

# **A Brief Overview of Bill C-78, An Act to Amend the Divorce Act and Related Legislation**

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## **Part 2: Amendments Relating to Interjurisdictional Agreements and Treaties**

### **Convention on the International Recovery of Child Support and Other Forms of Family Maintenance**

Also known as the Hague Child Support Convention, this 2007 multilateral agreement is intended to “improve cooperation among States for the international recovery of child support and other forms of family maintenance,” and establishes a procedure under which a person may:

- a) apply for a support order *de novo* in another signatory state, referred to in the convention as “Contracting States;” and,
- b) secure the recognition and enforcement of support orders made by the courts of one signatory state in other signatory states.

Under article 2, the convention applies to spousal support orders, in limited circumstances, and to child support orders “arising from a parent-child relationship” respecting children under the age of 21.

The bill would add a number of new provisions to the *Divorce Act* to provide the legislative framework necessary to implement the Hague Child Support Convention.

The bill would give the convention the force of law in Canada under section 28.1(1), and the convention would prevail in the event of any inconsistencies between it and any federal legislation under subsection (2).

Payees, including potential payees, residing in a signatory state may seek:

- a) a support order *de novo*, under section 28.5(2)(a);

- b) an order varying a support order, under section 28.5(2)(a);
- c) the recognition of a foreign support order that has the effect of varying domestic child support order, under section 28.4; and,
- d) the calculation or recalculation of child support, if a child support service exists in the payor's province of habitual residence, under section 28.5(2)(b),

by applying to the central authority in the province in which the payor is habitually resident. Payees may also apply directly to the courts of the payor's province of habitual residence for the recognition and enforcement of foreign support orders under section 29.3.

Payors residing in a signatory state may seek:

- a) an order varying a support order, under section 29.1(2)(a);
- b) the calculation or recalculation of child support, if a child support service exists in the payee's province of habitual residence, under section 29.1(2)(b); and,
- c) the recognition of a foreign order that has the effect of suspending or limiting the enforcement of domestic child support order, under section 29,

by applying to the central authority in the province in which the payee is habitually resident. Payors may also apply directly to the courts of the payee's province of habitual residence for the recognition and enforcement of foreign orders that have the effect of suspending or limiting the enforcement of a domestic child support order under section 29.4.

Support orders that are made by the courts of signatory states and have been recognized by a domestic court will have legal effect throughout Canada.

### **Convention on Jurisdiction, Applicable Law Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children**

This succinctly-titled convention, also known as the Hague Convention on Parental Responsibility and Protection of Children, was made in 1996 and establishes procedures:

- a) to determine the signatory state which has jurisdiction "to take measures" to protect a child or the child's property;
- b) to determine the law to be applied by signatory states with jurisdiction; and,
- c) for the recognition and enforcement of "measures of protection" among signatory states.

Under article 3, *measures* is given an expansive meaning that includes determining a parent's right to:

- a) exercise parental responsibilities in respect of a child;
- b) custody of a child, including the right to decide the child's place of residence;
- c) guardianship of a child; and,
- d) manage a child's property.

Under article 2, the convention applies to children under the age of 19.

The bill would add a number of new provisions to the *Divorce Act* necessary to address the Hague Convention on Parental Responsibility and Protection of Children.

The bill would give the convention the force of law in Canada under section 30.1(1), subject to certain provincial limitations expressed at section 30.3, and the convention would prevail in the event of any inconsistencies between it and any federal legislation under subsection (2).

The bill would supplement the jurisdictional rules in sections 4, 5, 6 and 6.1 of an amended *Divorce Act* with respect to applications for parenting orders under section 16.1 of the act, contact orders under section 16.5 and variation orders under section 17 as follows:

- a) the courts of a province will *not* have jurisdiction where a child is habitually resident in a signatory state, under section 30.4, unless
  - i. the child is present in the province and the child is a refugee or a displaced person under article 6 of the convention, under section 30.6,
  - ii. the court would have jurisdiction under section 3 of the *Divorce Act* and at least one spouse has parental responsibility in respect of the child, under section 30.7(1)(a),
  - iii. the court would have jurisdiction under section 3 and the spouses and anyone else with parental responsibility in respect of the child accept the jurisdiction of the court, under section 30.7(1)(b),
  - iv. the court would have jurisdiction under section 3 and the court believes it is in the best interest of the child to take jurisdiction, under section 30.7(1)(c),
  - v. there is an agreement between the court and the signatory state that the court will have jurisdiction pursuant to articles 8 or 9 of the convention, under section 30.9, or

- vi. the case is urgent;
- b) the courts of a province will have jurisdiction where the child has been wrongfully removed to that province and the child has become habitually resident in the province pursuant to article 7(2) of the convention, under section 30.5; and,
- c) the courts of a province *may decline* to exercise jurisdiction where there is an agreement between the court and the signatory state that the signatory state will have jurisdiction pursuant to articles 8 or 9 of the convention, under section 30.8.

Under section 31.1, a “measure” taken by a signatory state that has the effect of varying a domestic parenting order or a contact order is deemed to be a variation order under section 17 of the act, subject to the discretion of the court on application under section 31.2(1), and may be enforced as a domestic order under s. 31.3.

Judicial decisions to recognize or to *not* recognize a “measure” have effect throughout Canada under section 31.2(2) and (3).

### ***Family Orders and Agreements Enforcement Assistance Act***

The *Family Orders and Agreements Enforcement Assistance Act* is a federal statute intended to assist in the enforcement of support orders, custody orders and access orders by allowing individuals and provincial agencies access to federal data, allowing federal funds owed to payors and other debtors to be garnisheed, and allowing federal licences to be suspended on the application of provincial agencies.

The bill would amend the definitions at section 2 of the FOAEAA to accord with the new language on parenting orders and contact orders proposed for the *Divorce Act*.

The more important other amendments proposed to the FOAEAA are these:

- a) provincial child support services, the designated authorities referenced in the interjurisdictional support order portions of the *Divorce Act*, and the central authorities referenced in the Hague Child Support Convention portions of the act will be included among the agencies able to obtain information under the act;
- b) federal data may be accessed when a support order *de novo* or a variation order are sought, not only as an enforcement measure when an order has been obtained;
- c) provincial child support services may seek federal data when recalculating a child support order;
- d) the definition of “order” for the garnishment provisions of the act is amended to include

- i. agreements for the payment of support,
- ii. orders and agreements for the payment of expenses related to the exercise of parenting time and contact, and
- iii. orders for the payment of expenses related to the denial of or failure to exercise parenting time and contact;

and,

- e) the definition of “support order” for the licence suspension provisions of the act is amended to include agreements for the payment of support;

*Part I of this overview concerned the key portions of Bill C-78 amending the Divorce Act with respect to terminology, the duties of spouses and counsel, the best interests of children, parenting orders and contact orders, the relocation of spouses and children, the inter-jurisdictional variation of support orders and child support calculation services.*