FAMILY DISPUTE RESOLUTION INSTITUTE OF ONTARIO (FDRIO)

SUBMISSION RE BILL C-78,
AMENDMENTS TO THE DIVORCE ACT

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Attention: Marc-Olivier Girard, Clerk of the Committee

Standing Committee on Justice and Human Rights

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We are writing to you on behalf of the Family Dispute Resolution Institute of Ontario (FDRIO), an organization of diverse Family Professionals whose membership includes the leaders in the fields of Family Law, Financial Experts (Accountants, Business Valuators and Divorce Financial Professionals), and Child and Family Mental Health Professionals.

FDRIO members offer assistance to those who choose to resolve their issues out of court and to those whose issues are better served in a court managed process or in litigation.

We offer a wide range of services to these families, including screening for Domestic Violence and Power Imbalance, Legal advice and representation, Mediation, Arbitration (Med-Arb), Parenting Coordination, creating Parenting Plans, Interviewing Children, Counselling to address mental illness, addictions and abuse, Coaching, Valuations, Financial Planning, Custody Assessments, Public Education and Advocacy.

GENERAL COMMENTS:

We applaud the main objectives of Bill C-78, namely to:

- Encourage more cooperative out of court dispute resolution options, where appropriate
- Directly address the issue of Domestic Violence and its impact on children and the capacity to care for children
- Replace outdated "Custody and Access" language with "Parenting Orders" that emphasize ***responsibilities*** rather than parental rights, ***decision-making*** and ***allocation of time or contact with a child***
- Set out a non-exhaustive list of criteria for assessing the child's "best interests"
- Clarify the important factors and onus in relocation cases
- Use administrative processes, to reduce court applications, in order to update child and spousal support orders or agreements

KEY OBJECTIVES OF DIVORCE REFORM:

While we support Bill C-78 overall, there are a number of areas where greater clarity is important to achieve its objectives. In our view the key elements of any divorce reform include:

- A recognition that separation occurs primarily due to psychological stresses, personality, cultural, financial, domestic violence, mental health or addiction issues. This creates significant disruption, uncertainty and stress for most families. Couples need or would benefit from more encouragement to explore supportive processes that do not add undue conflict, cost, or complexity and can be completed in a timely fashion. Of course screening for voluntariness and power imbalance and domestic violence is essential to ensure the process chosen is appropriate and designed with safety as a priority.
- An awareness that, apart from domestic violence or other risk of harm, most children want support, love and involvement with both parents.
- The process of separation and divorce should reduce or minimize family conflict, in the best interests of children.
- Separation and divorce are a period of transition and require considerable re-ordering of family life that is best managed with the assistance of professionals outside court – but with access to court if necessary. Families need to make practical decisions and benefit from a timely and supportive process that does not exacerbate conflict. When couples are supported in making their own decisions, the outcomes are generally respected and endure.
- Adversarial processes almost inevitably raise the level of conflict. However, cases of high conflict, abusive parents, or those with complex situations, who are unable or unwilling to address their issues cooperatively, there is a benefit to being fast tracked to Court. These families need a Unified Family Court with Family specialty judges and a policy of one judge per family for both separation and child welfare matters.
- A recognition that children and their parents, need clarity in their Parenting Plan as to
    i. Their responsibilities for the caretaking of their children.
    ii. How <u>significant</u> decisions (eg re Education, Religion, Health Care and Extra Curricular activities) will be made and disputes resolved.
    iii. When each parent is the responsible care-taker for the children (a Parenting Schedule that includes a Regular Schedule, School Breaks and PD Days and religious ore other “special” days (Birthdays, Mother’s Day/Father’s Day, etc), and
    iv. The process to follow when their plans need to change in predictable ways (eg as children get older, new partners enter the picture, mobility, changes in employment, significant health concerns) or when disputes arise.

Over the past few decades, it has become clear that families are frustrated with both the process, the cost, and the timeliness of addressing their separation issues. Increasingly individuals are appearing in court self-represented, with a resulting frustration by both litigants and the court system. The proposed legislation can offer an opportunity to better meet the needs of families and reduce the unnecessary burden on the courts.

Our many years of professional experience, confirmed by court data highlighting the concerns of separating couples, support the conclusion that more effective access to justice can be best achieved by increasing public education at an early stage, as to rights, responsibilities, safety measures, essential information to be gathered, a description of a Parenting Plan, and dispute resolution options– before couples become enmeshed in a lengthy, adversarial and expensive court process. Bill C-78 could make this a pre-requisite for those choosing to file for divorce or for issues that reflect a change of circumstances. Each province could be responsible for designing and implementing a program suitable for its populations' needs.

SPECIFIC COMMENTS:

In light of these objectives

1. **Definitions:** ***Family Dispute Resolution Process and Family Justice Services.*** We recommend that:
   - The definition of ***Family DR Process*** be changed to say "means a ***consensual*** process outside of court agreed upon by the parties", ….".
   - "Mediation/arbitration, arbitration and parenting coordination" be added to the list of process options. While not all available options have fully consensual outcomes, they do share many of the criteria; namely, they are all outside of court, they are selected voluntarily, the professional is chosen on consent of the parties, the parties must be screened for domestic violence and appropriateness and in the case of arbitration, they must have ILA. Also, both Med-Arb and PC attempt a voluntary outcome first and a decision by a professional is only rendered if an impasse is reached (as agreed by the parties).

- There should be a duty for ALL FDR professionals to screen for domestic violence and assess the appropriateness and voluntariness of the various process options. The Divorce Act should adopt the wording of the recent ***B.C. Family Law Act***; namely: All "family dispute resolution professionals", should include family law lawyers, family law mediators, collaborative professionals, family justice counselors or other supportive court personnel."
- The definition of ***Family Justice Services*** needs clarification. Specifically, we recommend that ***Family Justice Services*** be subsumed under ***Family DR Processes***. While both the FJS and the FDR processes happen in court, some FDR processes happen outside court. Having 2 different categories is confusing.
- We suggest including such services as the Mandatory Information Program (MIP) Online Family DR programs, Duty Counsel, experienced DR professionals, the Family Law Information Centre (FLIC) and triage to community services under the umbrella of ***Family DR Processes***.

2. Duties for Parties and Legal Advisors – we recommend that:

- There should be clarification as to the definition of a 'legal advisor' vs a 'lawyer'.
- The duty on parties and legal advisors be clarified with specific examples. At present, it is not clear what is expected in order to fulfill this obligation.
- Family lawyers should attend a minimum of 2 day training in Screening for DV and Power Imbalance.
- Lawyers should be required to inform clients about ***Family Dispute Resolution Processes*** and discuss which options may not be appropriate in cases of domestic violence, coercion, lack of capacity to negotiate or bad faith negotiation. Today Law Schools, Bar Associations and ADR associations offer many options to educate lawyers about FDR services and there should be NO exemption for lawyers on the basis that they are unaware of such services.
- In cases where the lawyer is unsure about safety, or in complex cases, lawyers should refer clients to a trained ' DV Triage' professional who can assess the appropriateness and voluntariness of a referral to an FDR process.
- The lawyers' duty should arise from the time they are retained, not delayed until an action is commenced.
- There should be specific consequences for lawyers or legal advisors failing to fulfil their duties. In the past, this obligation has not been fulfilled as was intended.

3. The addition of **Domestic Violence** to the criteria of 'Best Interests' is a positive addition, but it is important to recognize other forms of 'harm' to children, such as neglect, emotional abuse, and failure to provide medical care.
4. **Views of the Child**

We support the importance of encouraging more opportunities for the views of children to be heard when creating a Parenting Plan. Research in other jurisdictions, eg Australia and the U.S. demonstrates that when trained professionals meet with children to hear their views, anser their questions and address their fears and concerns, parenting disputes are often resolved and Plans created that ensure children feel heard and are more likely to accept the outcome. This suggestion is consistent with Article 12 of the *United Nations Convention on the Rights of the Child*, to which Canada is a signatory, and would be consistent with provincial legislation that requires consideration of the child's views as a best interests' factor.

We do <u>not</u> support the proposal that the best person to interview children is the judge. Rather, this is a role for a trained children's mental health professional and could be a part of a Mediation or a Collaborative process – preferably out of court, in an informal setting.

Judges are already overburdened and courts are clogged with families facing long delays. Bringing children to court means drawing them into a highly polarized conflict, and increases the likelihood that parents will put children under considerable pressure – or offer them bribes to choose sides.

Perhaps a judicial interview with adolescents caught in a highly polarized Parenting Alienation case, may be warranted, but not as the person of choice – or the venue of choice for creating a reassuring and supportive venue for understanding children's perspective.

5. **The Relocation rules** are helpful, but potentially too complex. We recommend several changes:
   - The legislation specifies too many parties and will be difficult to administer.
   - Rather than encouraging parties to set specific geographic limits, which may not be practical (for example, with construction delays, a short distance may take more travel time than a place that is several kilometres farther), the legislation should specify that **when a contemplated move will make the existing parenting schedule no longer feasible**, there be a graduated list of DR process that the parties must choose from, in order to resolve the issue – <u>prior</u> to moving with the

child. This will encourage the moving party to give notice of a move at the earliest time rather than delaying until the last minute.

- The graduated list could contain the following steps:
    i. give written notice of a pending move, including the address at an early time, if possible 90 days in advance;
    ii. exchange concerns about the move and any suggested changes in the Parenting Schedule in writing;
    iii. consult with a lawyer, and/or return to a prior DR process (eg mediation, med-arb/PC or Collaborative professional);
    iv. ask for a voice of the child assessment if the child is 7 years of age or older; and
    v. if the matter is not resolved, agree to either arbitration or court. The moving parent can always choose to move, but it should be clear that the child(ren) will not necessarily move until the matter is resolved.
- There should be a requirement to give the child a voice from age 7 on when there will be a move of such a distance that the children have to change schools, extracurricular activities and be too far to have easy access to important friends and family members.

6. We are pleased with the provisions to permit **administrative processes for support variations**.
7. **Re-instate Family Court Clinics.** We recommend the Federal Ministry of Justice, the Provincial Ministries of the Attorney General and Health work on a cooperative initiative to restore or enhance Family Court Clinics. They were very successful and served as wonderful professional training grounds for Psychiatrists, Psychologists and Social Workers and were located in Kingston, Toronto and London. They would make a significant contribution in several additional locations; such as Ottawa, Windsor, Barrie and Thunder Bay.

    These agencies should be jointly funded (rent, equipment and staff salaries) and located outside the UFC's, as clients benefit from a less formal, more supportive and clinical environment. These Clinics offer diverse family professional services to separating families, such as educational programs (Parenting After Separation; Mandatory Family Law Education and Dispute Resolution options) as well as assessments, brief therapy and referrals to community agencies. They are often organized geographically so that they develop expertise in local resources and can help families find much needed

assistance in a timely manner. These Family Court Clinics fill an important need. They assist the court and families with Separation and Child Welfare issues such as allegations of abuse or neglect, mental health, addiction, parent alienation, grandparent and extended family disputes, as well as special needs of children. The staff are publicly funded and therefore affordable. If desired the clinics could apply a sliding scale.

NOTE: The B.C. Family Law Act, 2013 was enacted several years ago and reflects many of the objectives of Bill C-78. We recommend adopting the following language from the B.C. Act to ensure that Bill C-78 reflects the current best practices:

"family dispute resolution" means a process used by parties to a family law dispute to attempt to resolve one or more of the disputed issues outside court, and includes

(a) assistance from a family justice counsellor under Division 2 [Family Justice Counsellors] of Part 2,

(b) the services of a parenting coordinator under Division 3 [Parenting Coordinators] of Part 2,

(c) mediation, arbitration, collaborative family law and other processes, and

(d) prescribed processes;

“family dispute resolution professional” means:

> (a) a family justice counsellor [not applicable in Ontario and many other provinces];
>
> (b) a parenting coordinator;
>
> (c) a lawyer advising a party in relation to a family law dispute;
>
> (d) a mediator conducting a mediation in relation to a family law dispute, if the mediator meets the requirements set out in the regulations;
>
> (e) an arbitrator conducting an arbitration in relation to a family law dispute, if the arbitrator meets the requirements set out in the regulations;
>
> (f) a person within a class of prescribed persons; [allows for additional professionals as the field of family law evolves]

Duties of family dispute resolution professionals

8 (1) A family dispute resolution professional consulted by a party to a family law dispute must assess, in accordance with the regulations, whether family violence may be present, and if it appears to the family dispute resolution professional that family violence is present, the extent to which the family violence may adversely affect

(a) the safety of the party or a family member of that party, and

(b) the ability of the party to negotiate a fair agreement.

(2) Having regard to the assessment made under subsection (1), a family dispute resolution professional consulted by a party to a family law dispute must

(a) discuss with the party the advisability of using various types of family dispute resolution to resolve the matter, and

(b) inform the party of the facilities and other resources, known to the family dispute resolution professional, that may be available to assist in resolving the dispute.

(3) A family dispute resolution professional consulted by a party to a family law dispute must advise the party that agreements and orders respecting the following matters must be made in the best interests of the child only:

(a) guardianship;

(b) parenting arrangements;

(c) contact with a child.

"family violence" includes

(a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,

(b) sexual abuse of a family member,

(c) attempts to physically or sexually abuse a family member,

(d) psychological or emotional abuse of a family member, including

(i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,

(ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,

(iii) stalking or following of the family member, and

(iv) intentional damage to property, and

(e) in the case of a child, direct or indirect exposure to family violence;

In relation to the out of court models for dispute resolution, consider adding the following purpose to the legislation:

The purposes of this Part are as follows:

(a) to ensure that parties to a family law dispute are informed of the various methods available to resolve the dispute;

(b) to encourage parties to a family law dispute to resolve the dispute through agreements and appropriate family dispute resolution before making an application to a court;

(c) to encourage parents and guardians to

(i) resolve conflict other than through court intervention, and

(ii) create parenting arrangements and arrangements respecting contact with a child that is in the best interests of the child.