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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

Tabled in the House of Commons, May 22, 2018

Explanatory Note

The Minister of Justice prepares a “Charter Statement” to help inform public and Parliamentary debate on a government bill. One of the Minister of Justice’s most important responsibilities is to examine legislation for consistency with the *Canadian Charter of Rights and Freedoms* (“the Charter”). By tabling a Charter Statement, the Minister is sharing some of the key considerations that informed the review of a bill for consistency with the Charter. A Statement identifies Charter rights and freedoms that may potentially be engaged by a bill and provides a brief explanation of the nature of any engagement, in light of the measures being proposed.

A Charter Statement also identifies potential justifications for any limits a bill may impose on Charter rights and freedoms. Section 1 of the Charter provides that rights and freedoms may be subject to reasonable limits if those limits are prescribed by law and demonstrably justified in a free and democratic society. This means that Parliament may enact laws that limit Charter rights and freedoms. The Charter will be violated only where a limit is not demonstrably justifiable in a free and democratic society.

A Charter Statement is intended to provide legal information to the public and Parliament on a bill’s potential effects on rights and freedoms that are neither trivial nor too speculative. It is not intended to be a comprehensive overview of all conceivable Charter considerations. Additional considerations relevant to the constitutionality of a bill may also arise in the course of Parliamentary study and amendment of a bill. A Statement is not a legal opinion on the constitutionality of a bill.

Charter Considerations

The Minister of Justice has examined the 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*, for consistency with the Charter pursuant to her obligation under section 4.1 of the *Department of Justice Act*. This review involved consideration of the objectives and features of the bill.

What follows is a non-exhaustive discussion of the ways in which Bill C-78 potentially engages the rights and freedoms guaranteed by the Charter. It is presented to assist in informing the public and Parliamentary debate on the bill.

Overview

This bill will modernize federal family law through amendments to the *Divorce Act*, the *Family Orders and Agreements Enforcement Assistance Act* (FOAEAA) and the *Garnishment, Attachment and Pension Diversion Act* (GAPDA). The bill also makes a consequential amendment to the *Criminal Code*.

These proposed changes are intended to promote faster, more cost-effective and lasting solutions to family law disputes, reducing the burden on courts and leading to better outcomes for families. The proposals would advance four goals: promoting the best interests of the child, addressing family violence, reducing child poverty, and making Canada's family justice system more accessible and efficient.

The Charter rights and freedoms potentially engaged by the proposed amendments include sections 6, 7, and 8.

Section 6 of the Charter protects the rights of Canadian citizens to enter, remain in and leave Canada, and the right of citizens and permanent residents to move about, reside, and work in the province of their choice.

Section 7 of the Charter guarantees to everyone the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. These principles require, among other things, that any measures that engage the right to life, liberty or security of the person respect basic principles of procedural fairness.

Section 8 of the Charter protects against "unreasonable" searches and seizures. The purpose of section 8 is to protect individuals against unreasonable intrusion into a reasonable expectation of privacy. A search or seizure that intrudes upon a reasonable expectation of privacy will be reasonable if it is authorized by a law, the law itself is reasonable (in the sense of striking an appropriate balance between privacy interests and the state interest being pursued), and it is carried out in a reasonable manner.

Amendments to the *Divorce Act*

Amendments to the *Divorce Act* are aimed at ensuring that, when parents divorce, the best interests of the child are protected.

Clause 11 of the bill adds section 16.1 to the Act to authorize courts to make “parenting orders”, which would allocate the exercise of parenting time and decision-making responsibility in respect of any “child of the marriage”, a term defined at paragraphs 2(1) and 2(2) of the Act. This will replace the current authority conferred by the Act to make “custody orders.” Either or both of the spouses will be able to apply for a parenting order. In addition, a person other than a spouse who is a parent, stands in the place of a parent, or intends to stand in the place of a parent can apply for a parenting order, with leave from the court. A person other than a spouse who does not seek a parenting role, for example a grandparent, will be able to apply for a contact order in respect of the child under section 16.7 of the amended Act, with leave from the court.

Clause 11 of the bill amends section 16 of the Act to direct courts to take into consideration only the best interests of the child of the marriage in making a parenting order. Section 16 of the amended Act will also set out relevant factors for determining the best interests of the child.

Clause 11 of the bill adds sections 16.8 to 16.96 to the Act, which create a process requiring individuals with parenting time or decision-making responsibility to notify any other person with parenting time, decision-making responsibility, or a contact order of an intention to change their or the child’s place of residence or to relocate. The bill provides that the court may dispense with the usual notice requirements for changes in place of residence and relocations only where appropriate, pursuant to paragraphs 16.8(3) or 16.91(3), such as where there is a risk of family violence. A person with parenting time or decision-making responsibility who receives a notice of relocation can apply to the court to object to the relocation of the child. In the event of such an application, the court will determine whether to authorize the relocation on the basis of the best interests of the child, as informed by the factors listed in sections 16 and 16.95 and in accordance with the burdens of proof at section 16.93.

Rights and Freedoms Potentially Engaged

Section 6 of the Charter protects the rights of Canadian citizens to enter, remain in and leave Canada, and the right of citizens and permanent residents to move about, reside, and work in the province of their choice. Sections 16.9 to 16.96 of the amended Act impose procedural requirements on individuals with parenting orders intending to relocate. This has the potential to engage the mobility rights of parents, children of the marriage, or other individuals with a parenting order.

The following considerations support the consistency of the amendments with section 6 of the Charter. The amendments do not grant a court the authority to prevent a parent or other person with parenting time or decision-making responsibility from relocating. Relocation orders can only authorize or prohibit the relocation of the child. A relocation order that engages the mobility rights of the child can only be made in pursuit of the best interests of the child.

Section 7 of the Charter guarantees to everyone the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Because parenting orders determine how much time, if any, a parent can spend with their child, they have the potential to engage the psychological liberty and security interests protected by section 7. If a parenting order does engage interests protected by section 7, the authority for a parenting order and the process for its issuance would have to respect the principles of fundamental justice, such as the basic requirements of procedural fairness.

The following considerations support the consistency of the amendments with section 7 of the Charter. By entrusting to courts the authority to adjudicate disputes and make decisions about parenting time, decision-making responsibility, and relocation, the Act ensures that such disputes will be resolved in a fair and impartial manner. The Act provides that the court may dispense with the usual notice requirements for changes in place of residence and relocations only where appropriate, such as where there is a risk of family violence. Moreover, decisions concerning parenting time, decision-making responsibility, and relocation will be made based only on the best interests of the child. There are no presumptions in the Act with respect to parenting time or decision-making responsibility. Rather, courts making parenting or contact orders will analyze each application on a case-by-case basis, taking into account only the best interests of the child. The best interests of the child test gives the court significant flexibility to tailor the content of the order to each family's circumstances. In allocating parenting time, courts are also directed to give effect to the principle that a child should have as much time with each parent as is consistent with the best interests of the child.

Amendments to the *Family Orders and Agreements Enforcement Assistance Act*

Amendments to FOAEAA 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.

FOAEAA currently authorizes courts or court officers, provincial support enforcement services, and peace officers investigating child abduction offences to request and receive personal information contained in federal databanks. The information banks that can be searched are designated in the *Release of Information for Family Orders and Agreements Enforcement Regulations*. The information disclosed may include social insurance numbers, income and asset information, and location information.

Applications by courts

Section 7 of FOAEAA currently permits a court, on application by a person, service, agency or body entitled to have a family provision enforced, to make an application to the Minister of Justice to have information banks searched and information released, on a confidential basis, for the sole purpose of enforcing support.

Clause 40 of the bill amends sections 6 to 14 of FOAEAA. The amendments to section 7 will expand the purposes for which applications to the Minister may be made. In addition to enforcing a support order, applications can be made for the purpose of having a support provision established or varied. The amendments also add various safeguards to the process to help ensure that the release of information pursuant to FOAEAA does not jeopardize the safety and security of any individual, and to help ensure that the information released is not available to the public.

Applications by provincial enforcement services

Clause 41 of the bill amends sections 15 to 20 of FOAEAA. Section 15 will modify the scheme by which a provincial enforcement service may apply to the Minister of Justice to have the designated information banks searched in order to provide information prescribed in the regulations to the provincial enforcement service. Currently, under FOAEAA, the provincial enforcement service can only apply to obtain information about the location of a person who is in arrears under a support order. The new subparagraph 15(2)(c) will add an additional purpose for which a search can be conducted: locating the creditor or a debtor who may not be in arrears.

In addition, the requirement that designated provincial information banks be searched prior to the making of an application will be removed. This will permit simultaneous searches of both provincial and federal banks and enable provincial enforcement services to receive tracing information more quickly. Moreover, provincial enforcement services will no longer have to include an affidavit as part of their application. The information that is currently included in the affidavit will instead be provided to the Minister in the application form, which contains a binding declaration that must be signed by an officer of the provincial enforcement service.

Applications by peace officers

Amendments to section 14 of FOAEAA would remove the requirement that a charge be laid under sections 282 or 283 of the *Criminal Code* (child abduction) prior to submitting a FOAEAA application. A peace officer would instead have to attest that they have reasonable grounds to believe that an offence referred to in sections 282 or 283 has been committed when applying to the Minister to have the designated information banks searched and to have information released. The new section 5.1 will also enable the Minister of Justice to enter into an agreement with any police force in Canada concerning the searching for and the release of information under Part 1 of FOAEAA.

Designation of new bodies authorized to apply for information

The bill also amends FOAEAA to allow for the disclosure of information to additional provincial government entities dealing with family justice matters.

Section 15.1 will authorize a provincial child support service to apply to have the designated information banks searched and to have the information prescribed in the regulations released to the provincial child support service for the purposes of calculating or recalculating child support amounts.

Section 16 will authorize designated authorities (persons or entities authorized under the *Divorce Act* or a provincial act for processing inter-jurisdictional support applications and designated in an agreement with the province) to apply to have the designated information banks searched and have information released to assist with locating parties or prospective parties in support cases.

Section 16.1 will authorize a provincial or territorial Central Authority designated for the purposes of the 1996 *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children* and the 2007 *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance* to make an application to have the information banks designated in the Regulations searched and have information released to help to locate an individual in a case involving a request for assistance or an application under one of the Conventions.

Pursuant to section 6.2, a provincial enforcement service may act on behalf of a provincial child support service, a designated authority or a Central Authority for the purposes of making an application under Part I of FOAEAA.

Rights and Freedoms Potentially Engaged

Section 8 of the Charter, the right to be free from unreasonable search or seizure, is potentially engaged by the expanded search and disclosure powers that are created by the bill. Section 8 protects against unreasonable intrusion into anyone's reasonable expectation of privacy, including in relation to their personal information. This could include searching and disclosing information already in the hands of government actors, such as in federal information banks. Authorizing the Minister of Justice to disclose specified information to an expanded list of provincial government entities, as well as in new circumstances and for new purposes, potentially engages a person's reasonable expectation of privacy.

The following considerations support the consistency of the amendments with section 8 of the Charter. By expanding the circumstances in which information can be disclosed to help with the establishment, variation, and enforcement of family support orders, the amendments will support some of Canada's most vulnerable families. The expanded disclosure authorities aim to lessen the financial hardship of support recipients and their children, by assisting provinces and territories to effectively locate support payers as quickly as possible. The amendments will also improve access to justice for Canadians seeking to establish or vary support provisions in situations where a party does not meet their income disclosure obligations. Moreover, the information being disclosed is information that is already under government control in a federal databank, and therefore attracts a diminished expectation of privacy. There are additional safeguards that apply to the specific disclosures, as set out below.

Disclosure to courts

The following additional considerations support the consistency of the amendments to section 7 of FOAEAA with section 8 of the Charter. Before a court can authorize a request to the Minister to disclose location information pursuant to section 12 of FOAEAA, the court must be satisfied that the sole purpose of the application is to obtain information in order to establish or vary a support provision or to obtain information in order to enforce a family provision, and that the order is not likely to jeopardize the safety or security of any person. If the order is to be made *ex parte*, the applicant must submit an affidavit stating that reasonable steps have been taken to locate the party whose location information is being sought. Upon releasing the information, the Minister also has a duty to inform the person whose information is being released.

Information given to a court pursuant to an application under FOAEAA must be sealed and kept in a location to which the public has no access. The court is authorized to disclose the information to individuals or bodies that it considers appropriate only for the purpose for which it was requested (varying a support order or enforcing a provision of a family order or agreement), and may make any order to protect the confidentiality of the information.

Disclosure to provincial enforcement services

The following additional considerations support the consistency of the amendments to section 15 of FOAEAA with section 8 of the Charter. Authorized disclosures continue to be limited to circumstances aimed at helping families entitled to enforce support provisions. Moreover, the application process will be accompanied by procedural safeguards set out in the *Release of Information for Family Orders and Agreements Enforcement Regulations*, such as a requirement that the provincial enforcement service submit a binding declaration signed by one of its officers.

Disclosure to peace officers

The following additional considerations support the consistency of the amendments to section 14 of FOAEAA with section 8 of the Charter. The amendments aim to provide peace officers with greater flexibility in the investigation of child abduction cases, which often require urgent action to prevent further harm. Enabling peace officers to obtain tracing information from federal databanks prior to a charge being laid has the potential to speed up investigative efforts in many cases. Moreover, a peace officer's application under the amended section 14 of FOAEAA will have to be accompanied by an affidavit setting out reasonable grounds to believe that an offence referred to in sections 282 or 283 of the *Criminal Code* has been committed, stating that the information requested will be used to assist in the investigation of the offence, identifying the person suspected of having committed the offence, and setting out the particulars of the reasonable steps that have been taken to locate the person alleged to have committed the offence and the child or children alleged to have been abducted. The amendments also require that agreements on the disclosure of information concluded with police forces establish safeguards for the protection of the information. The amendments further provide that the Minister shall not disclose information to a peace officer unless satisfied that the safeguards provided for are in place.

Disclosure to provincial child support services, designated authorities and Central Authorities

The following additional considerations support the consistency of the amendments to sections 15.1, 16 and 16.1 of FOAEAA with section 8 of the Charter. The entities who can apply to the Minister for information to be disclosed remain exhaustively listed in the Act. The amendments require that agreements on the disclosure of information concluded with provinces and territories establish safeguards for the protection of the information. The amendments further provide that the Minister shall not disclose information to a provincial service or authority unless satisfied that the safeguards provided for are in place.