BRIEF
BY THE BARREAU DU QUÉBEC

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

June 5, 2019

Barreau du Québec

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Acknowledgements

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Overview of the Barreau du Québec's position

✓ Changes in terminology

The bill amends the terminology used with respect to parenting arrangements. Rather than using concepts of custody and access, the bill uses the terms "contact order", "parenting order" and "parenting time". The previously advocated vocabulary tended to reinforce the climate of conflict between the parties and considered the child as an object.

The Barreau du Québec supports the proposed changes to the terminology in general. However, some changes seem inappropriate and inadequate.

✓ Codifying the principle of best interests of the child

The Barreau du Québec welcomes the codification of the cardinal principle of the best interests of the child in section 16. This amendment places the child at the heart of family law reform and gives the child's needs primary consideration. The explicit definition of this principle will provide better guidelines for this sometimes broad and vague concept.

However, we believe that this provision requires further clarification so that priority is not given to certain factors over others.

✓ Some provisions breach the principle of parental authority

Sections 16.1 to 16.5 allow third parties to intervene at various levels in the child's life and in decisions concerning the child. The Barreau du Québec believes that several decision-making powers in respect of the child that are allocated to third parties belong to the parental authority and that allowing such interference by third parties is not only a breach of this principle but is against the best interests of the child.

✓ Clarifications needed by Parliament

The Barreau du Québec believes that several provisions require clarification by Parliament. Some clauses, including sections 16.1 and 16.2, are difficult to understand and seriously lack clarity.

Also, subsection (1)(b) of section 16.1 is particularly problematic since we do not know who Parliament is referring to when it mentions a person who intends to stand in the place of a parent and who would be entitled to parenting time or decision-making responsibility for the child.

The person who intends to stand in place of the parent cannot be person acting in *loco parentis* according to jurisprudence, since to qualify as such the person must already be acting like the parent and this must be apparent from the child's interactions with that person.

✓ **Family violence**

The Barreau du Québec applauds the inclusion of family violence in the bill. It is a delicate matter but must be taken into account when it comes to the best interests of the child in a given context. In addition, we believe that the definition of violence is sufficiently comprehensive and open-ended to be applied to most scenarios.

However, we believe that Parliament must make clear that the prohibition against killing or wounding an animal does not apply during recreational activities like hunting or fishing. Moreover, the prohibition against damaging property must be restricted to property to which the family member has a sentimental attachment. These clarifications are needed to avoid absurd situations in which normal behaviour could be seen as family violence. Such behaviour could be condemned by either party in an acrimonious divorce.

✓ **Foreign divorce**

The Barreau du Québec has two issues with section 22. First of all, the provision states that a divorce granted by a competent authority would be recognized under the Act. However, in some countries, France, for example, there is no legal authority that grants a divorce. Canadian law must recognize all divorces that respect public order and Canadian values even if they are not granted by a court order.

We also point out that a constitutional conflict could arise between this provision and article 3167 of the *Civil Code of Quebec* concerning the jurisdiction of foreign authorities in matters of divorce.

Contents

Introduction

On May 22, 2018, the Minister of Justice and Attorney General of Canada, the Honourable Jody Wilson-Raybould, tabled in the House of Commons 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.

This important reform aims to modernize family law to reaffirm the importance of the best interests of the child and make legislation more relevant to today's societal realities. The bill also proposes to:

- guide the courts on the factors to be assessed in the best interests of the child;
- guide the courts on the concept of family violence;
- promote non-contentious measures and family dispute resolution processes;
- amend outdated terminology related to custody and access;
- provide legislative guidance for the relocation of a child; and
- simplify certain processes, including those related to family support obligations.

The Barreau du Québec is interested in this bill and wishes to share its comments.

1. General comments

The Barreau du Québec welcomes the government's initiative to put the child at the heart of the *Divorce Act* (hereinafter the "Act"), to make it more responsive to today's society and to remove outdated terminology from the Act by using less antagonistic terms.[1] In general, the Barreau du Québec supports the bill. However, we would like to submit some concerns and suggestions.

1.1 Changes in terminology

The bill amends the terminology used with respect to parenting arrangements. Rather than using concepts of custody and access, the bill uses the terms "contact order", "parenting order" and "parenting time". The previously advocated vocabulary tended to reinforce the climate of conflict between the parties and considered the child as an object.

The Barreau du Québec supports the proposed changes to the terminology in general, in particular the deletion of the word "access", which seems simplistic. However, other changes,

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

such as the addition of the words "contact order" and "transfer", seem inappropriate and inadequate. We will discuss this further during our detailed analysis of the bill's sections.

2. Specific comments

2.1 Decision-making responsibility in respect of a child

> Definition of "decision-making responsibility" as proposed in s. 1(7) of the bill
>
> 1(7) […] ***decision-making responsibility*** means the responsibility for making significant decisions about a child's wellbeing, including in respect of
> **(a)** health;
> **(b)** education;
> **(c)** culture, language, religion and spirituality; and
> **(d)** significant extra-curricular activities; (responsabilités décisionnelles)
> […]

> Sections 599 and 601 of the *Civil Code of Quebec*
>
> **599.** The father and mother have the rights and duties of custody, supervision and education of their children.
>
> They shall maintain their children.
>
> […]
>
> **601.** The person having parental authority may delegate the custody, supervision or education of the child.

We strongly support the inclusion of the decision-making responsibility factor in the bill, which we believe includes elements provided for in sections 599 and 601 of the *Civil Code of Quebec* but goes even further. Also, by explicitly listing the matters over which an individual can have significant decision-making responsibility, Parliament makes distinctly clear the state of the law in this regard and limits potential debate.

2.2 Family violence when an animal is killed or harmed or property is damaged

We wish to draw attention to the inclusion in the bill of the concept of family violence and the establishment of clear parameters to guide judges. It is a delicate matter but must be taken into account when it comes to the best interests of the child in a given context. In

addition, we believe that the definition of violence is sufficiently comprehensive and open-ended to be applied to various scenarios.

We question clause (i) of the definition of family violence, which reads as follows:

> (i) the killing or harming of an animal or the damaging of property; (*violence familiale*)

We believe it is appropriate to specify that the killed or wounded animal must be a pet. This will avoid the absurd situation where a parent could be blamed for having killed an animal during recreational activities like hunting or fishing.

We also believe Parliament must clarify what it is meant by "the damaging of property". We believe the child or family member must have a sentimental attachment to the property. This clarification is necessary to avoid absurd situations in which normal behaviour could be described as family violence. Such behaviour could be condemned by either party in an acrimonious divorce.

2.3 The duty of the legal adviser to inform their client of the possibility of reconciliation

New section 7.7 of the *Divorce Act* proposed in clause 8

Reconciliation

7.7 (1) Unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so, it is the duty of every legal adviser who undertakes to act on a spouse's behalf in a divorce proceeding

(a) to draw to the attention of the spouse the provisions of this Act that have as their object the reconciliation of spouses; and

(b) to discuss with the spouse the possibility of the reconciliation of the spouses and to inform the spouse of the marriage counselling or guidance facilities known to the legal adviser that might be able to assist the spouses to achieve a reconciliation.

Duty to discuss and inform

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

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

(b) to inform the person of the family justice services known to the legal adviser that might assist the person

(i) in resolving the matters that may be the subject of an order under this Act, and

(ii) in complying with any order or decision made under this Act; and

(c) to inform the person of the parties' duties under this Act.

Certification

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

Although the bill restates section 9 of the current Act, with the exception of replacing the term "avocat" with "conseiller juridique" (French version only), we believe it is important to add to subsection (1)(b) the words "where appropriate". The Barreau du Québec is concerned that a legal adviser may pressure parties to reconcile, mistakenly believing that they are fulfilling a duty under the Act. We also believe that it should be made clear that it is at the legal advisor's discretion to determine, based on the facts of the case, whether a discussion on reconciliation is beneficial to their client. Discussion on a potential reconciliation may at times be ill-advised, for example, in cases of domestic violence between the spouses.

2.4 Clearer codification of the principle of best interests of the child

New section 16 of the *Divorce Act* proposed in clause 12

Best interests of child
16 (1) The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.

Primary consideration

(2) When considering the factors referred to in subsection (3), the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being.

Factors to be considered

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

(a) the child's needs, given the child's age and stage of development, such as the child's need for stability;

(b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;

(c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;

(d) the history of care of the child;

(e) the child's views and preferences, by giving due weight to the child's age and maturity, unless they cannot be ascertained;

(f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;

(g) any plans for the child's care;

(h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;

(i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;

(j) any family violence and its impact on, among other things,

(i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and

(ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and

(k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

Factors relating to family violence

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

(a) the nature, seriousness and frequency of the family violence and when it occurred;

(b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;

(c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;

(d) the physical, emotional and psychological harm or risk of harm to the child;

(e) any compromise to the safety of the child or other family member;

(f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;

(g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and

(h) any other relevant factor.

Past conduct

(5) In determining what is in the best interests of the child, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order.

Maximum parenting time

(6) In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.

Parenting order and contact order

(7) In this section, a parenting order includes an interim parenting order and a variation order in respect of a parenting order, and a contact order includes an interim contact order and a variation order in respect of a contact order.

The Barreau du Québec welcomes the codification of the cardinal principle of the best interests of the child in section 16. This amendment places the child at the heart of family law reform and gives the child's needs primary consideration. The explicit definition of this principle will provide better guidelines for this sometimes broad and vague concept.

However, we believe it is necessary to specify in subsection (3) that the factors to be considered be analyzed without priority being given to one over the other. This addition will ensure that the analysis takes into account the specific case of the child in question, depending on his or her own needs.

That said, we believe that the first factor, "the child's needs, given the child's age and stage of development, such as the child's need for stability", is not a factor to be considered, but should rather underpin the analysis of the best interests of the child in section 16. In our opinion, the very essence of the best interests of the child is that their basic needs are met. However, it is important that this element not become an argument for sole custody either.

2.5 Terms and conditions of parenting orders

New section 16.1 of the *Divorce Act* proposed in clause 12

Parenting order

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

(a) either or both spouses; or

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

Interim order

(2) The court may, on application by a person described in subsection (1), make an interim parenting order in respect of the child, pending the determination of an application made under that subsection.

Application by person other than spouse

(3) A person described in paragraph (1)(b) may make an application under subsection (1) or (2) only with leave of the court.

Contents of parenting order

(4) The court may, in the order,

(a) allocate parenting time in accordance with section 16.2;

(b) allocate decision-making responsibility in accordance with section 16.3;

(c) include requirements with respect to any means of communication, that is to occur during the parenting time allocated to a person, between a child and another person to whom parenting time or decision-making responsibility is allocated; and

(d) provide for any other matter that the court considers appropriate.

Terms and conditions
(5) The court may make an order for a definite or indefinite period or until a specified event occurs, and may impose any terms, conditions and restrictions that it considers appropriate.

Family dispute resolution process

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

Relocation

(7) The order may authorize or prohibit the relocation of the child.

Supervision

(8) The order may require that parenting time or the transfer of the child from one person to another be supervised.

Prohibition on removal of child

(9) The order may prohibit the removal of a child from a specified geographic area without the written consent of any specified person or without a court order authorizing the removal.

The bill provides for the new concept of a parenting order, which replaces the custody order. As mentioned earlier, we support the idea of replacing the term "custody". Current vocabulary accentuates the contentious climate, and the adoption of new terminology helps to overcome this problem. The expression "parenting order" suggested in the bill is more appropriate.

The Barreau du Québec points out that the proposed wording of section 16.1(1) is difficult to understand.

Our understanding is that when subsection (b) refers to a person, other than a spouse, who stands in the place of a parent, it is probably referring to a person acting *in loco parentis*. The concept of *in loco parentis* was defined by the case law in *Chartier v. Chartier* in 1998.[2]

In this case, the Supreme Court defined the status of the person acting as the parent of the child without biologically being the parent and the rights and obligations that flow from this role. The Court held that, in order to apply the principle of a parent *in loco parentis*, the evidence must show that the person has decided to take on a parenting role and that this willingness may be inferred from intention, expressed explicitly or implicitly. The court provided the following factors to help determine the existence of a parental relationship that would qualify as an individual *in loco parentis*.

- Does the child participate in the extended family in the same way as would a biological child?
- Does the person provide financially for the child (depending on ability to pay)?
- Does the person discipline the child as a parent?
- Does the person represent, either explicitly or implicitly, that he or she is responsible as a parent to the child?
- What is the nature or existence of the child's relationship with the absent biological parent?

It is therefore clear that, to be seen as acting in *loco parentis*, the person must already be acting like the parent and this must be apparent from the child's interactions with that person.

[2] [1999] 1 SCR 242.

However, subsection (b) also refers to a person, other than a spouse, who **intends** to stand in the place of a parent. This seems unusual to us because it goes beyond the definition of *in loco parentis* in Chartier.

This seems problematic to us since we do not know who Parliament is referring to when it mentions a person who intends to stand in the place of a parent and who would be entitled to parenting time or decision-making responsibility for the child. It could be anyone. Expanding the scope of people who can make an application for a parenting order will result in litigation before the courts, where several people will want to claim rights in respect of the child.

Moreover, it is not in the best interests of the child that several people who do not have a significant role in the child's life may claim rights in respect of the child on the basis of vague legal concepts. However, we recognize that some exceptional circumstances could justify granting parental rights to third parties who intend to stand in the place of a parent. It is therefore appropriate for Parliament to specify the cases covered by this provision in order to dispel any problems of clarity and reduce the possibility of unnecessary litigation.

On another note, we welcome the addition of subsection (6) providing for the possibility of making orders directing the parties to attend a family dispute resolution process subject to provincial law. This makes it possible to respect the legal framework already established in this area in the provinces, where applicable, but also encourage the use of other means of resolution when no framework is provided. For example, Quebec law does not impose any constraints forcing the parties to attend this process, but the Code of Civil Procedure[3] strongly recommends such a process and provides a framework for its use.

In terms of terminology, the Barreau du Québec believes that the terms "transfert" and "retirer" in subsections (8) and (9) are inadequate since they have the effect of treating the child like an object or a good. Terms such as "modalités de transition" instead of "transfert" and "déplacer" instead of "retirer" would be more appropriate.

We also believe that subsection (9) lacks clarity. The meaning of "geographic area" needs to be clarified. Is consent required when moving to another country or province, or is it required even moving to a different city or neighbourhood? We also believe it is necessary to specify that a person who has only contact rights with the child cannot be given priority over the parental authority. It would be ridiculous if a parent could not travel with their child because a person with a limited relationship with the child opposes it.

2.6 Parenting time

New section 16.2 of the *Divorce Act* proposed in clause 12

[3] Code of Civil Procedure, Book VII: Private Dispute Prevention and Resolution Processes.

Parenting time — schedule

16.2 (1) Parenting time may be allocated by way of a schedule.

Day-to-day decisions

(2) Unless the court orders otherwise, a person to whom parenting time is allocated under paragraph 16.1(4)(a) has exclusive authority to make, during that time, day-to-day decisions affecting the child.

Section 16.2 regarding parental time does not make sense to us. By combining the definition of parenting time in section 2 with the provisions of sections 16.1(4)(a) and 16.2, confusion results as to who is the subject of the latter provision. We understand from reading section 16.2 that there is a both a desire that the time the child spends in the company of each spouse be maximized and that day-to-day decisions be allowed to be made by a third party. In our view, this creates confusion by limiting the exercise of parental authority, especially with regard to Quebec provincial law, which has already legislated in this area.

Article 600 of the *Civil Code of Québec* provides that both parents exercise parental authority together. Paragraph 2 of this article states that it is only in exceptional circumstances, such as if either parent dies, is deprived of parental authority or is unable to express his or her will, that parental authority is fully exercised by the other parent. That said, a parent with parental authority may delegate certain responsibilities such as the custody, supervision or education of the child to a third party in accordance with article 601, but nevertheless remains the parental authority.

2.7 Decision-making responsibility in respect of a child and entitlement to information

New section 16.3 of the *Divorce Act* proposed in clause 12

Allocation of decision-making responsibility

16.3 Decision-making responsibility in respect of a child, or any aspect of that responsibility, may be allocated to either spouse, to both spouses, to a person described in paragraph 16.1(1)(b), or to any combination of those persons.

In our view, section 16.3 is problematic because it is a direct affront to the principle of parental authority. By allocating decision-making responsibility to persons who are neither parents nor persons acting *in loco parentis*, Parliament is encouraging the intervention of third parties in decisions about the child's life that belong to the parental authority.

Moreover, in our view, it is not in the best interests of the child that decisions concerning the child are made by a third party who is not a parental authority.

We would add that there is also the risk of constitutional litigation over the division of powers, particularly with respect to provincial jurisdiction in civil matters.

> New section 16.4 of the *Divorce Act* proposed in clause 12
>
> Entitlement to information
>
> 16.4 Unless the court orders otherwise, any person to whom parenting time or decision-making responsibility has been allocated is entitled to request from another person to whom parenting time or decision-making responsibility has been allocated information about the child's well-being, including in respect of their health and education, or from any other person who is likely to have such information, and to be given such information by those persons subject to any applicable laws.

The same is true of section 16.4, which provides that any person having parenting time or decision-making responsibility is entitled to request information about the child's well-being from the persons having parenting time, decision-making responsibility or information to this effect. This clause seems to subordinate the interests of the parental authority to those of third parties wanting information, for example on the child's health and education.

Finally, as is the case with section 16.1(6), the Barreau du Québec recommends adding the phrase "subject to provincial law" to avoid any conflict with the provincial law already in force on the issue of parental authority.

2.8 Contact order and its terms and conditions

> New section 16.5 of the *Divorce Act* proposed in clause 12
>
> 16.5 (1) A court of competent jurisdiction may, on application by a person other than a spouse, make an order providing for contact between that person and a child of the marriage.
>
> Interim order
>
> (2) The court may, on application by a person referred to in subsection (1), make an interim order providing for contact between that person and the child, pending the determination of the application made under that subsection.

Leave of the court

(3) A person may make an application under subsection (1) or (2) only with leave of the court, unless they obtained leave of the court to make an application under section 16.1.

Factors in determining whether to make order

(4) In determining whether to make a contact order under this section, the court shall consider all relevant factors, including whether contact between the applicant and the child could otherwise occur, for example during the parenting time of another person.

Contents of contact order

(5) The court may, in the contact order,

(a) provide for contact between the applicant and the child in the form of visits or by any means of communication; and

(b) provide for any other matter that the court considers appropriate.

Terms and conditions

(6) The court may make a contact order for a definite or indefinite period or until a specified event occurs, and may impose any terms, conditions and restrictions that it considers appropriate.

Supervision

(7) The order may require that the contact or transfer of the child from one person to another be supervised.

Prohibition on removal of child

(8) The order may provide that a child shall not be removed from a specified geographic area without the written consent of any specified person or without a court order authorizing the removal.

Variation of parenting order

(9) If a parenting order in respect of the child has already been made, the court may make an order varying the parenting order to take into account a contact order it makes under this section, and subsections 17(3) and (11) apply as a consequence with any necessary modifications.

The bill replaces the term "accès" with the word "contact". The Barreau du Québec found the word "accès" to be inappropriate since it tends to consider the child as an object. That said, the same applies to the word "contact". We propose the term "communication" in a child rights' context.

In addition, the Barreau du Québec believes that, in subsection (4) of the provision, it would be useful to add the factors listed in subsection (3) of section 16, but with the necessary adaptations.

Finally, the issue of section 16.1(9) also arises in subsection (8), namely that this provision requires more clarity and explanation. Consent should be asked only of those with decision-making authority. Once again, we believe this provision is contrary to parental authority in that it violates the rights acquired by persons having parental authority by imposing restrictions on their parental rights.

2.9 Recognition of foreign divorce

New section 22 of the *Divorce Act* proposed in clause 18

Recognition of foreign divorce

22 (1) A divorce granted, on or after the coming into force of this Act, by a competent authority shall be recognized for the purpose of determining the marital status in Canada of any person, if either former spouse was habitually resident in the country or subdivision of the competent authority for at least one year immediately preceding the commencement of proceedings for the divorce.

Recognition of foreign divorce

(2) A divorce granted after July 1, 1968 by a competent authority, on the basis of the domicile of the wife in the country or subdivision of the competent authority, determined as if she were unmarried and, if she was a minor, as if she had attained the age of majority, shall be recognized for the purpose of determining the marital status in Canada of any person.

The Barreau du Québec has two issues with new section 22 of the Act. First of all, the provision states that a divorce granted by a competent authority would be recognized under the Act. However, in some countries, there is no legal authority that grants a divorce. For example, in France, since 1 January 2017, an amicable divorce agreement may be signed by both parties and filed with a notary without the spouses having to go before a judge.[4] The law must therefore recognize all divorces that respect public order and Canadian values even if they are not granted by a court order.

> Article 3167 of the *Civil Code of Quebec*
>
> 3167. For actions in matters of divorce, the jurisdiction of foreign authorities is recognized if one of the spouses had his or her domicile in the State where the decision was rendered, or had his or her residence in that State for at least one year before the institution of the proceedings, if the spouses are nationals of that State, or if the decision would be recognized in any of those States.
>
> For actions in matters of dissolution of a civil union, the jurisdiction of foreign authorities is recognized only if their State provides for that institution; if it does so provide, their jurisdiction is recognized on the same conditions as for divorce.

We also point out that a constitutional conflict could arise between this provision and article 3167 of the *Civil Code of Quebec* concerning the jurisdiction of foreign authorities in matters of divorce.

[4] Section 50, Law No. 2016-1547 of 18 November 2016 to Modernize XXI Century Justice https://www.legifrance.gouv.fr/eli/loi/2016/11/18/JUSX1515639L/jo [in French only]