.1.5 Changes in Place of Residence and Relocation (Clause 12)

Under section 16(7) of the current *Divorce Act*, any person who has custody of a child "may be required to give notice of any change of residence to any other person who has been granted access privileges."[67] As a rule, notice must be given 30 days before the change of residence.[68] A person who receives such notice may "challenge the intended change of residence … or seek variation of the custody or access arrangements in order to preserve meaningful contact with the child."[69]

Bill C-78 creates a distinction between a simple change in place of residence and relocation. As discussed in section 2.1.1 of this Legislative Summary, in order to qualify as "relocation," a change in residence must be considered likely to have a significant impact on the child's relationship with a person who has parenting time, decision-making responsibility or contact. Given the potential disruption to the child's relationships inherent in the concept of relocation, the new rules governing relocation are more comprehensive than those governing a change in place of residence.

2.1.5.1 Changes in Place of Residence

New section 16.8 requires a person who has parenting time or decision-making responsibility for a child to notify any other person who has parenting time, decision-making responsibility or contact if that person intends to change residences. The notice must include the new address and contact information of the person who is moving, as well as the expected moving date. The court may set aside the notice requirements, for example, where there is a risk of family violence. **The bill was amended at committee stage to add new section 16.8(4), which provides that an application to have the notice requirements set aside may be made without notice to any other party.**

2.1.5.2 Relocation

Requests for parental relocation with children have been described as "some of the most challenging cases for the family justice system."[70] In part, this is because relocation cases leave little room for compromise: when "relocation occurs … relations between a child and a parent will be permanently altered."[71]

Since the 1996 Supreme Court of Canada decision in *Gordon v. Goertz*,[72] it has been accepted that judges must apply the "the best interests of the child" test in making decisions about the relocation of a child.[73] In order to assist the court in making these decisions, *Gordon v. Goertz* sets out a non-exhaustive list of factors for the court to consider.

However, the decision did not establish priorities among the listed factors, other than to note that judges are to consider the reasons for the move only in the "exceptional case."[74] Moreover, as the "best interests of the child" test requires an assessment of the facts of each case, trial judges necessarily have substantial discretion in reaching their decisions. This has been said to make "outcomes difficult to predict … [and] settlements harder to negotiate."[75]

While recognizing that relocation cases should be governed by the same general principles as other custody and access cases, some commentators have argued that more structure and guidance is needed to address the "unique nature and special challenges" inherent in relocation cases. As Professor Bala has noted,

> [c]learer direction in the context of the application of the best interests test for relocation cases would facilitate judicial resolution of such cases, promote settlements, reduce costs for litigants and the justice system, and help parents to make post-separation plans for their children.[76]

Bill C-78 responds to this concern by setting out detailed requirements that must be followed in cases of relocation. Under the new regime, a person who has parenting time or decision-making responsibility must notify any other person who has parenting time, decision-making responsibility or contact of his or her intention to relocate. Under new section**s 16.9(1) and** 16.9(2)**, as amended at committee stage,** the notice must be given at least 60 days before the expected date of the proposed relocation**, and in the form prescribed by the regulations,** and must include the following:

- the expected date of the relocation;
- the new address and contact information of the person relocating;
- a proposal as to how parenting time, decision-making responsibility or contact, as the case may be, could be exercised**; and**
- **any other information prescribed by the regulations.**

New section 16.9(3) provides that the court may set aside the notice requirements, for example, where there is a risk of family violence**. The bill was amended at committee stage to add new section 16.9(4), which provides that an application to have the notice requirements set aside may be made without notice to any other party.**

Relocation is permitted where it is authorized by the court or where no objection has been made within 30 days of the notice being received and there is no order prohibiting relocation (new section 16.91). **The bill was amended at committee stage to provide that a person making an objection has the choice of setting out their objection in a form prescribed by the regulations or by making an application to court.**[77] Where the court authorizes the relocation of the child, new section 16.95 provides that it may instruct that costs relating to the exercise of parenting time by a person who is not relocating be shared between that person and the person who is relocating the child.

In keeping with the *Divorce Act* as currently written, Bill C-78 requires that the court consider the best interests of the child when deciding whether to authorize the relocation of a child. The best interests of the child are determined by applying both the factors set out in new sections 16(2) and 16(3) (as discussed above) and a list of seven additional factors specific to relocation cases, which are to be considered by the court (new section 16.92(1)). Among these factors, and contrary to the current requirements under *Gordon v. Goertz*,[78] the reasons for the relocation must be specifically considered by the court (new section 16.92(1)(a)).

Also of note, new section 16.92(1)(e) requires the court to consider whether there is a pre-existing agreement in place that specifies the geographic area in which the child is to reside. According to Professor Bala, by including provisions that require the court to take issues other than relocation into consideration, the bill may bolster parent confidence in parenting agreements and increase their use.[79]

Finally, new section 16.93 establishes a shifting burden of proof in relocation cases, based on the amount of time that the relocating parent spends with the child:

- If both parties have "substantially equal" parenting time, the party who intends to relocate has the burden of establishing that the relocation is in the best interests of the child.
- If the relocating party has the child in his or care for the "vast majority" of the time, the burden of establishing that the relocation is not in the best interests of the child lies with the objecting party.
- In any other cases, both parties have the burden of proof.

This provision has attracted a degree of commentary. On the one hand, it has been argued that the provision creates a presumption in favour of the primary parent, thereby increasing the likelihood of litigation;[80] on the other hand, it has been contended that parents will respond to the provision by increasingly including relocation restrictions in parenting agreements, thus reducing litigation.

2.1.5.3 Change of Residence by Persons with Contact

New section 16.96(1) requires a person who has contact with a child under a contact order to notify in writing any person with parenting time or decision-making responsibility of their intention to change their place of residence, along with their contact information and the date of the change.

If the change is likely to have a "significant" impact on the child's relationship with that person, the notice shall be given at least 60 days before the move**, in the form prescribed by the regulations,** and **must set out** information as to how contact could be continued in light of the change (new section 16.96(2)).

Both requirements can be modified or deemed not to apply if the court considers it is not appropriate to enforce them, including where there is a risk of family violence (new section 16.96(3)).

2.1.6 Variation Orders (Clause 13)

The provisions contained in section 17 of the current *Divorce Act* address the variation of existing orders relating to support and custody. Bill C-78 amends some of these provisions and creates new provisions that reflect the updated terminology of the bill as described in section 2.1.1 of this Legislative Summary.

It also adds two new provisions to assist the court in interpreting its duty to ensure that there has been a change in circumstances of the child before making a variation order. New section 17(5.2) specifies that the relocation of a child is deemed to constitute a change in circumstances, while new section 17(5.3) provides that the prohibition of a proposed relocation does not constitute a change in circumstances.

2.1.7 Interjurisdictional Proceedings (Clauses 14 and 22)

Interjurisdictional proceedings arise where the parties live either in different provinces and territories or in different countries. Under the current *Divorce Act*, there are two methods to vary a spousal or child support order. Both procedures contain provisions that are applicable in proceedings where parties do not reside in the same jurisdiction.

The first method is described in section 17 of the existing *Divorce Act*, which sets out the general provisions for varying, rescinding or suspending court orders.[81] Section 17 is complemented by section 17.1, which relates specifically to interjurisdictional cases. Provided both spouses live in different provinces and both consent, section 17.1 allows the court to make an order based on submissions received from the spouses orally, by affidavit or by any means of telecommunication.[82]

The second method is set out in current sections 18 and 19.[83] Section 18 provides for the granting of a provisional variation order in one province or territory, while section 19 sets out the rules for confirming the provisional order in another province or territory. Although this process is "structured to ensure that both parties have the opportunity to be fully heard before a final order is made,"[84] it has been described as "very time consuming, administratively complex and unable to meet the needs of an increasingly mobile population."[85] Moreover, the process described in sections 18 and 19 is not available if the respondent does not live in Canada.[86]

Bill C-78 replaces existing sections 18 and 19 of the *Divorce Act* with a new regime governing proceedings between provinces, and between a province and a foreign jurisdiction. Unlike the current procedure set out in the Act, the new regime allows former spouses who reside in different jurisdictions not only to commence proceedings to vary a support order, but also to obtain a support order without notice to the other spouse. The new regime has been described as similar to the regimes set out in the various provincial interjurisdictional support orders Acts.[87]

New section 18.1 provides that, where the former spouses live in different provinces, either may apply to obtain, vary, rescind or suspend a support order, or to have child support calculated or recalculated, without notice to the other.

New section 19 sets out a similar process that applies where a former spouse lives in a "designated jurisdiction"[88] outside Canada and wishes to obtain or vary a support order, or requests to have child support calculated or recalculated. In such instances, the former spouse, through the relevant authority in the country where the former spouse lives, applies to the "designated authority"[89] in the province where he or she believes the other party lives. The application is then heard in that province.

New section 19.1 provides that when a former spouse living in a designated jurisdiction obtains an order from a responsible authority outside Canada that has the effect of varying a support order, the former spouse can apply to the designated authority in the province where the respondent lives for recognition and enforcement of that order. The decision of the designated jurisdiction is registered in accordance with the law of the relevant province and is deemed to be an order made under amended section 17 (new section 19.1(3)).

In addition, clause 22 of the bill replaces existing section 17.1 with new section 23.1, which is broader in scope. Whereas existing section 17.1 applies only to interjurisdictional variation orders, new section 23.1 can be used for new orders as well. This is intended to improve access to justice and increase efficiency.

2.1.8 Recognition of Foreign Order Varying a Parenting or Contact Order (Clause 19)

Bill C-78 adds new section 22.1(1), which provides for the recognition of a foreign order that varies, rescinds, or suspends a parenting or contact order, unless any of the following apply:

- The child concerned is not habitually resident in the foreign jurisdiction.
- The decision was made, other than in an urgent case, without the child having been given the opportunity to be heard.
- A person claims that the decision negatively affected his or her parenting time, decision-making responsibility or contact and that he or she was not given the opportunity to be heard (other than in an urgent case).
- Recognition of the decision is contrary to public policy, taking into consideration the best interests of the child.
- The decision is incompatible with a later decision that meets the recognition requirement under new section 22.1.

Where the decision is recognized by a Canadian court, it is deemed to be an order made under amended section 17 (variation orders) and has legal effect throughout Canada (new section 22.1(2)).

2.1.9 Right to Divorce in Both Official Languages

Access to justice in both official languages has been the subject of several parliamentary studies over the past two decades. In its 1998 report, the Special Joint Committee on Child Custody and Access recommended that the government amend the *Divorce Act* to ensure that "parties to proceedings under the *Divorce Act* can choose to have such proceedings conducted in either of Canada's official languages."[90] However, in 2017, the Fédération des associations de juristes d'expression française de common law informed the House of Commons Standing Committee on Official Languages that "the right to divorce in French does not exist" across the country. Specifically, the "right" to divorce in French does not currently exist in British Columbia, Nova Scotia or Newfoundland and Labrador.[91]

In its first reading version, Bill C-78 did not address the right to divorce in both official languages. Several witnesses expressed concern about this situation to the committee. The bill was amended at committee stage by adding new section 23.2, which establishes that any person has the right to use either official language in any proceeding under the *Divorce Act*.[92] New section 23.2 also provides that any party to a proceeding has the right to a judge who speaks the same official language as that party.

2.1.10 Calculation of Child Support (Clause 24)

Since 1997, the *Federal Child Support Guidelines* have required the court to "order the designated monthly amount of child support set out in the applicable provincial table."[93] The amount in the table is fixed according to the payor's annual income and the number of children provided for by the order.[94]

Bill C-78 adds new section 25.01 to the *Divorce Act*, which enables the Minister of Justice to enter into an agreement with a province to allow a provincial child support service to calculate the amount of child support owing, in accordance with the guidelines, and set it out in a decision. If either or both spouses disagree with the amount calculated, new section 25.01(5) provides that either or both may apply for a court order under existing section 15.1 ("Child Support Orders").

Moreover, Bill C-78 preserves the Minister of Justice's authority to enter into an agreement with a province to allow a provincial child support service to recalculate the amount of child support owing, in accordance with the guidelines (amended section 25.1(1)). The bill adds new section 25.1(1.2) to allow the provincial child support service to deem the spouse's income to be of a certain amount where the spouse does not provide income information.

2.1.11 International Conventions (Clauses 30 and 31)

Canada's federal government has "exclusive jurisdiction to sign and ratify international treaties," but the provinces have the authority to "implement treaties dealing with matters within the legislative jurisdiction of the provinces."[95]

Canada has signed the 1996 Hague Child Protection Convention and the 2007 Hague Child Support Convention, but is not yet party to either. Bill C-78 is the federal implementing legislation for the two conventions. It would give "force of law" to the 2007 and 1996 conventions insofar as they fall within the legislative competence of Parliament (new sections 28.1(1) and 30.1(1), respectively).

The two conventions provide rules for federal states, such as Canada, to implement the conventions incrementally in different territorial units (i.e., the provinces and territories). Upon final ratification of either or both of the conventions, Canada "would declare that the Convention will apply in those provinces and territories that have amended their laws to be consistent with the Convention and have asked the federal government to have the Convention apply to them."[96]

2.1.11.1 *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (Clause 30)

The 2007 Hague Child Support Convention was designed to "establish an international system for the recovery of maintenance which is fair, efficient, and effective."[97]

Key features of the Convention include

- provisions to ensure effective access to cross-border maintenance procedures;
- a system for the recognition and enforcement of cross-border maintenance decisions; and
- measures that provide for prompt and effective enforcement.[98]

In an effort to promote cooperation and efficiency, the Convention addresses many practical matters related to claims processing, including language requirements, standardized forms and exchange of information on national laws.[99]

The Convention also pays particular attention to the "reduction of costs, complexities, and delay," recognizing that all these factors can "inhibit" parties who are not wealthy from bringing claims.[100] For example, the provisions in articles 14 to 17 regarding free legal assistance in child support cases attempt "to ensure that international procedures will be genuinely accessible."[101]

Although the 2007 Hague Child Support Convention is concerned primarily with child support payments, it also applies to other forms of maintenance, including spousal support. There are two different categories of spousal support under the Convention: the first category concerns an application that is related to, and made at the same time as, an application for child support; the second includes all other claims for spousal support.[102] The Convention treats these categories differently, and claims for the recognition and enforcement of spousal support do not benefit from all of the provisions of the Convention where they are not made in conjunction with a claim for child support.[103] Nevertheless, Contracting States can make a declaration to extend the application of the whole of the Convention to spousal support.[104]

In addition, Contracting States can declare the Convention to cover other kinds of family maintenance, including for example, obligations from grandparents, step-parents and adult siblings.[105]

New section 28.1(2) provides that the 2007 Hague Child Support Convention prevails over the *Divorce Act* and any other federal law, to the extent there is any inconsistency between them.

2.1.11.1.1 Article 61 and Provincial Application

Article 61 of the 2007 Hague Child Support Convention allows states with two or more territorial units in which different legal systems apply to declare that the Convention applies to all its territorial units (i.e., provinces, in the case of Canada), or to one or more of them.

New section 28.3 introduces certain provisions that apply when one party to a divorce lives in a province where the Convention applies due to the application of Article 61, and the other party resides in another Contracting State. The application of these provisions, set out in new sections 28.4 and 29.5, does not exclude the application of other provisions in the *Divorce Act*, unless otherwise indicated.

New sections 28.4 and 29.5 contain a variety of measures relating to new orders, variation of orders and recognition and enforcement of orders, designed to help creditors (former spouses to whom support is owed or who seek to obtain support) and debtors (a former spouse who owes support or from whom support is sought) resolve their legal disputes.

2.1.11.2 *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* (Clause 31)

The 1996 Hague Child Protection Convention "builds a structure for effective international co-operation in child protection matters."[106] It addresses a wide range of international child protection issues, including "parental disputes over custody or contact … [and] … the protection of runaway teenagers."[107]

The uniform rules set out in the Convention do the following:

- establish rules in respect of jurisdiction and applicable law (Chapter II – "Jurisdiction");[108]
- enable the automatic recognition and enforcement of court orders and other agreements made in one Contracting State to be recognized in other Contracting States (Chapter IV – "Recognition and Enforcement");
- provide a basic framework for the exchange of information and cooperation between judicial and administrative authorities in Contracting States (Chapter V – "Co-operation"); and
- allow any country where a child is present to take necessary emergency or provisional measures of protection.[109]

The Convention does not apply to maintenance obligations, among other matters.[110]

In its 2015 report, *Alert: Challenges and International Mechanisms to Address Cross-Border Child Abduction*, the Standing Senate Committee on Human Rights recommended that the federal government work with the provinces to expedite the ratification of the 1996 Hague Child Protection Convention.[111]

New section 30.1(2) provides that the 1996 Hague Child Protection Convention prevails over the *Divorce Act* and any other federal law, to the extent there is any inconsistency between them.

2.1.11.2.1 Article 59 and Provincial Application

Article 59 of the 1996 Hague Child Protection Convention allows states with two or more territorial units in which different legal systems apply to declare that the Convention applies to all its territorial units (i.e., provinces, in the case of Canada), or to one or more of them.

New sections 30.4 to 31.3 "supplement the jurisdictional rules" set out in the *Divorce Act*, as amended by Bill C-78, with respect to applications for parenting orders under new section 16.1(1), contact orders under new section 16.5(1) and variation orders under amended section 17.[112]

For example, section 30.4 provides that a court in a province does not have jurisdiction to hear parenting, contact or variation orders when a child is habitually resident in a country other than Canada to which the Convention applies, with certain exceptions. Among these exceptions, new section 31 grants a court in a province jurisdiction in "urgent cases" where the child is present in the province.

Further, sections 30.4 to 31.3 only apply in a province if the Convention's application has been extended to it by the application of Article 59, and if the child concerned is under 18 years of age (new section 30.3).

2.2 Amendments to the *Family Orders and Agreements Enforcement Assistance Act* (Clauses 42 to 80)

2.2.1 Definitions (Clause 43)

Bill C-78 amends the definition of "family provision" established in section 2 of the *Family Orders and Agreements Enforcement Assistance Act* (FOAEAA) by adding the terms "parenting provision," and "contact provision" and replacing "access right" with "access provision." Unlike amendments to the *Divorce Act* in clause 1, which repeal the terms "custody" and "custody order," the related term "custody provision" remains in the interpretation section of the FOAEAA; however, it is amended to remove references to "awarding" custody of a child.

2.2.2 Search of Information Banks and Release of Information

2.2.2.1 Information Banks (Clauses 43 and 46)

Nine information banks may currently be searched under the FOAEAA for the purposes prescribed under the Act. Eight of these information banks are updated annually. One information bank, added in January 2017, is updated monthly.[113]

Together, clauses 43 and 46 create the potential for a greater number of information banks to be covered by the FOAEAA's provisions for the search of information banks and the release of information. Clause 46 replaces existing section 15 of the FOAEAA, which limits the information banks that can be searched under these provisions to those designated by the regulations and controlled by Employment and Social Development Canada, the Canada Revenue Agency, and the Canada Employment Insurance Commission. Clause 43 adds a new definition of "information bank" to section 2 of the Act, broadening its interpretation to mean any bank that is designated by regulation. Clause 43 also amends the definition of "information bank director" to remove references to specific entities.[114]

At present, sections 13 and 14 of the FOAEAA set out the circumstances in which provincial enforcement services, peace officers or court officials may apply to the Minister for a search of federal information banks. Section 14 limits such searches to cases where provincial information banks have already been searched or where there are reasonable grounds to believe that the person, child or children have left the province. Clause 46 removes these limitations. According to the Department of Justice, "[t]his will permit simultaneous searches of both provincial and federal banks and enable provincial enforcement services to receive tracing information more quickly."[115]

Current section 16 of the FOAEAA limits the information that may be searched in information banks and released to the following:

- the address of a person, or the name and address of the employer of a person who is
  - in arrears of support payments,
  - believed to have possession of a child or children named in custody or access provisions, or
  - believed to have possession of a child or children who are the focus of an abduction investigation under sections 282 or 283 of the *Criminal Code*;
- the address of any child named in the application; and
- the name and address of the employer of any child named in the application.

Rather than listing the type of information can be searched as is currently the case under the FOAEAA, clause 46 of the bill lists the purposes for which information may be released, which differs based on the family law bodies or services making the application. In some cases, information that can be searched and released will be prescribed by regulation. As a result, Bill C-78 creates the potential for a wider array of information to be released.

2.2.2.2 Applications to the Court (Clauses 46 and 47)

Under the current law, any person, body or service may apply to courts to have court officials request that the Minister of Justice search information banks and release specified information for specific purposes. By amending section 7 of the FOAEAA, clause 46 expands the purposes for which applications may be made for the search

of information banks and release of information. In addition to enforcing a family provision in an agreement (i.e., a parenting, contact, custody or access provision), amended section 7 now allows applications to be made to have a support provision established or varied.

Clause 46 of the bill also establishes the conditions to be met before a court can authorize its officials to request that information banks be searched and that information be released (amended section 12). First, the court must be satisfied that the application is made for the sole purpose of establishing or varying a support order, or of enforcing a family provision (new section 10(a)). Second, the order must not be likely to jeopardize the safety or security of any person (new section 10(b)). The current regime requires only that the judge be satisfied that reasonable efforts have been made to locate the person, child or children in question and that, where it is alleged that the person, child or children in question has or have left the province, that there are reasonable grounds to believe so (existing section 12).

2.2.2.2.1 Documentation Requirements (Clause 46)

Clause 46 amends sections 8 and 9 to set out the documentation that must be submitted when applying for a court-authorized request for the search of information banks and the release of information. Requirements vary depending on whether the application is to establish or vary a support provision (amended section 8(1)) or to enforce a family provision (new section 9(1)).

If an application is made *ex parte*, meaning that other affected individuals are not party to the proceedings, additional requirements apply (new sections 8(2) and 9(2)). In *ex parte* applications, the applicant must sign an affidavit stating that reasonable measures have been taken to locate the affected person, in the case of support provisions, or, in the case of enforcing family provisions, the affected person, child, or children.

New sections 8(3) and 9(3) create additional requirements for individuals (as opposed to an enforcement body or service) making an *ex parte* application to a court for the search of information banks and the release of information. They must provide the following:

- the results of a recent criminal background check; and
- an affidavit stating
  - that the sole purpose of the application is to obtain information to establish or vary a support provision, or to enforce a family provision, as the case may be,
  - whether they are subject to any court order, agreement or similar document restricting communication with the affected person, child or children,
  - whether they have caused or attempted to cause physical harm to the person, child or children in question, or have caused them to fear for their own safety and security, or that of another person, and
  - whether they have been charged with or found guilty of an offence against the person, child or children.

The current regime does not require that individuals applying to courts to authorize a request for the search of information banks and release of information provide additional documentation in the case of *ex parte* applications.

2.2.2.2.2 Disclosure and Confidentiality of Information Released to Court (Clause 46)

Under current section 13 of the FOAEAA, information is released to courts on a confidential basis. New section 13(2) requires courts to seal the requested information. The court may also make orders regarding the confidentiality of information. The court has discretion to disclose the information to any person, service, body or official of the court, as appropriate, for the purposes of establishing or varying a support provision or enforcing a family provision in an agreement (new section 13(3)).

In the case of *ex parte* applications made by individuals, under new section 12.1, the Minister of Justice must send the absent person a copy of the order authorizing the application for the release of information and a notice that information will be released. However, new section 11 gives the court the power to order that the Minister not send a copy of the authorization order or notice that the information will be released.

2.2.2.3 Applications to the Minister of Justice by Provincial Family Law Authorities (Clauses 45 and 46)

Clause 45 amends section 5 of the FOAEAA to provide that federal–provincial information-sharing agreements may designate not only provincial enforcement services, but also the following bodies:

- provincial child support services;
- persons or entities responsible for interjurisdictional support applications under the *Divorce Act* or provincial acts (“designated authorities”); and
- persons or entities acting as a central authority for the purposes of the 1996 Hague Child Protection Convention and the 2007 Hague Child Support Convention.

Clause 46 allows these authorities to apply directly to the Minister of Justice for the search of information banks and the release of information in specific circumstances (new section 6.1). Provincial enforcement services may also act on behalf of these entities under new section 6.2.

2.2.2.3.1 Peace Officers Investigating Child Abduction (Clause 46)

Section 282 of the *Criminal Code* (Code) creates an offence of abduction of a person under the age of 14 years by a parent, guardian or other person having lawful care of the child, with the intention of depriving another parent or guardian of possession of

the child, in contravention of a custody order. Section 283 of the Code creates the same offence where no custody order is in place.[116] Section 13(c) of the FOAEAA allows peace officers investigating these offences to request the release of information from federal information banks.

Amendments to section 14 of the FOAEAA remove the requirement that a charge be laid under sections 282 or 283 of the *Criminal Code* prior to applying for the search of information banks and release of information under the FOAEAA. Instead, peace officers must attest, in an affidavit, that they have reasonable grounds to believe that an offence under those sections has been committed (new section 14(3)(a)). Amended section 14(2) of the FOAEAA removes requirements that peace officers investigating a child abduction prove that provincial information banks were searched prior to making the application.

2.2.2.3.2 Provincial Enforcement Services (Clause 46)

All provinces and territories have programs designed to help enforce support orders and agreements. The FOAEAA currently provides that provincial enforcement service officers may apply for the search of information banks and the release of information regarding a person who is in arrears under a support provision or to locate a person believed to have a child or children in their possession in breach of a family provision (current sections 13 to 16). Clause 46 amends section 15 of the FOAEAA to set out the purposes for which a search can be conducted. The purposes are as follows (new section 15(2)):

- to obtain information about a person in arrears to enforce a support provision;
- to locate a person in breach of parenting, contact, custody or access provisions and who has possession of the child or children who are the subjects of the provision; or
- to locate a creditor or a debtor under a support provision.

Clause 46 also removes certain documentation requirements established in section 14(4) of the FOAEAA, including detailed requirements on the contents of a supporting affidavit. Instead, new section 15(1) establishes that the form and manner of the application will be laid out in the regulations. According to the Department of Justice, the information currently required for the affidavit will be included in an application form requiring the officer to sign a binding declaration.[117]

2.2.2.3.3 New Authorized Bodies (Clause 46)

Pursuant to new section 15.1, a provincial child support service may apply to have information searched and released to allow for the calculation or recalculation of the amount of child support payable.

New section 16 stipulates that designated authorities may request that information banks be searched and information released in order to obtain assistance with two forms of application to a court, where the parties or prospective parties reside in different provinces and make, or could make,

- an application under the *Divorce Act* to obtain, vary, rescind or suspend a support order, or to calculate or recalculate child support amounts; or
- an application under provincial Acts regulating the reciprocal enforcement of support orders that establish or vary a support order.

Provincial acts generally apply to separated common law partners.

Central authorities may also apply to have information searched and released in response to a request for assistance made under a convention or to obtain assistance to process an application made under a convention (new section 16.1).

Under new sections 17(2) and 17(3), on his or her own initiative, the Minister of Justice may also request the search of information banks and the release of information to locate a person named either in a request for assistance under a convention or in an application made under a convention.

2.2.3 Garnishment of Federal Payments to Satisfy Orders (Clauses 51 to 69)

Part II of the FOAEAA provides for the garnishment of federal monies should they become payable to individuals in default of their family support obligations. Sections 24 to 28 allow the Crown to be garnisheed in accordance with the provincial law under which a garnishee summons is issued. A garnishee summons may take the form of a court order or a document issued by a provincial enforcement service.

Federal payments that may be garnisheed are determined through regulations. Among the potential payments outlined in the *Family Support Orders and Agreements Garnishment Regulations* are refunds on personal income tax and funds payable under the *Employment Insurance Act*, *Old Age Security Act* or the CPP.[118] Depending on the circumstances, the Crown may discharge its liability by making payments directly to a court or a provincial enforcement service (existing section 44).

According to section 55 of the FOAEAA, if garnishment may occur under both the FOAEAA and the GAPDA, which applies to federal public servants, it will first be applied under the GAPDA.

2.2.3.1 Definitions (Clause 51)

Clause 51 amends section 23(1) of the FOAEAA to repeal the definitions of “support order” and “support provision.” These two definitions are incorporated into the newly defined term “order,” which includes a reference to any enforceable order, judgment, decision or agreement respecting maintenance, alimony or support.

Notably, the new term “order” incorporates new classes of family law expenses for which a debtor may have payments garnisheed (new section 23(4)). Claims for garnishment under section 24 of the FOAEAA may now be based on the following:

- an order or judgment respecting expenses incurred as the result of the denial of parenting time, custody, access or contact;
- an order or judgment respecting expenses incurred as the result of the failure to exercise parenting time, custody, access or contact; and
- an order, judgment or agreement respecting expenses related to exercising parenting time, custody or access when a child has been relocated (as defined in amended section 2(1) of the *Divorce Act* or under provincial law).

2.2.3.2 Binding Period of Garnishee Summons on the Crown (Clauses 54 and 55)

Clause 54 amends sections 28 and 29 of the FOAEAA to extend the period for which a garnishee summons can bind the Crown from five years to twelve years. Together, clauses 54 and 55 allows for the enactment of regulations specifying the duration of a garnishee summons and the circumstances in which it will be found to be binding.

2.2.3.3 Payable Monies (Clause 57)

Relevant departments responsible for garnishable funds have a duty to inform the Minister of Justice whether the claimed amounts are currently or foreseeably payable to the judgment debtor (i.e., the person owing money). To meet this duty, new section 37.1 allows the Minister of National Revenue to demand that a judgment debtor file a tax return for that tax year if the Minister knows or suspects that monies would be payable to the judgment debtor if he or she were to file a return.

2.2.3.4 Notice to Judgment Debtor (Clause 63)

Section 45 of the FOAEAA currently requires the Minister of Justice to notify a judgment debtor named in a garnishee summons that such a document has been served on the Minister. By replacing the term “shall” with “may,” clause 63 uses language that permits, but does not require, the Minister of Justice to notify the judgment debtor.

2.2.4 Denial of Passports and Licences (Clauses 70 to 76)

A debtor is in persistent arrears (defined as failing to pay support for three payment periods or accumulating over $3,000 in arrears) can face restrictions relating to the debtor’s passport or other licences listed in the schedule to the FOAEAA. Specifically, section 67 of the FOAEAA allows a provincial enforcement service to apply to the Minister of Justice to suspend the debtor’s licence or passport, to prevent the issuance of new licences or a passport, or to prevent their renewal. The provincial

enforcement service may make this request only after reasonable attempts have been made to enforce the support order and after a notice has been sent to the debtor.

2.2.4.1 Right to Search Information Banks (Clause 75)

Clause 75 creates new section 68.1, which grants the right to the Minister of Justice or the minister responsible for the issuance of the licence in question to search the information banks covered under Part I of the FOAEAA to confirm the identity of a debtor who is the subject of an application.

2.2.5 General Provisions

2.2.5.1 Research (Clause 79)

Clause 79 permits the Minister of Justice to undertake research "related to matters governed by this Act." A 2017 audit suggested that FLAS's performance measures should be expanded to include measuring the program's impact on child poverty or Canadian families.[119]

2.2.5.2 Privacy and Prohibitions on Sharing Information (Clause 80)

Sections 80 to 82 of the FOAEAA make it an offence for public servants or contractual employees to share information obtained pursuant to the FOAEAA, except in accordance with the Act. Clause 80 of the bill amends section 80, making it an offence to share personal information as defined in section 3 of the *Privacy Act*.[120] Clause 80 also specifies that a public servant or contractual employee may be authorized to share the information if so authorized by another Act of Parliament.

2.3 Amendments to the *Garnishment, Attachment and Pension Diversion Act* (Clauses 81 to 119)

Most of the changes to the GAPDA clarify and simplify the language of provisions without changing their meaning or impact. These changes are not included in this Legislative Summary.

In addition, provisions that require the service of documents and other information by registered mail have been amended to allow service by any prescribed method, presumably to allow for more modern forms of delivery (amended sections 7(2) and 19(2)).

2.3.1 Definitions (Clause 82)

Clause 82(2) amends section 2 of the GAPDA to add three definitions. The first, for "order," refers to an agreement relating to maintenance, alimony or support, or an order, judgment or decision, that is either interim or final and is enforceable in a province and that can require the federal government to garnish the wages of its employees. The addition of this definition does not change the GAPDA substantively, but it clarifies which orders are applicable to garnishment and attachment proceedings under the GAPDA.

The second definition, for "parliamentary entity," means the Senate, the House of Commons, the Library of Parliament, the office of the Senate Ethics Officer, the office of the Conflict of Interest and Ethics Commissioner, the Parliamentary Protective Service, or the office of the Parliamentary Budget Officer. Throughout subsequent clauses amending the GAPDA, references to these entities are replaced with the term "parliamentary entity."

The third definition added by clause 82(2) is "provincial enforcement service," which has the same meaning as in section 2 of the FOAEAA: "any service, agency or body designated in an agreement with a province [concerning the search for and release of information] that is entitled under the laws of the province to enforce family provisions."

2.3.2 Garnishment and Attachment Proceedings (Clauses 83 to 102)

Bill C-78 makes changes to the GAPDA that apply to garnishment and attachment proceedings involving government departments, certain Crown corporations and parliamentary entities.

2.3.2.1 Government Departments and Certain Crown Corporations (Clauses 85 to 90)

Clause 85 amends section 6(2) to extend the period during which service of a garnishee summons on Her Majesty is considered effective from 30 to 45 days. This clause also adds section 6(3) to clarify that the garnishee summons does not bind Her Majesty after the periods and in the circumstances specified in the *Garnishment and Attachment Regulations*.[121]

Clause 89(3) adds section 11(3.1) to the GAPDA to recognize payment to a provincial enforcement service by Her Majesty as good and sufficient discharge of Her Majesty's liability in respect of the garnishment order, provided that provincial garnishment law permits such payments to provincial enforcement services.

New section 11(5) under clause 89(3) allows Her Majesty to recover excess funds paid in error to a party who instituted garnishment proceedings regarding a federal public servant. The GAPDA currently only permits recovery from a debtor (i.e., the federal employee whose wages are being garnished) if Her Majesty, in honouring a garnishee summons, mistakenly overpays the debtor.

Section 12 of the GAPDA lists types of regulations that the Governor in Council may make regarding garnishment proceedings that involve employees of government departments or Crown corporations. Clause 90 amends section 12 to add that regulations may be made respecting methods of service of documents, designating days on which service of documents on Her Majesty is deemed to be effected, and specifying periods and circumstances for the purpose of section 6(3).

2.3.2.2 Parliamentary Entities (Clauses 93 to 100)

Clauses 95, 98 and 99 replicate the changes made by clauses 85, 89(3) and 90, respectively, regarding garnishment proceedings involving parliamentary entities.

2.3.2.3 Priority of Garnishment Proceedings (Clause 101)

For all garnishment proceedings involving the federal government, new section 27.1 states that Her Majesty ranks in priority over the party that instituted garnishment proceedings against a federal employee if that employee is also indebted to Her Majesty. New section 27.2 mandates that a garnishee summons involving a federal employee for a maintenance, alimony or support obligation shall be honoured before any other garnishee summons.

2.3.3 Diversion of Pension Benefits to Satisfy Financial Support Orders (Clauses 103 to 115)

2.3.3.1 Definitions (Clause 105)

Clause 105(3) amends the definition of “financial support order” in section 32(1) of the GAPDA to clarify that the term includes interim and final orders, judgments, decisions, or agreements for maintenance, alimony, or support that are enforceable in a province. The definition of “pension benefit” under this section is also amended to include bridge benefits. Bridge benefits are temporary benefits for federal employees eligible for the public service pension plan who retire before the age of 65. The temporary benefit “bridges” the gap in benefits that exists until the beneficiary becomes eligible to receive CPP benefits.[122]

2.3.3.2 Involvement of Provincial Enforcement Services (Clauses 106 and 115)

A key change made by Bill C-78 to the GAPDA is to allow for the involvement of provincial enforcement services in the diversion of pension benefits. Under section 33(1) of the GAPDA, a person named in a financial support order may only make an application to the designated minister for diversion of a pension benefit payable to the person against whom the order has been made. Such applications may be made on behalf of a person by another person, according to section 33(2). Clause 106(1) amends section 33(2) to state that applications may also be made by

a provincial enforcement service on behalf of a person. Under existing section 33(3), diverted pension benefits are to be paid to the applicant or any other person designated in the financial support order. Clause 106(1) amends this section to add a provincial enforcement service as an allowable recipient of diverted pension benefits if the law of the province permits it.

Clause 106(2) adds section 33(2.1), which specifies that applications for diversion of pension benefits must contain the prescribed information and documents. According to new section 33(2.2), such documents can include a list of a recipient's arrears of maintenance, alimony or support prepared and submitted by a provincial enforcement service. Clause 115(2) amends section 46 of the GAPDA to allow the Governor in Council to make regulations respecting the making of applications on behalf of a person by a provincial enforcement service and the submission of corresponding documents, as provided for under amended section 33.

2.3.3.3 Diversion of Pension Benefits That Are Not Immediately Payable (Clause 107)

A person entitled to support from a debtor may apply for an order to divert the debtor's pension benefits when the debtor is no longer employed in the public service; is between the ages of 50 and 59 or 55 and 64, depending on when the debtor started working for the federal government; and is not a recipient but has exercised an option under the *Public Service Superannuation Act* to receive a deferred annuity, a return of contributions or an annual allowance (current section 35.1(1) of the GAPDA). According to section 35.1(2), a court may make an order to divert these benefits if it is satisfied that there is an extended pattern of non-payment of the financial support order, and the person making the application has made a reasonable effort to enforce the financial support order through other means. Clause 107(1) adds section 35.1(1.1) and amends section 35.1(2) to expand the application of such orders to debtors previously employed with the Canadian Forces who have ceased to make contributions to the Canadian Forces Pension Fund and the Reserve Force Pension Plan, are entitled to a deferred annuity and are between the ages of 50 and 60 years old.

2.3.3.4 Designation of Minister (Clause 113)

Clause 113 adds section 40.2 to the GAPDA, allowing the Governor in Council to designate one or more federal ministers as the minister or ministers responsible for the diversion of pension benefits to satisfy financial support orders.

2.3.4 General Provisions (Clause 116)

Clause 116 adds a third part, entitled "General Provisions," to the GAPDA after section 47. New section 48 allows the Governor in Council to designate one or more federal ministers to administer Parts I and III of the GAPDA. Under new section 49, the Minister may undertake research related to matters governed by the GAPDA but

is prohibited from collecting information for research purposes from a parliamentary entity without the entity's consent.

Clause 116 also introduces a summary conviction offence regarding unauthorized communication and distribution of personal information obtained by a federal employee carrying out the provisions of the GAPDA (new section 51). The offence is punishable by a fine of up to $1,000 or a prison term of up to six months, or both.

NOTES

1. 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 Session, 42nd Parliament.
2. Department of Justice, "Government of Canada announces new measures to strengthen and modernize family justice," News release, 22 May 2018.
3. Ibid.
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.
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. **Department of Justice, *Strengthening and modernizing Canada's family justice system*.**
7. Julien D. Payne and Marilyn A. Payne, *Canadian Family Law*, 6th ed., Irwin Law Inc., Toronto, 2015, p. 10.
8. *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.).
9. *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).
10. Payne and Payne (2015), p. 11.
11. Nicholas Bala, *Reforming the Parenting Provisions of the* Divorce Act*: A Commentary on Bill C-78*, Paper presented to the 2018 National Family Law Program, Vancouver, 10 July 2018.
12. Payne and Payne (2015), p. 3. Other than in Nova Scotia, where matrimonial cruelty constituted an alternative ground for relief, adultery was the sole ground for divorce.
13. One of the most significant changes introduced by 1985 amendments to the *Divorce Act* was the creation of a single ground for divorce called "marriage breakdown." Marriage breakdown can be established by proving either separation for at least one year, or one of three fault-based criteria: adultery, physical cruelty or mental cruelty. For a detailed overview of the 1985 reforms, see Kristen Douglas, *Divorce Law in Canada*, Publication no. 96-3E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 30 September 2008.
14. Department of Justice, *Strengthening and modernizing Canada's family justice system*.
15. *Family Orders and Agreements Enforcement Assistance Act*, R.S.C. 1985, c. 4 (2nd Supp.). [FOAEAA]

16. The information banks in question are established by the *Release of Information for Family Orders and Agreements Enforcement Regulations*, SOR/87-315, s. 3.

17. Department of Justice, *Charter Statement – 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 [*Charter Statement – Bill C-78*], 22 May 2018.

18. *Garnishment, Attachment and Pension Diversion Act*, R.S.C. 1985, c. G-2.

19. Department of Justice, *Audit of Family Law Assistance Services*, 28 March 2017, p. 2.

20. HCCH, *The Hague Children's Conventions: Protecting children across international frontiers*, September 2017, p. 2.

21. The Hague Conference currently has 83 members: 82 States and one Regional Economic Integration Organization (the European Union). See HCCH, *HCCH Members*.

22. HCCH (2017), p. 3.

23. Ibid.

24. Ibid.

25. Canada was among the first signatories of the 1980 Hague Child Abduction Convention. See HCCH, "Status Table," *28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. See also Nicholas Bala and Mary Jo Maur, "The Hague Convention on Child Abduction: A Canadian Primer," *Canadian Family Law Quarterly*, Vol. 33, No. 3, 2014, p. 269.

26. Canada has not yet signed the 1993 Hague Intercountry Adoption Convention. See HCCH, "Status Table," *33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*.

27. HCCH, "Status Table," *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*; and HCCH, "Status Table," *38: Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*.

28. Department of Justice, *Strengthening and modernizing Canada's family justice system*.

29. Action Committee on Access to Justice in Civil and Family Matters [Cromwell Committee], *Access to Civil & Family Justice: A Roadmap for Change*, October 2013.

30. Nicholas Bala, "Bringing Canada's *Divorce Act* into the New Millennium: Enacting a Child-Focused Parenting Law," *Queen's Law Journal*, Vol. 40, No. 2 [2015], p. 479.

31. Cromwell Committee, *Meaningful Change for Family Justice: Beyond Wise Words – Final Report of the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters*, April 2013, p. 56.

32. Canadian Bar Association, Letter to the Honourable Jody Wilson-Raybould, 22 December 2017.

33. Bala (2015).

34. Department of Justice Canada, *Supporting Families Experiencing Separation and Divorce Initiative Evaluation: Final Report*, March 2014, p. i.

35. Ibid., pp. 47 and 67.

36. Ibid., p. 31.

37. Ibid.

38. Bala (2015), p. 454.

39. Where appropriate, the term “spouse” should be read to include former spouses.

40. As is discussed later in this Legislative Summary, the person with parenting time has “the exclusive authority to make, during that time, day-to-day decisions affecting the child.” See Bala (2018), p. 4.

41. John-Paul E. Boyd, *A Brief Overview of Bill C-78, An Act to Amend the Divorce Act and Related Legislation: Part 1 – Amendments Other than Those Relating to Interjurisdictional Agreements and Treaties*, Canadian Research Institute for Law and the Family, May 2018, p. 2.

42. The Department of Justice notes that “mediation usually involves direct discussions with the other parent.” A mediator is a “neutral third party who can help … [parents] … identify issues in dispute, discuss these issues and come up with possible solutions.” See Department of Justice, “Section 5: Options for developing a parenting arrangement,” *Making plans: A guide to parenting arrangements after separation or divorce*.

43. Ibid. The Department of Justice defines collaborative law as a “specific type of negotiation.” It involves parents, their lawyers and other professionals agreeing to work cooperatively to reach an agreement. During the collaborative process, the parents agree not to bring any court applications. Each party has his or her lawyer present at the negotiations to help find solutions and explain legal issues.

44. Boyd, Part I (2018), p. 2.

45. Ibid.

46. For further discussion of updates to jurisdictional provisions, see Boyd, Part I (2018), pp. 2–3.

47. According to the federal *Interpretation Act*, the use of the term “province” in legislation includes Yukon, the Northwest Territories and Nunavut. See *Interpretation Act*, R.S.C. 1985, c. I-21, s. 35(1).

48. *Divorce Act*, s. 16(8).

49. Bala (2018), p. 7.

50. Department of Justice Canada (2014), p. 24. See also Leena Yousefi, “Bill C-78 brings changes that every family law lawyer should know about,” *The Lawyer’s Daily*, 24 May 2018.

51. Department of Justice Canada (2014), p. 24.

52. Department of Justice, “Section 5: Options for developing a parenting arrangement,” *Making plans: A guide to parenting arrangements after separation or divorce*.

53. Bala (2018), p. 3.

54. Department of Justice, *Strengthening Canada’s Family Justice System: Bill C-78 and what it means for Canadians and Legal Professionals*, Speech by the Honourable Jody Wilson-Raybould, Vancouver, 10 July 2018.

55. Bala (2015), p. 470.

56. United Nations, Office of the High Commissioner for Human Rights, *Convention on the Rights of the Child*, 20 November 1989.

57. Bala (2015), p. 470.

58. Payne and Payne (2015), p. 542.

59. See, for example, Canadian Bar Association (2017); and Bala (2015), pp. 470–473.

60. See discussion in Bala (2015), pp. 472–473; and Payne and Payne (2015), pp. 541–550.

61. New section 16(6) appeared as new section 16.2(1) in the first reading version of Bill C-78. The amendment to move the section was moved by Mr. Colin Fraser.

62. Bala (2018), p. 8.

63. Ibid., p. 4.

64. Bruce Smyth and Richard Chisholm, "Shared-time Parenting after separation in Australia: Precursors, Prevalence and Postreform patterns," *Family Court Review*, Vol. 55, No. 4, October 2017, pp. 494–499, cited by Bala (2018), p. 5.

65. Department of Justice, "Section 5: Options for developing a parenting arrangement," *Making plans: A guide to parenting arrangements after separation or divorce*.

66. Ibid.

67. Payne and Payne (2015), p. 528.

68. Existing section 16(6) confers on the court a general power to make orders under section 16 for any period it thinks "fit and just."

69. Payne and Payne (2015), p. 528.

70. Bala (2015), p. 474.

71. Ibid.

72. *Gordon v. Goertz*, [1996] 2 SCR 27.

73. Prior to *Gordon v. Goertz*, it was widely accepted that "the well-being of the child … [was] … fundamentally interrelated with the well-being of the custodial parent … [who was] … considered the best person to make decisions affecting the child and the new family." See Nicholas Bala and Andrea Wheeler, "Canadian Relocation Cases: Heading Towards Guidelines," *Canadian Family Law Quarterly*, Vol. 30, 2012, p. 2.

74. *Gordon v. Goertz*, para. 49.

75. Bala and Wheeler (2012), p. 1.

76. Bala (2015), p. 475.

77. In the first reading version, new section 16.91 required individuals objecting to a relocation to make an application to the court.

78. Bala (2015), p. 474.

79. Bala (2018), p. 12.

80. Robert Harvie, "Bill C-78, Divorce, Shared Parenting and Mobility," Huckvale LLP Blog, 23 May 2018.

81. Existing section 5(1) of the *Divorce Act* provides that a court in a province has jurisdiction to determine a variation proceeding where either former spouse is ordinarily resident in the province at the commencement of the proceeding, or both former spouses accept the jurisdiction of the court.

82. Department of Justice, "*Divorce Act*," *Some Considerations for Practitioners in Inter-jurisdictional Support Cases*.

83. The procedure set out in sections 18 and 19 is available only for support orders, whereas the section 17 procedure can be used to vary custody or support orders.

84. Payne and Payne (2015), p. 320.

85. Ibid., p. 319.

86. Department of Justice, "*Divorce Act,*" *Some Considerations for Practitioners in Inter-jurisdictional Support Cases*.

87. Boyd, Part I (2018), p. 8.

88. A “designated jurisdiction” is a foreign country or political subdivision of a foreign country that is designated by legislation in the province in which one of the spouses resides as providing for the reciprocal enforcement of support orders.

89. A “designated authority” is a person or entity designated by the province to exercise the powers set out in sections 18.1 to 19.1 within the province.

90. Parliament of Canada, Special Joint Committee on Child Custody and Access, *For the Sake of the Children*, Second Report, Recommendation 17, December 1998.

91. House of Commons, Standing Committee on Official Languages, *Evidence*, 1st Session, 42nd Parliament, 6 April 2017, 1210 (Daniel Boivin, President, Fédération des associations de juristes d’expression française de common law inc.).

92. House of Commons, Standing Committee on Justice and Human Rights, *Minutes of Proceedings*, 1st Session, 42nd Parliament, 5 December 2018.

93. Payne and Payne (2015), p. 370.

94. Ibid.

95. Martha Bailey, “Canada’s Implementation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction,” *New York University Journal of International Law and Politics*, Vol. 33, No. 1, 2000, pp. 17–18.

96. Department of Justice, “E. International Conventions,” *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)*.

97. William Duncan, “The New Hague Child Support Convention: Goals and Outcomes of the Negotiations,” *Family Law Quarterly*, Vol. 43, No. 1, 2009, p. 5.

98. HCCH, *Outline:* Hague Child Support Convention, June 2012, p. 1.

99. Ibid.

100. Duncan (2009), pp. 5–6.

101. HCCH (2012), p. 2.

102. 2007 Hague Child Support Convention, art. 2(1).

103. HCCH (2012), p. 2.

104. Where the scope of the application has not been extended, parties may have the option to use section 19 of the *Divorce Act* to pursue a standalone application to vary a spousal support order.

105. HCCH (2012).

106. HCCH (2017), p. 8.

107. Ibid.

108. Article 5 provides that the primary basis of jurisdiction is the State of the child’s habitual residence. This rule is consistent with Canadian provincial and territorial legislation on custody and access. See Uniform Law Conference of Canada, *Hague Conventions on Protection of Adults and Children – Report 2001*, Toronto, 21 August 2001.

109. New Zealand, Ministry of Justice, *Extended National Interest Analysis: Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, p. 1; and HCCH (2017), p. 8.

110. 1996 Hague Child Protection Convention, art. 4(e).

111. Senate, Standing Committee on Human Rights, *Alert: Challenges and International Mechanisms to Address Cross-Border Child Abduction*, Thirteenth Report, 2nd Session, 41st Parliament, July 2015.

112. John-Paul E. Boyd, *A Brief Overview of Bill C-78, An Act to amend the Divorce Act and Related Legislation: Part 2 – Amendments Relating to Interjurisdictional Agreements and Treaties*, Canadian Research Institute for Law and the Family, June 2018.

113. The information bank in question is Employment and Social Development Canada's Employment Insurance Program Investigation (ESDC PPU 171). See "Regulatory Impact Analysis Statement," *Regulations Amending the Release of Information for Family Orders and Agreements Enforcement Regulations*, SOR/2018-63, 27 March 2018, in *Canada Gazette*, Part II, Vol. 152, No. 8, 18 April 2018, p. 697.

114. Section 8 of the *Canadian Charter of Rights and Freedoms* [the Charter] guarantees a right to be free from unreasonable search and seizure, including with respect to personal information over which persons have a reasonable expectation of privacy. This guarantee is "subject only to such reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society" as set out in section 1. For the Government of Canada's position on these Charter considerations with respect to Bill C-78, see Department of Justice, *Charter Statement – Bill C-78*. The statement asserts that the amendments to the FOAEAA are consistent with section 8 of the Charter because the information being disclosed is already under government control in a federal database, and it therefore attracts a diminished expectation of privacy. The Charter Statement notes that circumstance-specific safeguards built into Bill C-78 sufficiently protect privacy while accomplishing goals that are consistent with the Charter, i.e., lessening financial hardship on support recipients and their children and improving access to justice.

115. Department of Justice, *Charter Statement – Bill C-78*.

116. *Criminal Code*, R.S.C. 1985, c. C-46, ss. 282 and 283.

117. Department of Justice, *Charter Statement – Bill C-78*.

118. *Family Support Orders and Agreements Garnishment Regulations*, SOR/88-181, s. 3.

119. Department of Justice (2017), p. 5.

120. Under section 3 of the *Privacy Act*, the term "personal information" encompasses "information about an identifiable individual that is recorded in any form," and the *Privacy Act* includes a long list of examples of personal information and exclusions. See *Privacy Act*, R.S.C. 1985, c. P-21. The Department of Justice is already subject to obligations under the *Privacy Act*. A 2017 audit concluded that the Family Law Assistance Service is meeting its obligations under the *Privacy Act* with respect to the handling of personal information, but that there are "opportunities for improvement to further mitigate risks." See Department of Justice (2017), p. 15.

121. *Garnishment and Attachment Regulations*, SOR/83-212.

122. Government of Canada, *Retirement Income Sources*.