The *Divorce Act* Changes Explained: Part II

This technical guide provides information about changes to the Divorce Act through legislation Parliament passed in 2019. Specifically, it includes an explanation of federal family law amendments related to inter-jurisdictional family law matters, as well as technical information about amendments related to the *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (2007 Convention)* and the *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996 Convention)*. Each entry details the amendment to the legislation, explains the change, and provides the reason for it.

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Introduction

The objective of this paper is to provide guidance to Canadian family law practitioners respecting changes introduced by former 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] (former Bill C-78) affecting inter-jurisdictional support and parenting (custody)[2] and the interaction of new provisions with provincial and territorial laws and procedures. The paper will address what practitioners need to know about new rules and procedures under the *Divorce Act*[3] as well as federal implementation of two private international law Conventions that touch on family law[4], by providing practical information and practice tips.

Please refer to **Appendix A** for definitions.

[1] Former 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 Sess, 42nd Parl, 2019, c 16 (assented to 21 June 2019), online: <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-78/royal-assent> [Bill C-78].

[2] Former Bill C-78 introduced changes to terminology. The term "custody" in the Canadian *Divorce Act* was replaced by "parenting time".

[3] *Divorce Act*, RSC 1985, c 3 (2nd Supp).

[4] *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*, 19 October 1996 (entered into force 1 January 2002) [1996 Convention]. See online: <https://assets.hcch.net/docs/f16ebd3d-f398-4891-bf47-110866e171d4.pdf>; *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, 23 November 2007 (entered into force 1 January 2012) [2007 Convention]. See online: <https://assets.hcch.net/docs/14e71887-0090-47a3-9c49-d438eb601b47.pdf>.

Part I: The Inter-jurisdictional Recovery of Family Support in Canada

An inter-jurisdictional support case is one in which the parties live in different jurisdictions. Those jurisdictions could refer to either different provinces or territories or different countries. These types of cases are often referred to as "ISO" cases. ISO is the acronym for provincial and territorial inter-jurisdictional support orders legislation (entitled *The Inter-jurisdictional* or *Interjurisdictional Support Orders Act* depending on the province or territory). It governs the establishment, variation, registration, and enforceability of family support orders in the common law provinces and territories when those orders are made in other provinces or territories pursuant to provincial/territorial legislation or in other countries that have been designated as "reciprocating jurisdictions"[5]. A law based on the common law provinces/territories' model uniform ISO legislation and adapted to the Québec civil law system was passed, but is not in effect[6]. In Québec, the current applicable inter-jurisdictional legislation is *An Act respecting reciprocal enforcement of maintenance orders* (AREMO)[7].

Constitutional Context

The Canadian Constitution distributes legislative powers between the federal and provincial/territorial legislatures. As a result, the power to make laws concerning family support obligations is a shared jurisdiction. The provinces and territories have jurisdiction over family support, except in the context of a Canadian divorce, and for most aspects of the enforcement of support orders. Each province and territory runs a family support enforcement program (or maintenance enforcement program) which collects and disburses family support payments pursuant to orders and agreements registered with these programs.

[5] See definition of "reciprocating jurisdiction" in Appendix A, *below*.
[6] *An Act respecting the reciprocal issue and enforcement of support orders*, CQLR, c O-1.2.
[7] *An Act respecting reciprocal enforcement of maintenance orders*, CQLR c E-19 [AREMO].

The federal government is responsible for the law governing family support obligations in proceedings pursuant to the *Divorce Act*. The federal government does not run its own enforcement system. Rather, it supports the provincial and territorial systems by: 1) providing information to help locate a support payor, 2) garnishing federal moneys to satisfy a support obligation, and 3) enabling the suspension or denial of certain federal licenses such as federal marine and aviation licenses and including the Canadian passport, of persons in persistent default[8] of their family support obligations. These supportive measures are authorized by the *Family Orders and Agreements Enforcement Assistance Act* (FOAEAA)[9].

What does this have to do with ISO?

Since the provinces and territories each have the power to make their own laws in certain fields, they are separate entities when it comes to issues falling within their own (provincial/territorial) jurisdiction. This means that if a court in a province makes a support order under its provincial law (i.e. non-*Divorce Act* case) against someone living outside the province, the order may not be "recognized" (given effect) outside of the province where the order originated. To address the challenges of inter-jurisdictional enforcement, as early as 1946[10], most provinces and territories began enacting reciprocal enforcement of maintenance or support orders acts (REMO/RESO) to facilitate the enforcement of support obligations between parties residing in different jurisdictions.

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[8] Under the *Family Orders and Agreements Enforcement Assistance Act*, RSC 1985, c 4 (2nd Supp) [FOAEAA], a person is in “persistent default” of their support obligations if they have failed to pay their support for three pay periods or they are in arrears of more than $3,000.

[9] *Ibid*. The *Garnishment, Attachment and Pension Diversion Act,* RSC 1985, c G-2 also assists with the enforcement of support by providing for the garnishment of salaries paid to federal public servants and federal contractors as well as salaries paid by parliamentary entities (such as the House of Commons and the Senate) and the diversion of designated federal public service pension benefits to satisfy support obligations.

[10] For further discussion of REMO, see the Law Reform Commission of Canada's report Family Law: Enforcement of Maintenance Orders (Ottawa: Information Canada, 1976). For a history of the various amendments to legislation from its inception in 1946 until 1970, see J.-G. Castel, "Recognition and Enforcement of Foreign Judgments in Personam and In Rem in the Common Law Provinces of Canada" (1971) 17 McGill L.J. 11 at 163-79.
See reference to Ontario’s 1950 REMO Act (*The Reciprocal Enforcement of Maintenance Orders Act, R.S.O. 1950)* in the following decision: 1955 CanLII 16 (SCC) | A.G. for Ontario v. Scott | CanLII

REMO/RESO laws addressed the challenges associated with the enforcement of foreign or extra-provincial maintenance orders by providing a simplified way for an order made in one jurisdiction to be made enforceable in another jurisdiction. The laws also set out a procedure in which a person seeking support (or seeking to vary support) could start an application in their own province/territory that could ultimately result in an enforceable support order made in the province/territory where the respondent lived. REMO/RESO legislation set out a two-step process whereby an applicant was required to obtain a provisional order in their province/territory of residence and request confirmation of that order by a court in the respondent's province/territory.

Over time, however, it became apparent that the REMO/RESO process could be improved. Consequently, on January 31, 2003, provinces and territories began implementing ISO legislation to repeal and replace REMO/RESO legislation. The new ISO legislation was based on a model uniform law developed by a committee of family law officials from the provincial, territorial, and federal governments. ISO legislation has two main purposes: 1) to enable family support orders and agreements made outside of a jurisdiction to be enforced in the jurisdiction with the greatest ability to do so (usually where the support payor resides); and 2) to enable a party in one jurisdiction to apply to establish or vary a family support order without having to make a court application in the jurisdiction where the other party resides. As of January 1, 2006, ISO legislation is in force in all common law provinces and territories.

ISO legislation introduced a one-step forms-based process[11] that allows a person to send an application to establish or vary a support order through a designated authority in their province/territory to a designated authority in another province/territory where their request will be processed. The designated authority, a provincial/territorial administrative body, having reviewed the application (a package of forms including sworn evidence), will submit the package to the court on behalf of the applicant to obtain a decision. ISO legislation effectively gives full faith and credit to support orders made in other provinces and territories. ISO also includes provisions governing registration of extra-provincial /extra-territorial and foreign support orders for enforcement. It also restricts the ability to apply to set aside registration of foreign support orders based on jurisdictional grounds.

[11] See link to forms in Appendix B, *below*.

The inter-jurisdictional process under Québec's legislation, AREMO[12], resembles the common law provinces'/territories' previous system under REMO/RESO legislation in that it is restricted to provisional variation applications made by creditors. As a result, the recovery of family support in Québec involves a two-step process, which requires the applicant to obtain a provisional order in the jurisdiction where they reside and then have the order confirmed by a court in the respondent's jurisdiction before action can be taken.

Appendix B contains reference information, including a list of links to provincial and territorial ISO legislation, forms and designated authorities.

Practice Tips

- If your client is located in a common law province/territory (and it is a non-*Divorce Act* case), then look to the applicable ISO legislation.
- If your client is in Québec (and it is a non- *Divorce Act* case), then look to Québec's AREMO legislation.
- When a support order is made it should specify under what legislation it is being made – i.e. provincial/territorial ISO legislation/Québec AREMO or the federal *Divorce Act*.
- If you have questions about the process, contact the provincial or territorial designated authority in your client's province/territory of residence.

Provincial/Territorial ISO Legislation and the International Recovery of Family Support: Reciprocity Arrangements

Canada is currently not a party to any international convention concerning the enforcement of family support. In Canada, the international recovery of family support or family maintenance is facilitated by "reciprocity arrangements"[13] between provinces or territories and other countries. Common law provinces and territories have established arrangements pursuant to their ISO legislation under which certain other countries have been designated as "reciprocating jurisdictions"[14], while in the province of Québec, these reciprocity arrangements have been established by designation pursuant to AREMO. Under the *Divorce Act*, further to former Bill C-78 amendments, foreign jurisdictions with which provinces and territories have reciprocity with respect to support matters are referred to as "designated jurisdictions"[15].

[12] AREMO, *supra* note 7.
[13] See definition of "reciprocity arrangements" in Appendix A, *below*.
[14] See definition of "reciprocating jurisdiction" in Appendix A, *below*.
[15] See definition of "designated jurisdiction" in Appendix A, *below*.

Practice Tips

- If you have a client that wishes to have a support order enforced in another country, you can consult provincial or territorial websites or the Department of Justice Canada website to determine whether their province/territory of residence has established a reciprocity arrangement with that country: https://www.justice.gc.ca/eng/fl-df/enforce-execution/enforce-execut.html.
- If there is no reciprocity arrangement, the only way for most Canadians to have a support order enforced in another country is to hire a lawyer in that country and go to court.

Inter-jurisdictional Support under the *Divorce Act*

In 1985, Canada's Parliament enacted major revisions to almost every section of the 1968 *Divorce Act*. The 1985 legislation included procedures under the *Divorce Act* similar to those provided in provincial/territorial legislation to assist parties residing in different provinces and territories. Sections 18 and 19 of the *Divorce Act* introduced REMO/RESO-like provisions that provided for the granting of a provisional variation order in one province or territory and a confirmation hearing in another province or territory.

As of March 1, 2021, the amended *Divorce Act* provisions respecting inter-jurisdictional support are similar to those of ISO legislation adopted by the common law provinces and territories in the early 2000's. There is now greater uniformity across provincial/territorial and federal legislative frameworks.

Divorce Act, Inter-jurisdictional Support, and former Bill C-78

Amendments to the *Divorce Act* under former Bill C-78 streamline inter-jurisdictional processes for establishing and varying support for former spouses. As noted, the previous inter-jurisdictional process under the *Divorce Act* was modeled on the former provincial/territorial reciprocal enforcement of maintenance or support orders acts (REMO/RESO). However, this process was limited to the variation of support orders between provinces and territories. This meant that a former spouse could not obtain an initial (first) support order through the inter-jurisdictional process. In addition, ex-spouses living in another country could not obtain or vary a *Divorce Act* order for support through this process, or have their foreign order, which has the effect of varying a *Divorce Act* support order, recognized and enforced in Canada. These limitations caused challenges for families where one or both former spouses were living abroad.

Amendments to the *Divorce Act* introduced a streamlined process akin to the provincial/territorial ISO process by eliminating the first-stage hearing and introduced a new summary application procedure. Changes also broadened the scope of the previous inter-jurisdictional process by allowing former spouses to obtain or vary a support order under the *Divorce Act* when the parties reside in different provinces/territories, or when one party lives in a province/territory and the other party lives in a "designated jurisdiction"[16]. This process is designed to be easier and less costly for families living in different jurisdictions (i.e. different provinces or territories, or countries). It also ensures consistency between inter-jurisdictional proceedings, whether they are conducted under provincial/territorial inter-jurisdictional legislation (ISO legislation) or the *Divorce Act*. Finally, the changes allow for the recognition of a support order made in a designated jurisdiction, when the foreign order has the effect of varying a *Divorce Act* support order.

The Department of Justice Canada publication *The Divorce Act Changes Explained* includes a description of these amended *Divorce Act* provisions respecting inter-jurisdictional support.

Inter-jurisdictional Proceedings under the Divorce Act involving Provinces/Territories, or involving a Province/Territory and a Designated Jurisdiction

Changes introduced by former Bill C-78 allow a former spouse to make an application to obtain or vary a support order made under the *Divorce Act* through a "designated authority"[17] rather than commencing a court application. The application could be for an initial court order for support or for a variation of an existing support order. It could also be to request that the amount of child support be calculated or recalculated by a "provincial child support service"[18] in an inter-jurisdictional context.

The basic process for outgoing applications is now as follows:

- The former spouse seeking relief submits an application to the designated authority in their own province/territory or the responsible authority in their country (if they live in a designated jurisdiction[19]).

[16] See definition of "designated jurisdiction" in Appendix A, *below*.
[17] See definition of "designated authority" in Appendix A, *below*.
[18] See definition of "provincial child support service" in Appendix A, *below*.
[19] The process will be the same for cases involving a Canadian province or territory and a "designated jurisdiction" and for applications processed by a provincial Central Authority under the 2007 Convention, discussed in the International Conventions section, *below*.

- The designated authority of the applicant reviews the application and makes sure it is complete. It then sends it to the designated authority in the respondent's province or territory.
- The designated authority in the respondent's province/territory then sends the application to either a court in that jurisdiction or to a provincial child support service, if there is such a service in that province/territory with authority to deal with inter-jurisdictional cases.
- The respondent is then given notice of the application along with notice of what the respondent must do to respond to the application, including what information and documents to provide.
- Based on the information from both the applicant and the respondent, either a court or a provincial child support service in the respondent's jurisdiction makes a decision.

Case Illustration

Audrey and Enrico separated two years ago. Audrey lives in Manitoba with their daughter, Tammy, and Enrico moved to Saskatchewan after the divorce.

Enrico has an order under the *Divorce Act* to pay child support. Last week, Audrey found out that Enrico had started a new job with a higher salary. He has been working at his new job for over six months. Audrey wants to vary the amount of child support that Enrico pays since his income has increased. To do that, Audrey can submit an inter-jurisdictional application to the designated authority of Manitoba. The designated authority of Manitoba will review Audrey's application to make sure that it is complete. If the application is complete, the designated authority of Manitoba will send the application to the designated authority of Saskatchewan, the province in which Enrico resides.

The designated authority of Saskatchewan will send the application to the appropriate competent authority in Saskatchewan. A competent authority is either a court (typically the one closest to Enrico's residence) or the provincial child support service in Saskatchewan. Based on the contents of the application, the designated authority of Saskatchewan will decide which entity is the appropriate competent authority. In Andrea's case, since Enrico is not opposed to the variation, the appropriate competent authority will likely be a provincial child support service. The child support service will recalculate the child support amount based on the updated income information.[20]

[20] At the time of writing, there are not yet any provincial child support services that process these types of applications.

Conversion Applications

Further to former Bill C-78, section 18.2 of the *Divorce Act* sets out a mechanism to convert an application to vary a support order made under the *Divorce Act* to an inter-jurisdictional variation application. This conversion may take place at the request of the respondent (s. 18.2). If there is no action by the respondent, and if there is sufficient evidence, the court may hear the application in the respondent's absence (s. 18.3 (1) a)). If there is insufficient evidence, then the court may convert the application to an inter-jurisdictional variation application (s.18.3 (1) b)). This conversion is only possible if both former spouses reside in Canada.

See **Appendix C** for charts outlining conversion applications under the *Divorce Act.*

Case Illustration

Sophie, who lives in Ontario, makes an application under section 17(1) (a) of the *Divorce Act* to vary a support order granting her child support for her three children.

Mark, the respondent, lives in Nova Scotia. Mark is served with the variation application. Mark would like to use the ISO-like process under the *Divorce Act* so that the application is heard in Nova Scotia. Mark can request that the Ontario court convert the variation application made under section 17(1) (a) to an inter-jurisdictional application within 40 days after being served with the application. As Sophie is only requesting variation of support (and not parenting i.e. changes related to parenting arrangements including the time that the children will spend with each parent and each parent's decision-making responsibilities), the court must grant Mark's conversion request. With this conversion, the application will be heard in Nova Scotia.

Recognition of Foreign Decisions under the *Divorce Act*

Prior to former Bill C-78 *Divorce Act* amendments, there was no process under Canadian federal family laws to recognize foreign orders that had the effect of varying a *Divorce Act* support order. The amended *Divorce Act* provides for the recognition of foreign orders where:

1) they have the effect of varying a *Divorce Act* support order;

2) one or both former spouses move to a new country (designated jurisdiction) that makes an order for a different support amount than that provided for in the *Divorce Act* order; and

3) one of the former spouses seeks recognition and enforcement of that foreign order in Canada.

Changes to the *Divorce Act* allow for the recognition of a support order made by a competent authority in another country where that country is a "designated jurisdiction"[21] and when the order made in the other country has the effect of varying a *Divorce Act* support order. The process for registering a foreign order for recognition is determined under provincial/territorial law, including the grounds for objecting to registration of the order. The order has legal effect throughout Canada, which facilitates enforcement.

[21] See definition of "designated jurisdiction" in Appendix A, *below*.

Part II: New Inter-jurisdictional Rules on Parenting Orders and Contact Orders (see *The Divorce Act Changes Explained*)

Former Bill C-78 amendments create new rules for determining jurisdiction regarding parenting orders and contact orders. The amendments centralize jurisdiction for parenting matters in the child's habitual residence. The term "habitually resident" replaces the term "ordinarily resident" throughout the Act in order to align with terminology used in provincial and territorial statutes and in both the *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children*[22] (1996 Convention) and the *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*[23] (2007 Convention). In addition, with former Bill C-78 changes, the court may transfer applications involving a parenting claim to the province or territory where the child "habitually resides" rather than to the province/territory to which a child is "most substantially connected", as was required previously under the current *Divorce Act*.[24] The court also has greater discretion to transfer proceedings to the court where the child habitually resides, even in unopposed applications.

Applications for contact by a non-spouse will be made to the court seized of a parenting application if a proceeding is ongoing. If not, they will be made to the provincial or territorial court of the child's habitual residence, unless that court determines otherwise (s. 6.1).

For removal/retention cases, the court where the child is located will have to transfer parenting applications to the court of the child's habitual residence except under limited circumstances (consent/acquiescence, undue delay or the other court is better placed) (s. 6.2).

[22] 1996 Convention, *supra* note 4.
[23] 2007 Convention, *supra* note 4.
[24] *Supra* note 3 at ss 6(1)-(3).

Former Bill C-78 amendments also create new rules for cases where a child is habitually resident outside Canada, but where the 1996 Convention does not apply. First, they provide that a court can only take jurisdiction in such cases in "exceptional circumstances". Second, these changes in former Bill C-78 also provide that a court must recognize an order of a foreign court that has the effect of varying a parenting order or contact order made under the *Divorce Act*, unless one of the grounds for non-recognition exists. The list of grounds for non-recognition are consistent with those of the 1996 Convention.

Practice Tips

- Be ready to speak to the issue of jurisdiction - the court may raise the issue of the child's habitual residence even if the matter is unopposed.
- The court in the child's habitual residence often has the best evidence available about the child's situation.

Part III: The 1996 and 2007 Conventions and former Bill C-78 (see section by section description of amendments in Appendix D)

On May 23, 2017, Canada signed the 1996 and the 2007 Conventions but, as of time of writing, is not yet a party to either. As a first step toward becoming a party, Canada's Parliament needed to amend federal family laws to align them with the Conventions. Former Bill C-78 amendments therefore included provisions needed to implement the Conventions at the federal level.

More specifically, former Bill C-78 gives "force of law" to the 1996 Convention and the 2007 Convention and then makes several specific amendments to the *Divorce Act,* to clarify the application of the Conventions in the *Divorce Act* context. For example, the former Bill sets out the types of 2007 Convention support applications that may be recognized, recognized and enforced, varied or established pursuant to the *Divorce Act*. Finally, changes to the FOAEAA will also assist with operation of the Conventions[25]. What follows is a description of each Convention as well as information on what additional steps would be required for Canada to become a party to these instruments in the future.

Note that the coming into force of the provisions in former Bill C-78 for each international Convention, by Order in Council, will coincide with their entering into force for Canada internationally.

[25] The 2019 changes amend the *FOAEAA* to permit provincial and territorial designated authorities to apply for and receive information to process inter-jurisdictional cases. Federal, provincial and territorial Central Authorities for the purposes of certain Conventions prescribed by the regulations will also be able to apply for and receive address information to assist in international cases with locating debtors, children and parents. These Conventions will include the following Conventions adopted by the Hague Conference on Private International Law: the *Convention on the Civil Aspects of International Child Abduction* (1980 Child Abduction Convention), the 1996 Convention and the 2007 Convention.

2007 Convention

The 2007 Convention came into force internationally on January 1, 2013. As of February 2023, there are 46 Contracting Parties[26], including all members of the European Union (EU)[27], and the United States.

The 2007 Convention provides the legal framework for cross-border recognition and enforcement, establishment and modification of family support orders and agreements. It establishes an international system for administrative cooperation by requiring that a Central Authority be designated for each State Party to process international applications and implement Convention obligations. In federal States such as Canada, the 2007 Convention also allows designation of Central Authorities for each territorial unit to which the 2007 Convention has been extended.[28]

The 2007 Convention applies to the establishment, modification, recognition and enforcement of child support obligations for children under the age of 21, regardless of the marital status of the parents. It also covers recognition and enforcement of spousal support obligations where the spousal support claim is made with a claim for child support. Other claims for the recognition and enforcement of spousal support (i.e. when not made in conjunction with a claim for child support) come within the compulsory scope of the 2007 Convention, but do not benefit from the provisions of Chapters II and III which establish the system of administrative co-operation via Central Authorities, and which also contain generous provisions for assistance in child support cases. The 2007 Convention provisions will apply only if one of the spouses habitually resides in a Contracting State and the other spouse is habitually resident in a province or territory that has implemented the 2007 Convention. In the Canadian *Divorce Act* context, the spousal support provisions would apply only to former spouses (i.e. spouses already divorced by a Canadian court under the Canadian *Divorce Act*).

In addition, Contracting States may bring, by declaration, within the scope of the 2007 Convention (or any part of it) any other maintenance obligations arising from a family relationship, parentage, marriage or affinity.[29]

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[26] The expression “Contracting Party” covers both cases in which the Convention has, and cases in which the Convention has not yet, entered into force for that Party, including a Regional Economic Integration Organization (REIO), such as the EU, following the deposit of its instrument of ratification, accession, acceptance or approval. The number of Contracting Parties includes notably the EU and the States bound by the EU’s approval of the Convention; See “Status Table 38: Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance” (last updated June 22, 2022), online: *Hague Conference on Private International Law* <https://www.hcch.net/en/instruments/conventions/status-table/?cid=131>.

[27] All members of the EU with the exception of Denmark.

[28] 2007 Convention, *supra* note 4 at art 4(2).

[29] See *ibid* at art 2(1) for the scope of the 2007 Convention.

a. Benefits of becoming a party to the 2007 Convention

Ratification of the 2007 Convention will increase the number of countries with which Canadian jurisdictions have reciprocity, which will result in more family support flowing to Canadian families and children. Ratification of the 2007 Convention will make it easier to have Canadian child and spousal support orders recognized and enforced across international borders, as between States party to the 2007 Convention. It will also provide a means for Canadians to establish and vary a child support order in those States.

Becoming a party to the 2007 Convention will contribute to former Bill C-78 objectives of reducing child poverty and increasing the efficiency of the family justice system.

b. Role of the Central Authority

Under the 2007 Convention, Canada could designate a Federal Central Authority as well as provincial and territorial Central Authorities. Provincial and territorial Central Authorities would be primarily responsible for operations under the 2007 Convention.

Upon receiving an application from a Central Authority located in a State party to the 2007 Convention, a provincial or territorial Central Authority would be required to provide assistance to a former spouse residing in that State. The provincial or territorial Central Authority would then send the application to the appropriate competent authority in its jurisdiction. The competent authority could either be a court, which would generally be the court closest to where the former spouse habitually resides, or a provincial child support service, if that service were available in the province or territory.

The role of the Canadian Federal Central Authority would be to assist foreign Central Authorities in locating parties in Canada and with the transmission of applications to the appropriate provincial or territorial Central Authority, if required.[30]

[30] *Ibid* at arts 5-6.

c. Direct requests to Court

Under the 2007 Convention, direct requests[31] to courts would be available to foreign creditors seeking to have their support orders recognized or recognized and enforced in a province or territory to which the 2007 Convention applies.[32] Foreign debtors would also be able to make direct requests to courts for suspending or limiting the effect of a support order that was recognized or recognized and enforced in a province or territory to which the 2007 Convention has been extended. In these cases, foreign parties may wish to retain a lawyer in the appropriate province or territory to make requests or applications directly to the court if they choose this procedure rather than using Central Authority procedures.

Under provisions relating to the 2007 Convention, former Bill C-78 does not specifically address direct requests for the establishment and variation of support orders. Consistent with the 2007 Convention, former spouses may use the existing process set out in sections 15.1 (child support), 15.2 (spousal support) or 17 (variation of orders) of the *Divorce Act*.

d. Stand-alone spousal support claims

As previously mentioned, the 2007 Convention allows Contracting States to extend all or parts of the 2007 Convention to other types of family support such as spousal support only, or support for vulnerable persons by means of declaration.[33] Therefore, Canada could, after receiving a request from a province or territory to do so, declare on behalf of that province or territory that application of the 2007 Convention is extended to other types of family maintenance not covered by the core scope of the 2007 Convention, including the application of Chapters II and III (administrative cooperation via Central Authorities) for spousal support only applications (i.e. applications that do not involve child support).

Practically speaking, this declaration made on behalf of a province or a territory would extend the scope of the Convention to include processing by Canadian Central Authorities of incoming applications for spousal support only and ensure the processing of outgoing applications for spousal support only by Contracting States having made the same declaration (see Article 2(3)). The 2019 changes to federal family laws (former Bill C-78), once in force, will provide authority under the *Divorce Act* for provincial or territorial Central Authorities to assist with these applications, should the scope of application in a particular province or territory be extended.

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[31] *Ibid* at art 37.

[32] Under the 2007 Convention, Canada may, upon ratification, extend the application of the 2007 Convention to any province or territory that has amended its laws to implement the 2007 Convention and has asked Canada to declare that the 2007 Convention shall be applicable in that province or territory.

[33] *Supra* note 4 at art 2(3).

Status of Current and Future Reciprocity Arrangements between Canadian Provinces and Territories and Foreign States

As noted, Canadian provinces and territories currently have a number of reciprocity arrangements with foreign States to accommodate the establishment, modification, recognition and enforcement of support decisions across borders. Any such arrangements with States that are not party to the 2007 Convention will continue.

Where a reciprocity arrangement exists with a State that has become party to the 2007 Convention, the most effective rule (Article 52) will prevail. Article 52 (1) provides that the 2007 Convention does not prevent the application of such reciprocity arrangements if the arrangements provide for a more favorable application of the 2007 Convention, for example, a broader base of recognition/enforcement, a simpler procedure, more beneficial legal assistance, or direct applications from applicants to the Central Authority of the requested State.[34] Similarly, the 2007 Convention (Article 52(2)) does not prevent the application of a law in the requested State, which would provide for more effective rules.

Case Illustrations

Application for recognition and enforcement: Julie and David got divorced in Manitoba 3 years ago; the order under the Canadian *Divorce Act* required David to pay child support. After their divorce, Julie moved to Australia with their three children. Since the divorce, both Julie and David were promoted at work. Julie has a recent child support decision from Australia requiring David to pay child support for their three children. David still lives in Manitoba. Julie would like her child support decision enforced in Manitoba.

Assume both Australia and the province of Manitoba have implemented the 2007 Convention. Julie would ask the Central Authority in Australia for assistance in transmitting an application for recognition and enforcement of the Australian order that has the effect of modifying the previously made *Divorce Act* child support order to the Central Authority in Manitoba. The Convention application is consistent with section 28.4 of the *Divorce Act*.

Application for establishment: Erika resides in Colorado, USA, and has a three-year-old child. She was never married to the father of the child, and parentage has not been established for the child. Patrick, the father of the child, resides in British Columbia (BC). Erika would like Patrick to start paying child support.

[34] *Ibid* at art 52(1).

Assume both the United States and BC have implemented the 2007 Convention. In this case, the Central Authority in Colorado would transmit an application for establishment of a maintenance decision for the child to the Central Authority in BC. The Central Authority in BC would take the necessary steps to have a decision established, by referring the application to a competent authority, which would usually be a court. The competent authority in BC would facilitate the determination of parentage. Paternity testing may facilitate determination of parentage. In BC, the *Family Law Act*[35] governs the determination of parentage. Once the child support decision is made in BC, the competent authority in BC would take steps to facilitate enforcement if necessary (i.e. registration with the provincial maintenance enforcement program) and payments would be transmitted to the mother in Colorado without the need for further application by the mother.

Note that in the above scenario, the same could be accomplished under BC's ISO Act, as the state of Colorado is a reciprocating jurisdiction under the provincial Act. If under this existing reciprocity arrangement, Colorado benefits, for example, from a broader range of services from BC, then the Convention provides that the "most effective rule" applies. Under Article 52 "the most effective rule", the Convention shall not prevent the application of a reciprocity arrangement in force in the requested State that essentially provides for services or rules that are more effective. In this case, to the extent that the reciprocity arrangement provides for more effective services or rules, these would apply.

1996 Convention

The 1996 Convention came into force internationally on January 1, 2002. As of February 2023, there are 54 Contracting States including all the members of the EU, Australia and Switzerland. Both Canada and the United States have signed the 1996 Convention, but are not yet a party to it.

In Canada, most of the legislative areas to which the rules of the 1996 Convention apply fall under provincial/territorial jurisdiction. However, parenting matters fall under the jurisdiction of Canada's Parliament in the context of proceedings under the *Divorce Act*. More specifically, federal jurisdiction in relation to child custody and access matters exists where the issues are raised in the context of a divorce proceeding under the *Divorce Act* or subsequent to a divorce proceeding in a corollary relief proceeding, and when the parties seek to vary a *Divorce Act* order.

[35] *Family Law Act*, SBC 2011, c 25.

The 1996 Convention only applies among "Contracting States"[36]. It harmonises private international law rules to clarify such issues as which Contracting State's courts can make decisions about parenting arrangements for a child and which State's laws these courts will apply in making these decisions, when the child habitually resides in one Contracting State but also has close connections to one or more other States.

The 1996 Convention also sets out rules for the recognition and enforcement in one Contracting State of orders made in a different Contracting State. It also makes it easier for authorities in different Contracting States to communicate and cooperate with each other about many cross-border issues involving children covered under the scope of the 1996 Convention.

In addition to parenting matters, the rules of the 1996 Convention also apply to other matters related more broadly to the "protection of children", such as child protection, and the administration, conservation and disposition of children's property. However, former Bill C-78 only relates to parenting matters, as these are the only matters to which the rules of the 1996 Convention apply that fall within federal jurisdiction.

a. Benefits of becoming a party

Once Canada becomes a party, the 1996 Convention will reduce the risk of potentially conflicting decisions applying to the same child between Canada and other Contracting States. In addition, the 1996 Convention will facilitate the recognition and enforcement of Canadian parenting orders in other countries that are also party to the 1996 Convention, creating greater legal certainty. This will provide better assurances to families who travel or relocate to another Contracting State that their Canadian order will be respected. This could also make it easier to return a child to Canada in parental child abduction cases. It could also reduce costs for families by reducing the need to re-litigate the same issues in another Contracting State. In 2015, the Standing Senate Committee on Human Rights recognised the benefits of joining the 1996 Convention, both as a complement to the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*[37] (1980 Child Abduction Convention) and as a tool to help resolve cross-border parenting disputes[38].

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[36] 1996 Convention, *supra* note 4 at arts 15-17. The provisions of the 1996 Convention dealing with the applicable law, including the law governing parental responsibility arising by operation of law, may, however, allow for the application of the law of a Contracting or a non-Contracting State.

[37] *Convention on the Civil Aspects of International Child Abduction*, 25 October 1980 (entered into force December 1, 1983) [*1980 Child Abduction Convention*]. See online: <https://assets.hcch.net/docs/e86d9f72-dc8d-46f3-b3bf-e102911c8532.pdf>.

[38] "Alert: Challenges and International Mechanisms to Address Cross-Border Child Abduction: Report of the Standing Senate Committee on Human Rights" (2015), online: *Senate Canada* <https://sencanada.ca/Content/SEN/Committee/412/ridr/rep/rep13jul15-e.pdf>.

The 1996 Convention could lead to more effective communication and cooperation between authorities in Canada and in other countries party to the Convention about many other child-related issues. The potential benefits of the 1996 Convention continue to grow, as more countries become parties.

b. Implementation through changes to federal family laws

As stated earlier, once in force, the relevant *Divorce Act* amendments will give the 1996 Convention force of law, which, from a legal perspective, will be sufficient to implement the 1996 Convention federally. However, the changes include other amendments to clarify how some of the rules in the 1996 Convention are to be applied specifically in the *Divorce Act* context. The provisions of the *Divorce Act* dealing with the 1996 Convention will only apply to the provinces and territories to which the application of the 1996 Convention has been extended (see discussion in Part IV). In addition, in accordance with the 1996 Convention, they will only apply to children under the age of 18.

c. Jurisdictional rules

The basic jurisdictional rule in the 1996 Convention is that the authorities of the Contracting State where the child is habitually resident have jurisdiction to make decisions related to the protection of the person or property of the child[39]. The changes to federal family laws brought by former Bill C-78 reflect this rule by providing that a court otherwise having jurisdiction under the *Divorce Act* cannot make a decision about a child who is habitually resident in another Contracting State, unless specified exceptions provided by the 1996 Convention are met. These exceptions are as follows:

- The child is present in the province/territory and the child is a refugee, internationally displaced or their habitual residence cannot be determined[40].
- There is a divorce proceeding in the province/territory and other mandatory criteria are met. These criteria, under new section 30.7 of the *Divorce Act* are: 1) at least one spouse has parental responsibility for the child, 2) the spouses and any other person who has parental responsibility consent to the court taking jurisdiction, and 3) the court determines that it is in the best interests of the child to take jurisdiction[41].

[39] 1996 Convention, *supra* note 4 at art 5.
[40] *Ibid* at art 6.
[41] *Ibid* at art 10.

- The court in the province/territory has requested or been requested to assume jurisdiction in accordance with the 1996 Convention's transfer provisions[42]. This transfer can only occur where the competent authorities in both Contracting States agree that the authority that would assume jurisdiction after such transfer would be better placed to assess the child's best interests. The cases where jurisdiction is most likely to be transferred to a Canadian court will be those where there is a divorce proceeding pending in the province/territory, but where the conditions set out in new section 30.7 of the *Divorce Act* have not been met, or where the child has a substantial connection to the province/territory.
- The child is present in the province/territory and there is an urgent situation[43].

The jurisdictional provisions also provide that, if a child has become habitually resident in a province/territory as a result of a wrongful removal or retention, a court in that province/territory may only take jurisdiction once specific criteria set out in the 1996 Convention have been met[44]. This provision will help discourage international parental child abduction by denying a jurisdictional advantage to a person who has abducted a child. It is complementary to the 1980 Child Abduction Convention[45], to which Canada is a party.

d. Recognition and enforcement

While foreign parenting orders are generally recognized under provincial and territorial laws, there is one situation in which such orders must be recognized under the *Divorce Act*. This is where the foreign parenting order has the effect of modifying a previous parenting or contact order made under the *Divorce Act*. It must be recognized under the *Divorce Act* so that it has the effect of overriding the original *Divorce Act* order.

[42] *Ibid* at arts 8-9.
[43] *Ibid* at art 11.
[44] *Ibid* at art 7.
[45] *Supra* note 37.

Article 23 of the 1996 Convention provides for the recognition by "operation of law" in Contracting States of measures (decisions) taken in other Contracting States. This means that the decision will have legal effect in a province/territory without the need to undertake any particular formality, including the need for a court application.[46] Article 24 provides, however, that any interested person may ask a court to decide on the recognition or non-recognition of a measure taken in a Contracting State in accordance with the 1996 Convention[47]. Article 23(2) lists several grounds for non-recognition of a measure, for example if a person who claims their parental responsibility is infringed by the decision was not given an opportunity to be heard.[48] Changes to the *Divorce Act* under former Bill C-78 specify that this application may be made to any court in a province/territory if there is a sufficient connection between the matter and the province/territory.

Under former Bill C-78, where a foreign decision is recognized by operation of law in accordance with Article 23(1) of the 1996 Convention, that decision only has legal effect in the provinces and territories where the 1996 Convention applies.[49] In cases where a foreign decision is recognized by the court of a province/territory having a sufficient connection with the matter, however, it will have legal effect across Canada, consistent with the current approach under section 20(2) of the *Divorce Act*.[50]

While a foreign decision may be recognized by operation of law, if an individual wishes to have the foreign decision enforced additional steps will be required.[51] The provinces and territories will determine the appropriate procedure for their jurisdiction. Enforcement could be refused on the same grounds, as could the recognition of a foreign decision, meaning the grounds under Article 23(2) of the 1996 Convention. Former Bill C-78 clarifies this in the context of the *Divorce Act* and provides that a foreign decision will be enforced in the same way as an order of a court in the province/territory.

Former Bill C-78 also provides a basis for the recognition of foreign decisions modifying a parenting or contact order made under the *Divorce Act* in situations where the 1996 Convention does not apply. The grounds for non-recognition are similar to those found in the 1996 Convention. Once recognized, the decision will be enforceable as an order of a court in a province/territory, across Canada.

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[46] *Ibid* at art 23.
[47] *Ibid* at art 24.
[48] This basis for non-recognition would not apply in an urgent case; See *supra* 1996 Convention, *supra* note 6 at art 11.
[49] *Ibid*.
[50] *Ibid* at art 7; See also *Divorce Act*, *supra* note 3 at s 20(2).
[51] 1996 Convention, *supra* note 4 at art 26.

Case Illustration

Jurisdiction

Assume that both Canada and the U.S. are parties to the 1996 Convention (both have now signed it). Mary is aged six and lives with her mother in Winnipeg, Manitoba. Her parents are divorced and her dad lives in Minnesota. While visiting her dad for an extended access visit in the summer, Mary's father decides that it would be best for Mary to live with him, and brings an application in Minnesota for a custody (parenting) order to that effect.

In accordance with the 1996 Convention, the Minnesota court should decline jurisdiction, in favour of the courts in Manitoba, where Mary is habitually resident.

If Mary's father applies to the court in Winnipeg for decision-making responsibility and primary parenting time for Mary and to relocate Mary to Minnesota, the Manitoba court will vary the original *Divorce Act* order if it determines it is in the best interests of the child.

Recognition

If Mary relocates to Minnesota, Mary's father will need to register her in her new school. He does not need to go to court to have his Manitoba order recognized in Minnesota. He can rely on the Manitoba order as proof that he has custody of Mary (terminology used in Minnesota) and that he has authority to register her in school. The Manitoba order is recognized by operation of law, which means that it has automatic legal effect in Minnesota.

Under the 1996 Convention, it is, however, always possible to bring a court application for recognition or non-recognition of a court order made in another Contracting State.

If Mary's mother is concerned that the father may not comply with the parenting time terms in the Manitoba *Divorce Act* order, in accordance with the 1996 Convention, she may seek advance recognition of the Manitoba order in Minnesota, prior to Mary's relocation to that state.

Part IV: Coming into Force of Applicable Bill C-78 Provisions

Coming into Force of Inter-jurisdictional Support and Parenting Provisions

Order in Council

Bill C-78 received Royal Assent on June 21, 2019.[52] The *Divorce Act* provisions relating to inter-jurisdictional support and parenting came into force by Order in Council on March 1, 2021.

Certain FOAEAA amendments in former Bill C-78 came into force at the time of Royal Assent. Other amendments to the FOAEAA either came into force in December 2021 by Order in Council (Part III of FOAEAA) or will come into force by Order in Council at a later date (Parts I and II of FOAEAA) to allow time for regulatory amendments as well as technical and operational changes required to federal, provincial and territorial systems to be completed. The coming into force of FOAEAA changes that relate to the 1980 Child Abduction Convention, the 1996 and the 2007 Conventions is anticipated in 2023.

Coming into force of provisions relating to Conventions and Ratification

The coming into force of the provisions in former Bill C-78 for each international Convention, by Order in Council, will coincide with their entering into force for Canada internationally.

Each Convention will enter into force, for Canada, on the first day of the month following the expiration of three months after the deposit of Canada's instrument of ratification.

For Canada to ratify either the 1996 or the 2007 Convention, three steps would be required:

1. Changes to federal law would be required - in this case amendments to the *Divorce Act* to be consistent with Convention rules (this step was completed through former Bill C-78, although these provisions are not yet in force);

[44] Bill C-78, *supra* note 1.

2.

At least one province or territory would need to pass implementing legislation to ensure that its laws are consistent with Convention rules[53]; and

3. The province or territory requests that the federal government extend to have the Convention apply in its jurisdiction.

The 1996 Convention and the 2007 Convention could be ratified at different times. At the time of ratification of each Convention, Canada would extend the application only to those provinces and territories that have implemented the Convention and have asked the federal government to extend its application to their jurisdiction. Over time, Canada would make new declarations extending the application of the Convention to additional provinces and territories once these provinces and territories have also implemented the Convention and requested that its application be extended to their jurisdiction. These rules would allow Canada to become party to the Conventions without having to wait for all the provinces and territories to be ready to apply them.

Summary and Conclusion

This paper presented information on new rules and procedures affecting inter-jurisdictional support and parenting orders introduced by former Bill C-78. To assist family law practitioners, here are some key things you need to know to help your clients with inter-jurisdictional family law matters following the coming into force of former Bill C-78 inter-jurisdictional provisions:

1) With the coming into force of Bill C-78 inter-jurisdictional provisions, the rules relating to inter-jurisdictional support orders and parenting orders under the *Divorce Act* have changed.
2) The rules on inter-jurisdictional support in the *Divorce Act* have been broadened/expanded (to deal with international support enforcement), while procedures now resemble the one-step process under provincial/territorial ISO legislation.
3) Former Bill C-78 enacted new rules for determining jurisdiction regarding parenting orders and contact orders.
4) The 1996 Convention presents a number of potential benefits, including facilitating the recognition and enforcement of domestic family law orders and decisions in other Contracting States and discouraging “forum shopping”.

[53] British Columbia’s *Family Bill 8 – Attorney General Statutes (Hague Convention on Child and Family Support) Amendment Act, 2022, to implement the 2007 Convention in the province*, received Royal Assent on March 31, 2022. Manitoba’s *Bill 37 - The International Support and Family Maintenance (Hague Convention) Act* received Royal Assent on June 1, 2022.

5) The 2007 Convention creates an effective legal and operational system to ensure the effective international recovery of child support and other forms of family maintenance across borders. This system is comparable to the ISO process under Canadian law.
6) The majority of *Divorce Act* provisions came into force on March 1, 2021, but this did not include provisions dealing with the 1996 and 2007 Conventions; these latter provisions will come into force at a later date to coincide with the entering into force of each Convention for Canada internationally.
7) As of writing, Canada has signed the 1996 and 2007 Conventions, but has not yet ratified them. Canada is therefore not yet a party to these Conventions.
8) For Canada to become a party to the 1996 and 2007 Conventions, for each of the Conventions,

at least one province or territory needs to implement the Convention by amending its laws to be consistent with Convention rules; and at least one province or territory, having passed implementing legislation, needs to ask the federal government to have the Convention apply in its jurisdiction.

9) Information online, including *The Divorce Act Changes Explained* and 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 in the 42nd Parliament), are useful resources for counsel with questions about particular provisions of the legislation.

Appendix A – definitions

General – Definitions

reciprocity arrangements – In the Canadian context, this refers to reciprocity established between a province or territory and a foreign State or a political subdivision of the foreign State. Common law provinces and territories establish reciprocity with other jurisdictions by making regulations pursuant to inter-jurisdictional support orders (ISO) legislation declaring those jurisdictions to be "reciprocating jurisdictions" for family support purposes. In Québec, designations are made pursuant to *An Act respecting reciprocal enforcement of maintenance orders* (AREMO).

Divorce Act – Definitions

creditor – means a former spouse to whom support is owed or who seeks to obtain support.

debtor – means a former spouse who owes support or from whom support is sought.

designated authority – means a person or entity that is designated by a province or territory to exercise the powers or perform the duties and functions set out in sections 18.1 to 19.1 of the *Divorce Act* within the province/territory.

designated jurisdiction – means a jurisdiction outside Canada — whether a country or a political subdivision of a country — that is designated under an Act that relates to the reciprocal enforcement of orders relating to support, of the province/territory in which either of the former spouses resides.

provincial child support service – means any service, agency or body designated in an agreement with a province/territory under subsection 25.01(1) or 25.1(1).

responsible authority – means a person or entity that, in a designated jurisdiction, performs functions that are similar to those performed by the designated authority under subsection 19(4).

Provincial and Territorial Inter-jurisdictional Support Orders (ISO) Legislation - Definitions

reciprocating jurisdiction – means a jurisdiction declared in the regulations made under a provincial or territorial ISO Act to be a jurisdiction with which that province or territory has reciprocity on family support matters, including establishment, variation, recognition/registration and enforcement.

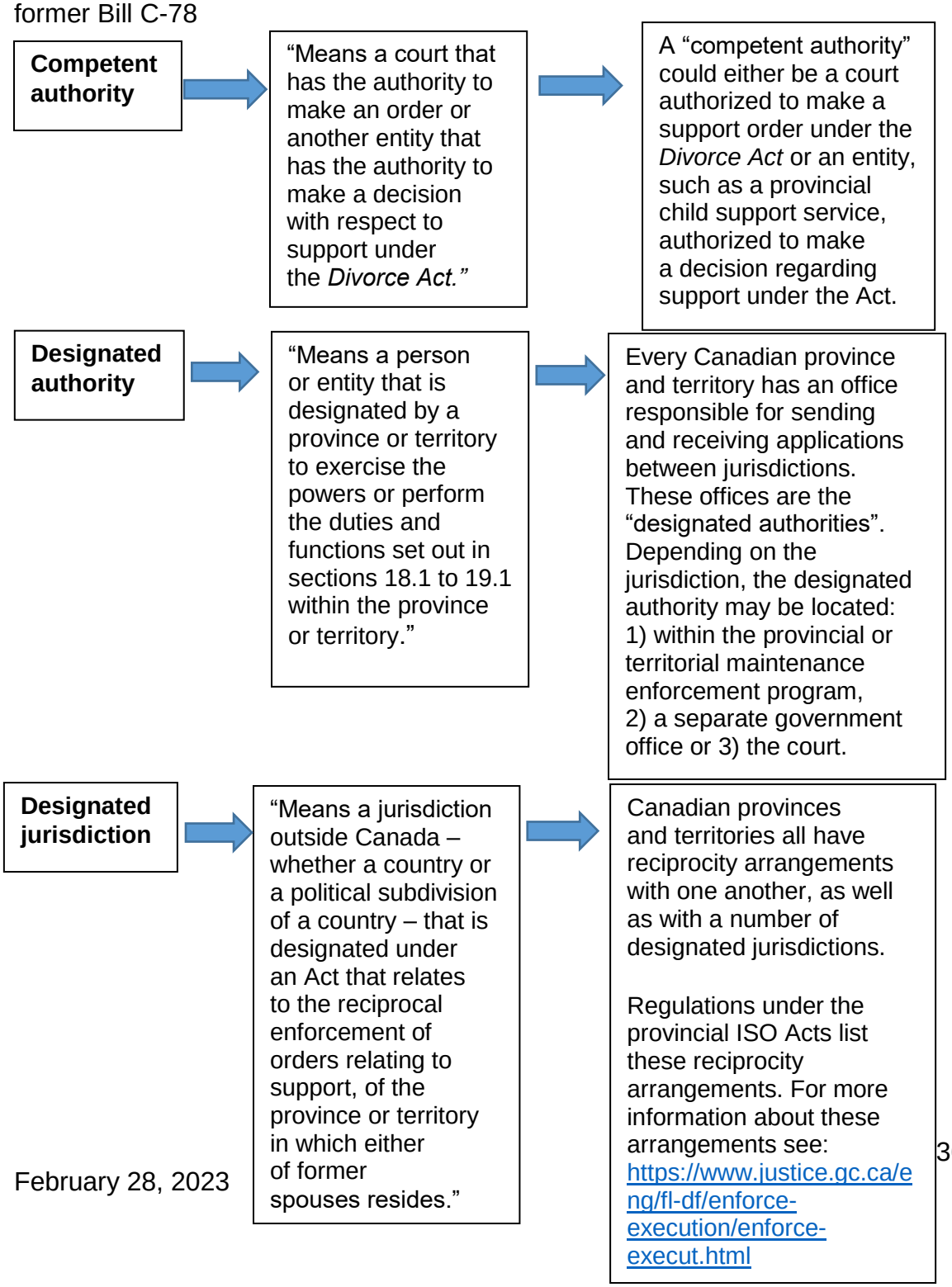
Appendix B

See link to the Department of Justice Canada webpages, which include links to provincial and territorial ISO legislation, ISO forms in each common law province and territory, including ISO designated authorities, as well as additional reference information, such as information on current reciprocity arrangements.

Appendix C

Fig. 1 provides four new definitions introduced by former Bill C-78 that apply to the inter-jurisdictional support process of the *Divorce Act*, and Fig. 2 provides a sketch of conversion applications under former Bill C-78

Fig. 1 Definitions specific to the Inter-jurisdictional support process: former Bill C-78



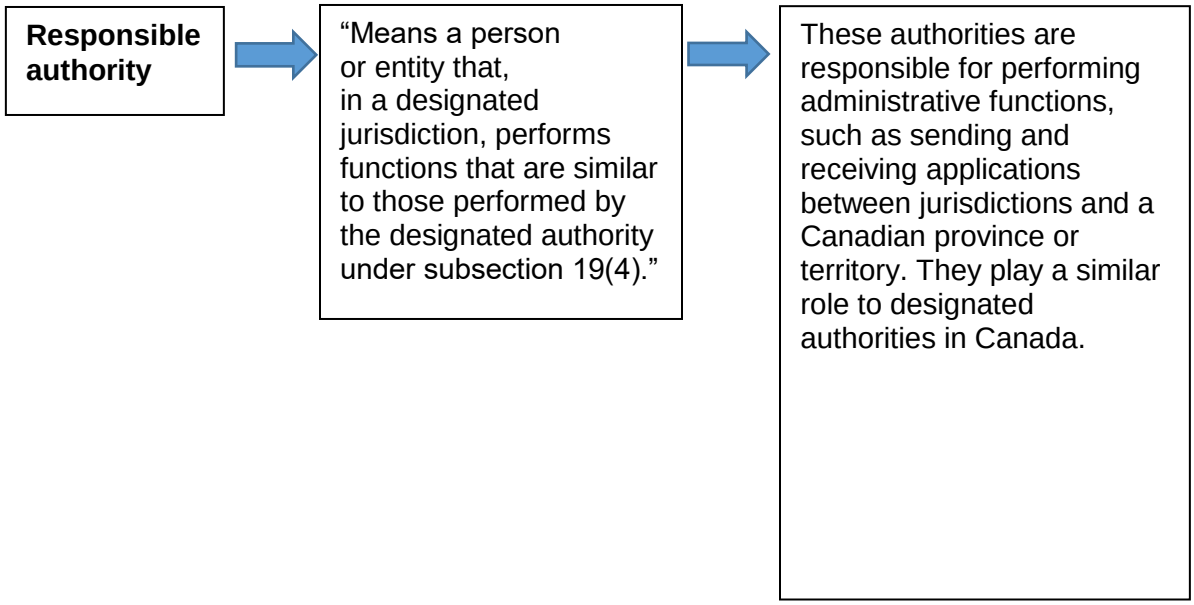
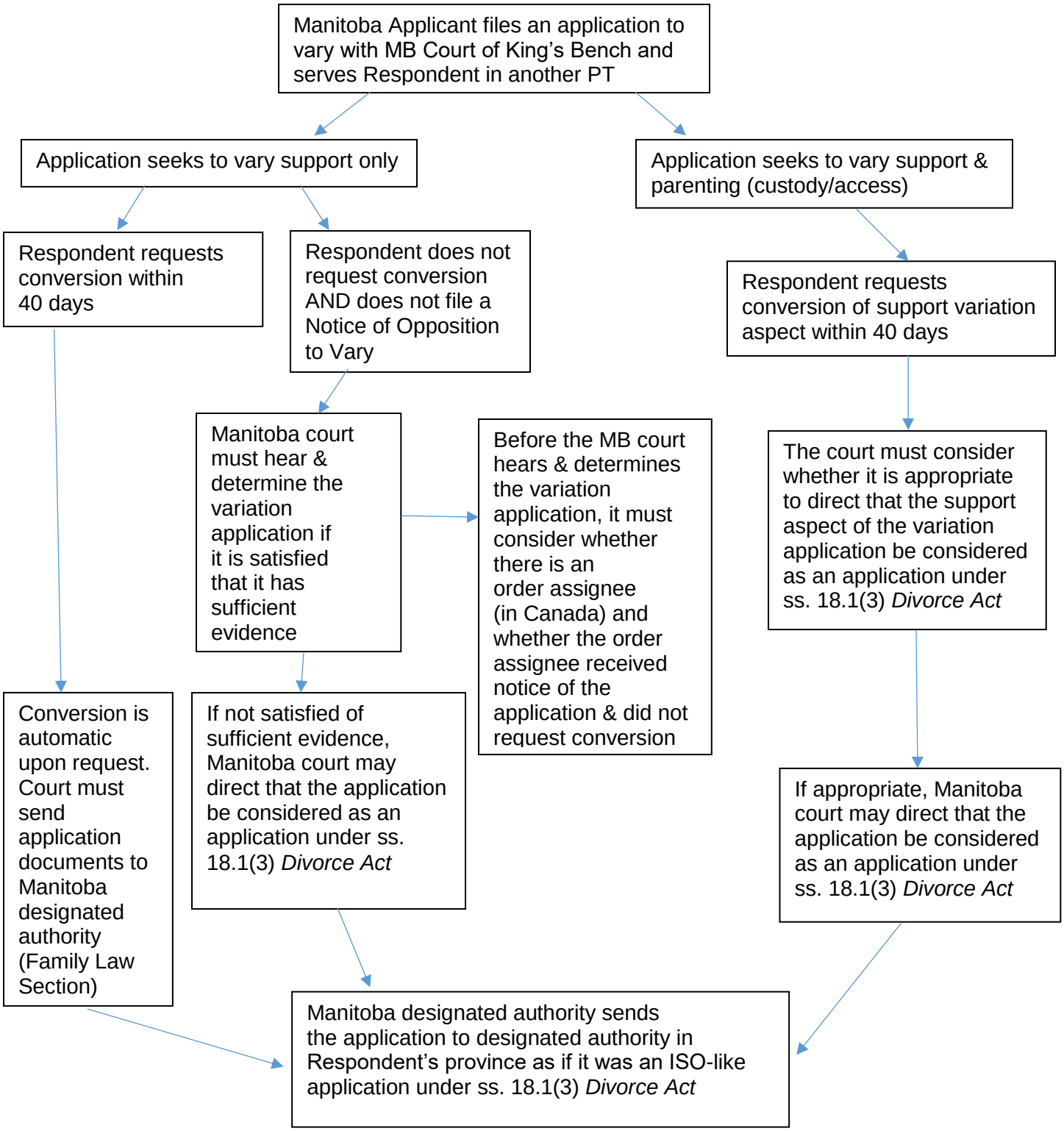

Responsible authority
“Means a person or entity that, in a designated jurisdiction, performs functions that are similar to those performed by the designated authority under subsection 19(4).”
These authorities are responsible for performing administrative functions, such as sending and receiving applications between jurisdictions and a Canadian province or territory. They play a similar role to designated authorities in Canada.

Fig. 2 Conversion Applications: former Bill C-78 – Manitoba example



Appendix D

Divorce act changes part ii: provisions relating to the 1996 convention and the 2007 convention explained

Background

This document explains some of the specific changes made to the *Divorce Act* through former Bill C-78, *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*. As noted above, the former bill received Royal Assent on June 21, 2019. The changes explained in this document relate to the *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (1996 Convention) and the *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance* (2007 Convention). For information on other changes to the *Divorce Act*, see *Divorce Act* Changes Explained.

Some of the changes to the *Divorce Act* came into force upon Royal Assent of former Bill C-78. However, most changes came into force on March 1, 2021.

The provisions relating to the 1996 and 2007 Conventions are not in force but will come into force on a day to be fixed by order of the Governor in Council that will coincide with the entering into force of each Convention for Canada internationally. Canada signed the two Conventions on May 23, 2017, but has not ratified either Convention at this time. Canada is therefore not yet a party to these Conventions.

What the document includes:

- A general explanation of specific changes to the *Divorce Act* (**What are the changes**)
- An overview of the reasons why the changes were made (**Reason for the changes**)
- A summary of the coming into force of the changes (**When the changes will come into force**)

What the document does not include:

- Legal advice. This document only provides general legal information about the changes to the *Divorce Act*. People may want to seek legal advice from a professional working in family law for additional information about the law and its application.

Please note that the official version of changes to the *Divorce Act* can be found in Bill C-78 on the Parliament of Canada website. The official version of the current *Divorce Act* can be found on the Justice Canada laws.

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

International Conventions (Definition)

(s 28, *Divorce Act*)

New section

International Conventions

Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance

Definitions

28 The following definitions apply in this section and in sections 28.1 to 29.5.

2007 Convention means the *Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, concluded at The Hague on November 23, 2007, set out in the schedule (Convention de 2007).

What is the change

The amendment adds relevant headings to the Act. The amendment also defines the term “2007 Convention” for the purposes of sections 28 to 29.5.

Reason for the change

The addition of headings and subheadings make it easier to use and understand the *Divorce Act*. The defined term is necessary to avoid using the full title of the Convention in several sections of the Act.

When

On a day to be fixed by order of the Governor in Council.

Central Authority (Definition)

(s 28, *Divorce Act*)

New section

Central Authority means any person or entity designated under Article 4 of the 2007 Convention that is responsible for carrying out the duties that are imposed on it by the 2007 Convention. (autorité centrale)

What is the change

The amendment defines “Central Authority” as a Canadian person or entity that is responsible for facilitating international administrative cooperation for the recovery of support among States Parties to the 2007 Convention.

Reason for the change

A definition of Central Authority is required for this part of the *Divorce Act*. Note that the 2007 Convention touches on an area of shared jurisdiction, Canada must designate federal, provincial and territorial Central Authorities to carry out Convention obligations.

When

On a day to be fixed by order of the Governor in Council.

Competent Authority (Definition)

(s 28, *Divorce Act*)

New section

competent authority means a court that has the authority to make an order, or another entity that has the authority to make a decision, with respect to support under this Act. (autorité compétente)

What is the change

The amendment defines competent authority as either a court that can make a support order under the *Divorce Act* or another entity such as a provincial child support service that can make a decision with respect to support under the Act.

Reason for the change

The definition of *competent authority* here applies specifically to s 28.4 to 29.5. The definition is related to the 2007 Convention and differs from the definition of competent authority in s 2.

When

On a day to be fixed by order of the Governor in Council.

Creditor (Definition)

(s 28, *Divorce Act*)

New section

creditor means a former spouse to whom support is owed or who seeks to obtain support. (créancier)

What is the change

The provision defines the term “creditor” for the purposes of the Act.

Reason for the change

The term is not defined elsewhere in the *Divorce Act* but is used in the context of the 2007 Convention.

When

On a day to be fixed by order of the Governor in Council.

Debtor (Definition)

(s 28, *Divorce Act*)

New section

debtor means a former spouse who owes support or from whom support is sought. (débiteur)

What is the change

The provision defines the term “debtor” in the Act.

Reason for the change

The term is not defined elsewhere in the *Divorce Act* but is used in the context of the 2007 Convention.

When

On a day to be fixed by order of the Governor in Council.

State Party (Definition)

(s 28, *Divorce Act*)

New section

State Party means a State other than Canada in which the 2007 Convention applies. (État partie)

What is the change

The provision defines the term “State Party” as a State in which the 2007 Convention applies other than Canada.

Reason for the change

The term is not defined elsewhere in the *Divorce Act* but is used in the context of the 2007 Convention.

When

On a day to be fixed by order of the Governor in Council.

Implementation, Interpretation and Application of the 2007 Convention

Force of law

(Heading and subsection 28.1 (1), *Divorce Act*)

New section

Force of law

28.1 (1) The provisions of the 2007 Convention have the force of law in Canada in so far as they relate to subjects that fall within the legislative competence of Parliament.

What is the change

The amendment gives legal effect to aspects of the 2007 Convention that fall within federal jurisdiction in Canada.

Reason for the change

To ensure consistency between federal legislation (*Divorce Act*) and Convention obligations.

When

On a day to be fixed by order of the Governor in Council.

Inconsistency

(s 28.1 (2), *Divorce Act*)

New section

Inconsistency

(2) The 2007 Convention prevails over this Act and any other federal law to the extent of any inconsistency between them.

What is the change

The amendment clarifies that the 2007 Convention takes precedence if conflict arises between it and any federal law, including the *Divorce Act.*

Reason for the change

As a party to an international Convention, Canada agrees to follow the rules of the Convention. This provision ensures that if there is an inconsistency between the 2007 Convention and a federal law, the Convention takes precedence.

When

On a day to be fixed by order of the Governor in Council.

Explanatory Report

(s 28.2, *Divorce Act*)

New section

Explanatory Report

28.2 In interpreting the 2007 Convention, recourse may be had to the Explanatory Report on the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, adopted by the Twenty-First Session of the Hague Conference on Private International Law held from November 5 to 23, 2007.

What is the change

The amendment specifies that the court may consult the Explanatory Report on the Convention to interpret the 2007 Convention.

Reason for the change

Explanatory reports on the various Hague Conventions provide important information about rationale, interpretation and application of these Conventions. The reports promote an internationally consistent interpretation of the Conventions. Including a reference to the Explanatory Report in the *Divorce Act* aligns with principles in the *Vienna Convention on the Law of Treaties*, to which Canada is a party, and with Canadian case law.

When

On a day to be fixed by order of the Governor in Council.

Application

(s 28.3, *Divorce Act*)

New section

Application

28.3 Sections 28.4 to 29.5 apply if either the creditor or the debtor, as the case may be, resides in a State Party and the other resides in a province in respect of which Canada has made a declaration extending the application of the 2007 Convention to that province. However, the application of those provisions does not exclude the application of the other provisions of this Act unless there is an indication to the contrary.

What is the change

The amendment sets out when the provisions of the *Divorce Act* related to the Convention will apply.

Reason for the change

Article 61 of the 2007 Convention, allows Canada to declare, at the time of ratification, that the 2007 Convention will apply to one or more of the provinces and territories that have implemented it and that have indicated their wish to be bound by the Convention. Additional declarations will be made once new jurisdictions have met these conditions. The amendment states that the *Divorce Act* provisions will apply only in the provinces and territories that implement the Convention.

For the 2007 provisions to apply, the creditor or the debtor has to reside in a province or territory that has implemented the 2007 Convention and the other party has to reside in a State Party to the Convention.

This provision also defines the scope of application of s 28.4 to 29.5 and clarifies that the other provisions of the *Divorce Act* generally apply, unless the Act specifically indicates otherwise. For example, this provision would help in a situation where a spouse, residing in a country that has a reciprocal arrangement with the province or territory where the other spouse resides (i.e. an arrangement to provide each other with services in relation to support), would like to submit an application for spousal support only (meaning an application that does not include a request for child support). A spousal support only application is not included in the core scope of the 2007 Convention and therefore would not benefit from Central Authority services. However, an application for spousal support only could be made under s 19 of the Act and spouses would benefit from the process set out under that provision, which includes the services of a designated authority under a reciprocal arrangement.

When

On a day to be fixed by order of the Governor in Council.

Application of Creditor to Central Authority

Recognition of State Party decision varying child support order

(s 28.4 (1), *Divorce Act*)

New section

Recognition of State Party decision varying child support order

28.4 (1) A creditor may, through the Central Authority designated by the State Party in which the creditor resides, submit to the Central Authority in the province in which the debtor is habitually resident an application for recognition and, if applicable, for enforcement of a decision of the State Party that has the effect of varying a child support order.

What is the change

The amendment provides that a creditor may submit an application through the Central Authority where they reside to the provincial/territorial Central Authority where the debtor habitually resides for the recognition, or the recognition and enforcement of, a foreign decision that has the effect of varying a child support order originally made under the *Divorce Act*.

Reason for the change

Provincial and territorial laws generally address the registration and recognition of foreign orders. When, however, a support order made under the *Divorce Act* is later modified by a State Party under foreign laws, the foreign modifying decision must be recognized under the Act for it to override the original order. This would happen in very specific circumstances: a support order is granted in Canada under the Act; one of the former spouses moves to a State Party, where the support order is subsequently varied; one of the parties seeks to enforce, in Canada, the order made in the State Party.

In this circumstance, under the 2007 Convention, a Canadian provincial or territorial Central Authority would be required to provide assistance to foreign creditors who seek to have their child support orders recognized, or recognized and enforced in a province or territory to which the Convention has been extended.

When

On a day to be fixed by order of the Governor in Council.

Spousal support order

(s 28.4 (2), *Divorce Act*)

New section

Spousal support order

(2) A creditor may also in the same manner submit an application for recognition and, if applicable, for enforcement of a decision of the State Party that has the effect of varying a spousal support order if the application is also for recognition and, if applicable, for enforcement of a decision of the State Party that has the effect of varying a child support order.

What is the change

Under this amendment, a creditor may, through the Central Authority where they reside, submit an application to a provincial or territorial Central Authority for the recognition, or the recognition and enforcement of, a foreign decision made in a State Party to the 2007 Convention that has the effect of varying a spousal support order originally made under the *Divorce Act* if the application is combined with an order for child support.

Reason for the change

Provincial and territorial laws generally address the registration and recognition of foreign orders. When a support order made under the *Divorce Act* is later modified by a State Party under foreign laws, the foreign modifying decision must be recognized under the *Divorce Act* for it to override the original order. For example, a support order is granted in Canada under the Act; one of the former spouses moves to a State Party, where the support order is subsequently varied; one of the parties seeks to enforce, in Canada, the order made in the State Party.

Under the 2007 Convention, a Canadian provincial or territorial Central Authority must provide assistance to foreign creditors who seek to have their spousal support orders recognized, or recognized and enforced, in a province or territory to which the Convention has been extended. However, this obligation exists only when applications are combined with child support orders.

When

On a day to be fixed by order of the Governor in Council.

Registration and recognition

(s 28.4 (3), *Divorce Act*)

New section

Registration and recognition

(3) The decision of the State Party is registered in accordance with the law of the province and that law, including the laws respecting reciprocal enforcement between the province and a jurisdiction outside Canada, applies in respect of the recognition of the decision.

What is the change

The amendment provides that the foreign decision shall be registered according to the law of the province/territory, and that provincial/territorial law applies in respect of recognition of the decision.

Reason for the change

Previously, no process existed under federal legislation to register and recognize foreign orders that have the effect of varying a *Divorce Act* order. Under the subsection, applications for recognition under the 2007 Convention in relation to foreign orders modifying a *Divorce Act* order would take place according to the rules set out under the law of the province or territory, including the grounds for objecting to registration of the order.

When

On a day to be fixed by order of the Governor in Council.

Enforcement

(s 28.4 (4), *Divorce Act*)

New section

Enforcement

(4) A decision that is recognized in accordance with the law of the province is deemed to be an order made under section 17, has legal effect throughout Canada and may be enforced in any manner provided for by the law of that province, including its laws respecting reciprocal enforcement between the province and a jurisdiction outside Canada.

What is the change

The amendment provides that the recognition of a foreign order in a province or territory is deemed to have the same effect as a variation order made under the *Divorce Act.* The order has legal effect throughout Canada and is enforceable under provincial/territorial law.

Reason for the change

Once the recognition process is completed, the order has legal effect throughout Canada. It will make it easier to keep enforcing support obligations when a debtor moves from one province or territory to another within Canada. This would apply even if the province or territory where the debtor moves has not implemented the Convention as the order would be a *Divorce Act* order and therefore enforceable across all provinces and territories.

When

On a day to be fixed by order of the Governor in Council.

Establishment or variation of child support order or calculation or recalculation of amount

(s 28.5 (1), *Divorce Act*)

New section

Establishment or variation of child support order or calculation or recalculation of amount

28.5 (1) A creditor may, through the Central Authority designated by the State Party in which the creditor resides, submit to the Central Authority in the province in which the debtor is habitually resident an application to be sent to the competent authority in the province.

What is the change

The amendment provides for cases where the creditor resides in a State Party and the debtor habitually resides in a province or territory that has implemented the 2007 Convention. A creditor residing in a State Party can send an application to their Central Authority, who will forward the application to the Central Authority located in the province or territory of the debtor's habitual residence. The provincial or territorial Central Authority would then send the creditor's application to the appropriate competent authority.

Reason for the change

The amendment clarifies the application process. A provincial or territorial Central Authority receiving an application from a Central Authority located in a State Party is required to provide assistance to a foreign creditor residing in a State Party. The provincial or territorial Central Authority sends the application to the appropriate competent authority.

When

On a day to be fixed by order of the Governor in Council.

Types of Applications

(s 28.5 (2), *Divorce Act*)

New section

Types of applications

(2) An application may seek

(a) to obtain or to vary a child support order; or
(b) to have the amount of child support calculated or recalculated, if the provincial child support service in the province in which the debtor habitually resides provides such a service.

What is the change

The amendment provides for the situation where the creditor resides in a State Party and the debtor habitually resides in a province or territory that has implemented the 2007 Convention. It enables the creditor to obtain or vary a child support order, or to have the amount of child support calculated or recalculated by a provincial/territorial child support service.

Reason for the change

The amendment clarifies the application process. Before the implementation of the 2007 Convention, a creditor living outside Canada could not vary an order made under the *Divorce Act* unless they made an application to vary that order directly to a Canadian court in the jurisdiction where the respondent ordinarily resided. With the amendment, a creditor living outside of Canada in a State Party can use the new application procedure to obtain or vary an order under the Act, if the 2007 Convention has been implemented in the province or territory where the debtor habitually resides.

A creditor can also send a request through the Central Authority in their province or territory to have an amount of child support calculated or recalculated by a provincial child support service (if this service exists in the respondent's province/territory). The provincial child support service would determine eligibility.

When

On a day to be fixed by order of the Governor in Council.

Sending of Application

(s 28.5 (3), *Divorce Act*)

New section

Sending of application

(3) The Central Authority shall, in accordance with the law of the province, send the application to the competent authority of that province.

What is the change

The Central Authority of the province or territory must send the application to the competent authority in accordance with the law of the province or territory.

Reason for the change

The provision creates administrative efficiencies; the provincial or territorial Central Authority reviews applications and sends them to the appropriate competent authority.

When

On a day to be fixed by order of the Governor in Council.

Application of section 19

(s 28.5 (4), *Divorce Act*)

New section

Application of section 19

(4) Subsections 19(5) to (12) and (16) apply with necessary modifications to the application except that a reference to a “respondent” shall be read as “debtor”, a reference to “designated authority” shall be read as “Central Authority in the province in which the debtor is habitually resident”, a reference to “responsible authority in the designated jurisdiction” shall be read as “Central Authority designated by the State Party in which the creditor resides” and “applicant” shall be read as “creditor”.

What is the change

The amendment provides that some subsections of s 19 of the *Divorce Act* related to inter-jurisdictional support applications apply to s 28.5.

Reason for the change

The change clarifies the process and aligns the rules for all inter-jurisdictional applications. For example, the steps that a court must follow under s 19, such as service of an application on the respondent, also apply to applications made under section s 28.5.

When

On a day to be fixed by order of the Governor in Council.

Order

(s 28.5 (5), *Divorce Act*)

New section

Order

(5) The court referred to in subsection 19(6) may, on the basis of the evidence and the submissions of the creditor and of the debtor, whether presented orally before the court or by affidavit or any means of telecommunication permitted by the rules regulating the practice and procedure in that court, make a child support order or an order varying a child support order, retroactively or prospectively.

What is the change

The amendment permits the court to make an order based on evidence submitted by the creditor and debtor, in whatever manner is permitted by the rules of court in the receiving jurisdiction. Provincial/territorial law governs the submission of evidence by affidavit.

Reason for the change

The amendment gives the court flexibility as to how evidence may be submitted, minimizing the disadvantage to the applicant of residing in a different jurisdiction than the court seized with the application. This facilitates the applicant's participation in hearings. The provision also supports administrative efficiencies by allowing the court to use any means of telecommunication permitted by court rules.

When

On a day to be fixed by order of the Governor in Council.

Application of certain provisions

(s 28.5 (6), *Divorce Act*)

New section

Application of certain provisions

(6) Subsections 15.1(3) to (8), section 15.3 and subsections 17(3), (4), (6) to (6.5) and (11) apply, with any necessary modifications, in respect of an order referred to in subsection (5).

What is the change

The amendment provides that all of the factors and objectives that apply to the making of a support order or variation of a support order under the Act also apply to an international application under the 2007 Convention, subject to any necessary adjustments.

Reason for the change

This provision clarifies that the substantive requirements for obtaining or varying a support order are the same for an application within Canada, and when the parties reside in different countries.

When

On a day to be fixed by order of the Governor in Council.

Exception

(s 28.5 (7), *Divorce Act*)

New section

Exception

(7) Subsections (1) to (6) apply despite sections 4 and 5.

What is the change

The amendment sets out subsections (1) through (6) as exceptions to the general jurisdictional rules provided in s 4 and 5 of the Act.

Reason for the change

The amendment creates an exception to the jurisdictional rules set out in section 4 and 5 of the *Divorce Act*, which generally require that an application be made in the habitual residence of one of the spouses/former spouses.

When

On a day to be fixed by order of the Governor in Council.

Application of Debtor to Central Authority

Recognition of State Party decision suspending or limiting enforcement of child support order

(s 29 (1), *Divorce Act*)

New section

Recognition of State Party decision suspending or limiting enforcement of child support order

29 (1) A debtor may, through the Central Authority designated by the State Party in which the debtor resides, submit to the Central Authority in the province in which the creditor is habitually resident an application for recognition of a decision of a State Party that has the effect of suspending or limiting the enforcement of a child support order.

What is the change

The amendment provides that a debtor may, through the Central Authority where they reside, submit an application to a provincial or territorial Central Authority for recognition in that province or territory of a decision. This would be recognition of a decision in a State Party that has the effect of suspending or limiting the enforcement of a child support order originally made under the Act.

Reason for the change

Provincial and territorial laws generally address the registration and recognition of foreign orders. When a support order made under the Act, however, is later modified by a State Party under foreign laws, the foreign modifying decision must be recognized under the Act for it to override the original order.

Under the 2007 Convention, a provincial or territorial Central Authority must provide assistance to a foreign debtor who seeks to have a foreign decision, which has the effect of suspending or limiting their child support order, recognized, or recognized and enforced in Canada. These foreign decisions must come from a State Party and can only be recognized, or recognized and enforced in a province or territory to which the Convention has been extended.

When

On a day to be fixed by order of the Governor in Council.

Spousal support order

(s 29 (2), *Divorce Act*)

New section

Spousal support order

(2) A debtor may also in the same manner submit an application for recognition of a decision of a State Party that has the effect of suspending or limiting the enforcement of a spousal support order, if the application is also for recognition of a decision of the State Party that has the effect of suspending or limiting the enforcement of a child support order.

What is the change

The amendment provides that a debtor may, through the Central Authority where they reside, submit an application to a provincial or territorial Central Authority for the recognition in that province or territory of a decision of a State Party that has the effect of suspending or limiting the enforcement of a spousal support order that was originally made under the Act. This application can only be made if it also includes the recognition of a decision of a State Party that has the effect of suspending or limiting the enforcement of a child support order.

Reason for the change

Provincial and territorial laws generally address the registration and recognition of foreign orders. When a support order made under the Act is later modified by a State Party under foreign laws, the foreign modifying decision must be recognized under the Act for it to override the original order.

Under the 2007 Convention, a provincial or territorial Central Authority must provide assistance to a foreign debtor who seeks to have a decision of a State Party that has the effect of suspending or of limiting the enforcement of a spousal support order recognized, or recognized and enforced, in a province or territory to which the Convention has been extended. This is only, however, if the application is also for recognition of a decision of a State Party that has the effect of suspending or of limiting the enforcement of a child support order.

When

On a day to be fixed by order of the Governor in Council.

Registration and recognition

(s 29 (3), *Divorce Act*)

New section

Registration and recognition

(3) The decision of the State Party shall be registered in accordance with the law of the province and that law, including its laws respecting reciprocal enforcement between the province and a jurisdiction outside Canada, apply in respect of the recognition of the decision.

What is the change

The amendment provides that the foreign decision shall be registered in accordance with the law of the province or territory and that provincial/territorial law applies to recognition of the decision.

Reason for the change

Previously, no process existed under federal legislation to recognize foreign orders that have the effect of varying an order under the Act. Under the new section, applications for recognition under the 2007 Convention in relation to foreign orders modifying a *Divorce Act* order would take place according to the rules set out under the law of the province, including the grounds for objecting to registration of the order.

When

On a day to be fixed by order of the Governor in Council.

Enforcement

(s 29 (4), *Divorce Act*)

New section

Enforcement

(4) A decision that is recognized in accordance with the law of the province is deemed to be an order made under section 17, has legal effect throughout Canada and may be enforced in any manner provided for by the law of that province, including its laws respecting reciprocal enforcement between the province and a jurisdiction outside Canada.

What is the change

The amendment provides that the recognition of a foreign order in a province or territory is deemed to have the same effect as a variation order made under the Act. The order has legal effect throughout Canada and is enforceable under provincial/territorial law.

Reason for the change

Once the recognition process is completed, the order has legal effect throughout Canada. It will make it easier to keep enforcing support obligations when a creditor moves from one province or territory to another within Canada. This would apply even if the province or territory where the creditor moves has not implemented the Convention as the order would be a *Divorce Act* order and therefore enforceable across all provinces and territories.

When

On a day to be fixed by order of the Governor in Council.

Variation of child support order or recalculation of amount

(s 29.1 (1), *Divorce Act*)

New section

Variation of child support order or recalculation of amount

29.1 (1) A debtor may, through the Central Authority designated by the State Party in which the debtor resides, submit to the Central Authority in the province in which the creditor is habitually resident an application to be sent to the competent authority in the province.

What is the change

The amendment allows a debtor residing in a State Party to send an application to its Central Authority, who then forwards it to the Central Authority of the province or territory where the creditor habitually resides. That Central Authority will send it to the appropriate competent authority.

Reason for the change

The change clarifies the process. A provincial or territorial Central Authority who receives a variation/recalculation application from a Central Authority located in a State Party must provide assistance to a foreign debtor residing in a State Party. To comply with 2007 Convention obligations, this type of application must be available to a debtor through the Central Authority.

When

On a day to be fixed by order of the Governor in Council.

Types of applications

(s 29.1 (2), *Divorce Act*)

New section

Types of applications

(2) An application may seek
(a) to vary a child support order; or
(b) to have the amount of child support recalculated, if the provincial child support service in the province in which the creditor habitually resides provides such a service.

What is the change

The provision provides for the situation where the debtor resides in a State Party and the creditor habitually resides in a province or territory that has implemented the 2007 Convention. It enables a debtor to vary a child support order or to have the amount of child support recalculated by a provincial child support service.

Reason for the change

Before implementation of the 2007 Convention, a former spouse living outside Canada could not vary an order made under the *Divorce Act* unless they made an application to vary their previous order directly to a Canadian court in the jurisdiction where the respondent ordinarily resided. With the new section, a debtor living outside of Canada in a State Party can use the new application procedure to vary an order under the *Divorce Act*, if the 2007 Convention has been implemented in the province or territory where the creditor habitually resides.

The debtor can also send a request through the Central Authority in their province or territory to have an amount of child support recalculated by a provincial child support service (if this service exists in the respondent's province or territory). The provincial child support service determines eligibility.

When

On a day to be fixed by order of the Governor in Council.

Sending of application

(s 29.1 (3), *Divorce Act*)

New section

Sending of application

(3) The Central Authority shall, in accordance with the law of the province, send the application to the competent authority of that province.

What is the change

The amendment requires that the Central Authority of the province or territory send the variation/recalculation application to the competent authority in accordance with the law of the province.

Reason for the change

The provision creates administrative efficiencies by requiring that the Central Authority review applications and send them to the appropriate competent authority.

When

On a day to be fixed by order of the Governor in Council.

Application of section 19

(s 29.1 (4), *Divorce Act*)

New section

Application of section 19

(4) Subsections 19(5) to (12) and (16) apply with necessary modifications to the application except that a reference to a “respondent” shall be read as “creditor”, a reference to “designated authority” shall be read as “Central Authority in the province in which the creditor is habitually resident”, a reference to “responsible authority in the designated jurisdiction” shall be read as “Central Authority designated by the State Party in which the debtor resides” and “applicant” shall be read as “debtor”.

What is the change

The amendment provides that some subsections of s 19 apply to s 29.1.

Reason for the change

The new provision aligns the rules for all inter-jurisdictional applications. For example, the steps that a court must follow under s 19, such as service of an application on the creditor, apply to applications made under s 29.1.

When

On a day to be fixed by order of the Governor in Council.

Order

(s 29.1 (5), *Divorce Act*)

New section

Order

(5) The court referred to in subsection 19(6) may, on the basis of the evidence and the submissions of the creditor and of the debtor, whether presented orally before the court or by affidavit or any means of telecommunication permitted by the rules regulating the practice and procedure in that court, make an order varying a child support order, retroactively or prospectively.

What is the change

The court can now make an order based on evidence submitted by the creditor and debtor, in whatever manner is permitted by the rules of court in the receiving jurisdiction.

Reason for the change

The provision provides the court with flexibility as to how evidence may be submitted, minimizing the disadvantage to the applicant residing in a different jurisdiction than the court seized with the application. This will facilitate the applicant’s participation in hearings. The amendment also supports administrative efficiencies by allowing the court to use any means of telecommunication permitted by court rules.

When

On a day to be fixed by order of the Governor in Council.

Application of certain provisions

(s 29.1 (6), *Divorce Act*)

New section

Application of certain provisions

(6) Subsections 17(3), (4), (6) to (6.5) and (11) apply, with any necessary modifications, in respect of an order referred to in subsection (5).

What is the change

The amendment provides that all of the factors and objectives that apply to the making of a variation order under the *Divorce Act* also apply to an international application made under the 2007 Convention for variation, subject to modifications.

Reason for the change

This provision clarifies that the substantive requirements for varying a support order under the Act are the same when the parties reside in different countries.

When

On a day to be fixed by order of the Governor in Council.

Exception

(s 29.1 (7), *Divorce Act*)

New section

Exception

(7) Subsections (1) to (6) apply despite section 5.

What is the change

The amendment creates exceptions to the general jurisdictional rules provided in s 5 of the *Divorce Act*.

Reason for the change

The amendment clarifies that subsections (1) through (6) are exceptions to the jurisdictional rules in s 5 of the *Divorce Act*.

When

On a day to be fixed by order of the Governor in Council.

Spousal Support Orders
Declaration in respect of a province

(s 29.2, *Divorce Act*)

New section

Declaration in respect of a province

29.2 If Canada declares under Article 2 of the 2007 Convention that the application of Chapters II and III of that Convention is to extend, in respect of a province, to spousal support orders, the applications described in sections 28.4 to 29.1 of this Act may also be made in respect of those orders and in that case those sections apply with any necessary modifications.

What is the change

If Canada makes a declaration under the 2007 Convention in respect of province or territory, then a provincial or territorial Central Authority would be authorized under the *Divorce Act* to assist with spousal support only applications under the Convention.

Reason for the change

The provision extends the scope of Convention to applications for spousal support only so that such applications are then eligible for provincial or territorial Central Authority assistance under the *Divorce Act*.

Under the 2007 Convention, Canada could, after receiving a request from a province or territory to do so, declare on behalf of that province or territory that the applications referred in s 28.4 to 29.1 may include applications relating to spousal support only, when such applications involve a spousal support order made under the *Divorce Act*. In this context, “a spousal support only” application means an application submitted to a provincial or territorial Central Authority, which does not include a request for assistance relating to child support matters.

When

On a day to be fixed by order of the Governor in Council.

Application of Creditor to Court

Recognition of State Party decision varying support order

(s 29.3 (1), *Divorce Act*)

New section

Recognition of State Party decision varying support order

29.3 (1) A creditor may submit to a court in the province in which the debtor is habitually resident an application for recognition— and, if applicable, for enforcement — of a decision of a State Party that has the effect of varying a support order.

What is the change

This subsection provides that a creditor may submit an application directly to a court in the province or territory in which the debtor habitually resides, for the recognition, or the recognition and enforcement of, a foreign decision that has the effect of varying a support order originally made under the *Divorce Act*.

Reason for the change

This provision is required to comply with 2007 Convention obligations. Under the 2007 Convention, direct requests to competent authorities must be available to foreign creditors who seek to have their support orders recognized, or recognized and enforced in a province or territory to which the Convention's application has been extended. This provision also allows a foreign creditor who has a spousal support order only (i.e. no child support order) to have it recognized and enforced under the Convention as a direct request to court but without the assistance of a Central Authority.

In this instance, recognition under the *Divorce Act* happens in very specific circumstances: a court grants a support order in Canada under the Act; one of the former spouses moves to a State Party, where the support order is subsequently varied; and then the parties want to have the order made in the State Party enforced in Canada.

When

On a day to be fixed by order of the Governor in Council.

Registration and recognition

(s 29.3 (2), *Divorce Act*)

New section

Registration and recognition

(2) The decision of the State Party shall be registered in accordance with the law of the province and that law, including the laws respecting reciprocal enforcement between the province and a jurisdiction outside Canada, applies in respect of the recognition of the decision.

What is the change

The amendment provides that the foreign decision must be registered according to the law of the province/territory, and that provincial/territorial law applies to the recognition of a decision.

Reason for the change

Previously, no process existed under federal legislation to recognize foreign orders that had the effect of varying a *Divorce Act* order. Under the new section, applications for recognition under the 2007 Convention in relation to foreign orders modifying a *Divorce Act* order would take place according to the rules set out under the law of the province/territory, including the grounds for objecting to recognition of the order.

When

On a day to be fixed by order of the Governor in Council.

Enforcement

(s 29.3 (3), *Divorce Act*)

New section

Enforcement

(3) A decision that is recognized in accordance with the law of the province is deemed to be an order made under section 17, has legal effect throughout Canada and may be enforced in any manner provided for by the law of that province, including its laws respecting reciprocal enforcement between the province and a jurisdiction outside Canada.

What is the change

The recognition of a foreign order in a province or territory is deemed to have the same effect as a variation order made under the *Divorce Act*. This order has legal effect throughout Canada and is enforceable under provincial or territorial law.

Reason for the change

Once the recognition process is completed, the order has legal effect throughout Canada. It will make it easier to keep enforcing support obligations when a debtor moves from one province or territory to another within Canada. This would apply even if the province or territory where the debtor moves has not implemented the Convention as the order would be a *Divorce Act* order and therefore enforceable across all provinces and territories.

When

On a day to be fixed by order of the Governor in Council.

Application of Debtor to Court

(s 29.4 (1), *Divorce Act*)

New section

Application of Debtor to Court

Recognition of State Party decision suspending or limiting enforcement of support order

29.4 (1) A debtor may submit to a court in the province in which the creditor is habitually resident an application for recognition of a decision of a State Party that has the effect of suspending or limiting the enforcement of a support order.

What is the change

A foreign debtor can apply directly to court for recognition of a decision made in a State Party suspending or limiting a support order under the *Divorce Act*.

Reason for the change

Provincial and territorial law generally address the recognition of foreign orders. When a support order is made under the Act and later modified by a State Party under foreign law, the foreign modifying decision must be recognized under the Act for it to be recognized and enforceable in a province or territory to which the Convention has been extended.

Under the 2007 Convention, direct requests to competent authorities must be made available to foreign debtors who seek to have decisions that have the effect of suspending or limiting a support order, recognized or recognized and enforced in a province or territory to which the Convention has been extended. This amendment allows a debtor to make a direct application to a court without the assistance of a Central Authority.

When

On a day to be fixed by order of the Governor in Council.

Registration and recognition

(s 29.4 (2), *Divorce Act*)

New section

Registration and recognition

(2) The decision of the State Party shall be registered in accordance with the law of the province and that law, including the laws respecting reciprocal enforcement between the province and a jurisdiction outside Canada, applies in respect of the recognition of the decision.

What is the change

This provision says that the foreign decision must be registered according to the law of the province or territory; provincial or territorial law applies with respect to recognition of the decision.

Reason for the change

Previously, no process existed under federal legislation to recognize foreign orders that had the effect of varying a *Divorce Act* order. Under the subsection, applications for recognition under the 2007 Convention in relation to foreign orders modifying a *Divorce Act* order would take place according to the rules set out under the law of the province or territory, including the grounds for objecting to registration of the order.

When

On a day to be fixed by order of the Governor in Council.

Enforcement

(s 29.4 (3), *Divorce Act*)

New section

Enforcement

(3) A decision that is recognized in accordance with the law of the province is deemed to be an order made under section 17, has legal effect throughout Canada and may be enforced in any manner provided for by the law of that province, including its laws respecting reciprocal enforcement between the province and a jurisdiction outside Canada.

What is the change

The recognition of a foreign order in a province or territory is deemed to have the same effect as a variation order made under the Act. This order has legal effect throughout Canada and is enforceable under provincial/territorial law.

Reason for the change

Once the recognition process is completed, the order has legal effect throughout Canada. It will make it easier to keep enforcing support obligations when a creditor moves from one province or territory to another within Canada. This would apply even if the province or territory where the creditor moves has not implemented the Convention as the order would be a *Divorce Act* order and therefore enforceable across all provinces and territories.

When

On a day to be fixed by order of the Governor in Council.

Limits on Divorce Proceedings
Support decision obtained in State Party

(s 29.5 (1), *Divorce Act*)

New section

Limits on Divorce Proceedings

Support decision obtained in State Party

29.5 (1) If a divorce proceeding is commenced in the province in which the debtor is habitually resident, the court of competent jurisdiction is not authorized to make an order under section 15.1 if the creditor has, in the State Party in which the creditor habitually resides, obtained a decision that requires the debtor to pay for the support of any or all of the children of the marriage.

What is the change

The court has no jurisdiction to hear and determine a request seeking an order for child support if 1) the creditor has already obtained, in a State Party, a decision that requires the debtor to pay support, and 2) the creditor still resides in the State Party.

Reason for the change

This provision creates an exception to ss 3 and 4 of the Act, which set out rules for determining the court's jurisdiction to hear and determine a divorce proceeding and a corollary relief proceeding.

Article 18 of the 2007 Convention imposes a "legal restriction" on a debtor's ability to vary an order or to seek a new one. Article 18 prohibits the debtor from asking another jurisdiction to vary a decision or to make a new decision where the original decision has been made in a State Party in which the creditor habitually resides, and the creditor continues to reside in that State Party.

In a divorce context, the legal restriction imposed by the 2007 Convention would apply in only one scenario. Article 18 prevents a debtor from asking a court to make a child support order if the creditor has already obtained a child support order in another State Party and the creditor continues to be habitually resident in that other State Party. This means that a Canadian court would not be authorized to make an order under section 15.1 as long as the creditor continued to be habitually resident in the State Party where the original support order was made.

The application of Article 18 of the 2007 Convention would not arise in the context of a variation application under the *Divorce Act* because in this scenario, there would be a pre-existing divorce order including support obligations made in Canada.

The court must comply with the 2007 Convention restriction, which “overrides” any jurisdictional rules under Canadian legislation that would otherwise permit the establishment of a support order unless an exception applies.

When

On a day to be fixed by order of the Governor in Council.

Exceptions

(s 29.5 (2), *Divorce Act*)

New section

Exceptions

(2) Subsection (1) does not apply if

(a) the creditor accepts the jurisdiction of the court, either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity;
(b) the decision-making authority that made the decision in the State Party has no jurisdiction to vary the decision or make a new one or refuses to exercise its jurisdiction to do so; or
(c) the decision cannot be recognized or declared enforceable in the province in which the debtor is habitually resident.

What is the change

The amendment creates exceptions to the legal restriction on a debtor's ability to establish an initial order.

Reason for the change

The general rule is that the court does not have jurisdiction to hear and determine a request to make a support order if the creditor has obtained, in a State Party, a decision that requires the debtor to pay child support and if the creditor still resides in the State Party unless an exception applies.

This subsection creates exceptions to the legal restriction on the debtor's ability to establish a new order. A court in a province or in a territory would be in a position to make an order under s 15.1 if the creditor submits to the jurisdiction of the court, either expressly or by defending on the merits of the case without objecting to the jurisdiction at the first available opportunity.

The court would also be allowed to make a new order if the decision-making authority in the State Party had no jurisdiction to vary the decision or make a new one or refused to exercise its jurisdiction to do so. Finally, a court in a province or territory would also be allowed to hear and determine a request for support if the decision cannot be recognized or declared enforceable in the province in which the debtor is habitually resident.

When

On a day to be fixed by order of the Governor in Council.

Other amendments relating to 2007 convention

Assignment of an order to a public body

(s 20.1 (1)(f), *Divorce Act*)

New section

Subsection 20.1(1) of the Act is amended by striking out “or” at the end of paragraph (d), by adding “or” at the end of paragraph (e) and by adding the following after paragraph (e):

(f) a public body referred to in Article 36 of the *2007 Convention*, as defined in section 28.

What is the change

Section 20.1(1) of the *Divorce Act* allows for the assignment of an order to a public body referred to in Article 36 of the 2007 Convention as required.

Reason for the change

Support orders can be assigned to a minister, member, agency or public body pursuant to the *Divorce Act.* These assignments often happen when the support recipient is on social assistance.

Implementation of the 2007 Convention will allow for applications for the recognition and enforcement of a decision made in a State party. The amendment would allow for an order to be assigned under section 20.1 of the Act to a public body in Article 36 of the 2007 Convention. This public body would be an order assignee in the other State Party.

When

On a day to be fixed by order of the Governor in Council.

Rights- public body

(s 20.1 (3), *Divorce Act*)

New section

Section 20.1 of the Act is amended by adding the following after subsection (2):

Rights – public body

(3) A public body referred to in paragraph (1)(f) to whom a decision of a State Party that has the effect of varying a child support order has been assigned is entitled to the payments due under the decision, and has the same right to participate in proceedings under this Act, to recognize and enforce the decision or if the recognition of this decision is not possible, to obtain a variation order, as the person who would otherwise be entitled to the payments.

What is the change

The amendment would (1) allow a public body to whom a support order is assigned to receive payments or; (2) to make an application for the recognition and enforcement of a State Party decision that has the effect of varying a child support order and; (3) if the recognition of the State Party decision is not possible, the public body would be able to file an application to vary an order.

Reason for the change

Under the 2007 Convention, a public body can act in place of a creditor. Under the *Divorce Act*, this is done through section 20.1, which deals with the assignment of orders. The amendment would allow a public body (order assignee under the *Divorce Act*) to receive payments, seek recognition of certain orders, and in certain circumstances apply to a court of competent jurisdiction to vary the support order.

When

On a day to be fixed by order of the Governor in Council.

Definition of *State Party*

(s 20.1 (4), *Divorce Act*)

New section

Definition of *State Party*

(4) For the purpose of subsection (3), ***State Party*** has the same meaning as in section 28.

What is the change

The amendment includes a reference to the definition of ***State Party*** in the section 28 of the *Divorce Act*.

Reason for the change

The subsection includes a reference to the term ***State Party*****,** which is defined in section 28, and clarifies that it has the same meaning.

When

On a day to be fixed by order of the Governor in Council.

Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

Definitions

(s 30, *Divorce Act*)

New section

Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

Definitions

1996 Convention means the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, concluded at The Hague on October 19, 1996, set out in the schedule. (Convention de 1996)

What is the change

The amendment adds a title describing the subject matter of ss 30 through 31.3. The amendment also defines the term “1996 Convention” for the purposes of sections 30 to 31.3.

Reason for the change

The title makes it easier to navigate and understand the Act.

“1996 Convention” refers to the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, concluded at The Hague on October 19, 1996.

When

On a day to be fixed by order of the Governor in Council.

Definitions

(s 30, *Divorce Act*)

New section

Definitions

State Party means a State other than Canada in which the 1996 Convention applies. (État partie)

What is the change

The amendment defines the term “State Party” for the purposes of sections 30 to 31.3.

Reason for the change

The amendment clarifies that “State Party” in these sections refers to a State other than Canada where the 1996 Convention applies.

When

On a day to be fixed by order of the Governor in Council.

Implementation, Interpretation and Application of the 1996 Convention

Force of law

(s 30.1(1), *Divorce Act*)

New section

Force of law

30.1 (1) The provisions of the 1996 Convention have the force of law in Canada in so far as they relate to subjects that fall within the legislative competence of Parliament.

What is the change

The amendment gives the 1996 Convention legal effect in Canada for matters under federal jurisdiction, such as parenting and contact orders under the Act.

Reason for the change

To ensure consistency between federal legislation (*Divorce Act*) and Convention obligations.

When

On a day to be fixed by order of the Governor in Council.

Inconsistency

(s 30.1(2), *Divorce Act*)

New section

Inconsistency

(2) The 1996 Convention prevails over this Act and any other federal law to the extent of any inconsistency between them.

What is the change

The amendment clarifies that the 1996 Convention takes precedence if a conflict arises between it and any federal law, including the *Divorce Act*.

Reason for the change

As a party to an international Convention, Canada agrees to follow the rules of the Convention. This provision ensures that if there is an inconsistency between the 1996 Convention and a federal law, that the Convention takes precedence.

When

On a day to be fixed by order of the Governor in Council.

Explanatory Report

(s 30.2, *Divorce Act*)

New section

Explanatory Report

30.2 In interpreting the 1996 Convention, recourse may be had to the Explanatory Report on the 1996 Hague Child Protection Convention, adopted by the Eighteenth Session of the Hague Conference on Private International Law that was held from September 30 to October 19,1996.

What is the change

The amendment specifies that the court may consult the Explanatory Report on the Convention to interpret the 1996 Convention.

Reason for the change

Explanatory reports on the various Hague Conventions provide important information about rationale, interpretation and application of these Conventions. The reports promote an internationally consistent interpretation of the Conventions. Including a reference to the Explanatory Report in the Act aligns with principles in the *Vienna Convention on the Law of Treaties*, to which Canada is a party, and with Canadian case law.

When

On a day to be fixed by order of the Governor in Council.

Application

(s 30.3, *Divorce Act*)

New section

Application

30.3 Sections 30.4 to 31.3 only apply in a province if
(a) Canada has made a declaration extending the application of the 1996 Convention to that province; and
(b) the child of the marriage concerned is under 18 years of age.

What is the change

The amendment sets out that the 1996 Convention-related provisions of the Act will apply when the child in question is under the age of 18, and Canada has made a declaration extending the application of the 1996 Convention to that province or territory.

Reason for the change

Article 59 of the 1996 Convention allows federal States such as Canada to declare, at the time of signature or ratification, the territorial units to which the Convention shall apply. They may modify this declaration subsequently, to extend the application of the Convention to additional territorial units. This provision allows for the gradual implementation of the 1996 Convention in federal States, as the territorial units are ready to implement it.

This rule will allow Canada to declare, at the time of ratification, that the 1996 Convention will apply to one or more of the provinces and territories that have implemented it and that have asked the federal government to have the Convention apply in their jurisdiction. Additional declarations will be made once new provinces and territories have met these conditions. The provision states that the *Divorce Act* provisions related to the Convention only apply in the provinces and territories to which the application of the Convention has been extended.

The provision also states that the *Divorce Act* provisions related to the Convention only apply to children under 18. This rule corresponds to Article 2 of the Convention, which defines the children to whom the Convention applies.

When

On a day to be fixed by order of the Governor in Council.

Jurisdiction

Child habitually resident in State Party

(s 30.4, *Divorce Act*)

New section

Child habitually resident in State Party

30.4 If a child concerned is habitually resident in a State Party, a court in a province does not have jurisdiction to hear and determine an application in respect of the child for a parenting order, a contact order or a variation order in respect of either such order, except in the circumstances set out in section 30.6, 30.7, 30.9 or 31.

What is the change

A court in a province or territory that would otherwise have jurisdiction under the *Divorce Act* does not have jurisdiction to make an order relating to parenting or contact if the child is habitually resident in another State Party, unless one of the identified exceptions applies.

Reason for the change

The basic jurisdictional rule in the 1996 Convention is that the authorities of a Contracting State where the child habitually resides have jurisdiction to make decisions related to the protection of the child (Article 5). Section 30.4 reflects this rule by providing that a court otherwise having jurisdiction under the *Divorce Act* cannot make a decision about a child who is habitually resident in another Contracting State, except in one of the following circumstances:

- the child is present in a province to which the Convention has been extended and the child is a refugee, internationally displaced or their habitual residence cannot be determined (Article 6, s 30.6)
- a divorce proceeding is underway in the province and certain other mandatory criteria are met (Article 10, s 30.7)
- the court has requested or been requested to assume jurisdiction under the Convention's transfer provisions (Articles 8 and 9, s 30.9)
- the child is present in Canada and there is an urgent situation (Article 11, s 31)

When

On a day to be fixed by order of the Governor in Council.

Wrongful removal or retention

(s 30.5, *Divorce Act*)

New section

Wrongful removal or retention

30.5 In the case of a wrongful removal or retention, as defined in Article 7(2) of the 1996 Convention, a court in a province has jurisdiction to hear and determine an application for a parenting order, a contact order or a variation order in respect of such orders only if the child has become habitually resident in that province and the conditions set out in subparagraphs 7(1)(a) or (b) of that Convention have been met.

What is the change

Section 30.5 provides that if a child has become habitually resident in a province or territory as a result of a wrongful removal or retention, a court in that province or territory may not exercise jurisdiction until the conditions set out in paragraphs 7(1) (a) or (b) of the 1996 Convention have been met and the court has jurisdiction under sections 3 – 5 of the *Divorce Act* jurisdiction.

Reason for the change

This provision is intended to discourage international parental child abduction and forum shopping by denying a jurisdictional advantage to a person who has abducted a child. It is intended to complement the 1980 Child Abduction Convention, to which Canada is a party.

The amendment refers to the definition of wrongful removal or retention found in Article 7(2) of the 1996 Convention, which is the same as in Article 3 of the 1980 Child Abduction Convention. Under this definition, a removal or retention is wrongful if it breaches “rights of custody,” which under both Conventions, “include rights relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.” (Article 3(b) 1996 Convention and Article 5(a) 1980 Child Abduction Convention)

In cases of wrongful removal or retention, the authorities of the Contracting State of the child’s habitual residence before the removal or retention keep jurisdiction until certain conditions have been met, even when the child has established a new habitual residence.

There are two situations when jurisdiction shifts to the new State of the child’s residence:

- Acquiescence: a person, institution or other body with “rights of custody” acquiesces to the removal (for example, they were aware of the removal of the child and there is clear evidence of an intention not to seek the return of the child).
- No Acquiescence :
    - the child has lived in the new State for at least 12 months since those with “rights of custody” knew or should have known of the whereabouts of the child
    - any request for return was made within the 12-month period and is no longer pending (e.g. an application for return under the 1980 Child Abduction Convention), and
    - the child is settled in the new environment.

It is important to note, however, that Article 7 of the 1996 Convention is of general application and is not limited to instances where the 1980 Child Abduction Convention applies. It therefore applies to wrongfully removed or retained children up to the age of 18 years (while the 1980 Child Abduction Convention applies up to the age of 16 years) and between Contracting States to the 1996 Convention, whether or not they are also party to the 1980 Child Abduction Convention.

When

On a day to be fixed by order of the Governor in Council.

Child present in the province

(s 30.6, *Divorce Act*)

New section

Child present in province

30.6 If one or more of the circumstances set out in Article 6 of the 1996 Convention exist and the child is present in a province, a court in that province that would otherwise have jurisdiction under any of sections 3 to 5 of this Act has jurisdiction to hear and determine an application in respect of the child for a parenting order, a contact order or a variation order in respect of either such order.

What is the change

The amendment clarifies that a court that would otherwise have jurisdiction under sections 3 (divorce proceeding), 4 (corollary relief proceeding) or 5 (variation proceeding), may take jurisdiction over a child who is present in the province or territory, in one of the circumstances set out in Article 6 of the Convention. This is despite the child not being habitually resident in the province or territory.

Reason for the change

Article 6 of the 1996 Convention is intended to ensure that a Contracting State can take jurisdiction over a child who is not habitually resident there, but is nonetheless present in specific circumstances (the child is a refugee, internationally displaced or the habitual residence of the child cannot be determined).

Because the *Divorce Act* requires that one of the parents be habitually resident in a province (or territory) for a year before a divorce proceeding can commence, Article 6 situations would likely arise very rarely under the Act.

When

On a day to be fixed by order of the Governor in Council.

Divorce proceeding – child habitually resident in State Party

(s 30.7 (1), *Divorce Act*)

New section

Divorce proceeding – child habitually resident in State Party

30.7 (1) For the purposes of Article 10 of the 1996 Convention, if the child is habitually resident in a State Party, a court in a province that would otherwise have jurisdiction under section 3 of this Act has jurisdiction to make a parenting order or contact order in respect of the child if

(a) at least one of the spouses has parental responsibility in respect of the child;
(b) the spouses and any other person who has parental responsibility accept the jurisdiction of the court; and
(c) the court is satisfied that it is in the best interests of the child to exercise jurisdiction.

What is the change

This amendment is consistent with Article 10 of the Convention and provides that a court that would otherwise have jurisdiction under s 3 (divorce proceedings) can make a parenting or contact order in relation to the child, despite the fact that the child is habitually resident in another State Party, if three conditions are met:

- at least one spouse has parental responsibility for the child,
- anyone with parental responsibility consents to the court taking jurisdiction, and
- the court determines that it is in the best interests of the child to take jurisdiction.

Reason for the change

The amendment aligns the Act with Article 10 of the Convention, and facilitates the resolution of divorce and parenting issues by the same court, saving both judicial resources and costs for the parents. The amendment applies only to an application for divorce, and not to corollary relief or variation proceedings.

When

On a day to be fixed by order of the Governor in Council.

Definition of parental responsibility

(s 30.7 (2), *Divorce Act*)

New section

Definition of *parental responsibility*

(2) For the purposes of subsection (1), *parental responsibility* has the same meaning as in Article 1(2) of the 1996 Convention.

What is the change

This amendment clarifies that for the purposes of s 30.7(1); the definition of “parental responsibility” in Article 1(2) of the 1996 Convention applies.

Reason for the change

The amendment clarifies the definition of parental responsibility.

When

On a day to be fixed by order of the Governor in Council.

Transfer of Jurisdiction

State Party better placed to assess child's best interests

(s 30.8, *Divorce Act*)

New section

State Party better placed to assess child's best interests

30.8 For the purposes of Articles 8 and 9 of the 1996 Convention, a court in the province in which a child is habitually resident that would otherwise have jurisdiction under any of sections 3 to 6 of this Act, or that has jurisdiction under section 30.6 of this Act, may decline to exercise jurisdiction to make, in respect of the child, a parenting order, a contact order or a variation order in respect of such an order if the conditions of Article 8 or 9, as the case may be, are fulfilled and there is agreement between the court and the competent authority of a State Party that the latter will have jurisdiction.

What is the change

If a child is habitually resident in a province or territory and the court has jurisdiction under sections 3 to 6 of the Act; or the child is present in the province or territory, and a court can take jurisdiction under ss 3 to 5 consistent with Article 6 of the Convention, the court can decline to exercise this jurisdiction in favour of a court in another State Party, if the conditions set out in Articles 8 or 9 of the Convention are met.

Reason for the change

In exceptional cases, Articles 8 and 9 allow for the transfer of jurisdiction from the Contracting State with primary jurisdiction (the Contracting State of the child's habitual residence (Article 5) or the Contracting State where a refugee, internationally displaced child, or a child's whose habitual residence cannot be determined is present (Article 6)) to another Contracting State.

Article 8 applies when the competent authority of a Contracting State with primary jurisdiction initiates a request for transfer; Article 9 applies when a competent authority of the other Contracting State initiates the request. Otherwise, the same conditions apply to a request for transfer under both Articles 8 and 9.

A transfer of jurisdiction is possible only when the Contracting State to which jurisdiction would be transferred is that:

- of the child's nationality,
- in which property of the child is located,
- whose authorities are seized of an application for divorce or legal separation of the child's parents, or the annulment of their marriage, or
- with which the child has a substantial connection.

The competent authorities in both Contracting States must agree that the authority in the Contracting State to which jurisdiction would be transferred is better placed to assess the best interests of the child.

This provision specifies which courts under the Act can decline jurisdiction to allow a competent authority of another State Party to assume jurisdiction.

It is anticipated that transfers are most likely to occur when the child has a substantial connection to the other Contracting State. For example, in a situation where there is a request to vary the parenting time provisions of an order in respect of a child who is habitually resident in a province, but whose parent lives in another country, the courts in both countries may determine that the court in the other country is best placed to make the determination, given that evidence about the parent and the child's interactions with the parent in the other country are there.

When

On a day to be fixed by order of the Governor in Council.

Canadian court better placed to assess child's best interests

(s 30.9, *Divorce Act*)

New section

Canadian court better placed to assess child's best interests

30.9 For the purposes of Articles 8 and 9 of the 1996 Convention, only the court in a province that would otherwise have jurisdiction under any of sections 3 to 5 of this Act may exercise jurisdiction to make a parenting order, a contact order or a variation order in respect of such orders if the conditions of Article 8 or 9, as the case may be, are fulfilled and there is agreement between the competent authority of a State Party and the court that the latter will have jurisdiction.

What is the change

The amendment identifies which courts can accept a transfer of jurisdiction to make a parenting, contact or variation order, in cases where the child either habitually resides in another State Party or that other State Party would have jurisdiction to make an order in relation to a child under Article 6, if the conditions of Article 8 or 9 are met.

Reason for the change

As noted above, in exceptional cases, Articles 8 and 9 allow for the transfer of jurisdiction from the competent authority of a Contracting State with primary jurisdiction (that is, that of the Contracting State of the child's habitual residence (Article 5) or that of the Contracting State where the child is present and is a refugee or internationally displaced, or whose habitual residence cannot be determined, (Article 6)) to the competent authority of another Contracting State.

Article 8 applies when the Contracting State with primary jurisdiction proposes or initiates a request for transfer; Article 9 applies when the other Contracting State initiates the request. Otherwise, the same conditions apply to a request for transfer under both provisions.

A transfer of jurisdiction is possible only when the Contracting State to which jurisdiction would be transferred is that:

- of the child's nationality
- in which property of the child is located
- whose authorities are seized of an application for divorce or legal separation of the child's parents, or the annulment of their marriage, or
- with which the child has a substantial connection.

The competent authorities in both Contracting States must agree that the authority in the Contracting State to which jurisdiction would be transferred is better placed to assess the best interests of the child.

This provision clarifies which courts under the Act have authority to accept a transfer of jurisdiction from another State Party. These are the courts that would otherwise have jurisdiction in divorce proceedings (s 3), corollary relief proceedings (s 4) and variation proceedings (s 5).

It is anticipated that the cases where jurisdiction is most likely to be transferred to a Canadian court would be those where there is a divorce proceeding but where the conditions set out in section 30.7 of the Act (Article 10 of the 1996 Convention) have not been met, or the child has a substantial connection to the province or territory.

When
On a day to be fixed by order of the Governor in Council.

Urgency

Urgent cases

(s 31, *Divorce Act*)

New section

Urgent cases

31 For the purposes of Article 11 of the 1996 Convention, a court in a province that does not have jurisdiction under sections 30.4 to 30.9 of this Act but that would otherwise have jurisdiction under any of sections 3 to 5 of this Act, may, in urgent cases, make a parenting order, a contact order or a variation order in respect of either such order if the child who would be the subject of the order is present in that province.

What is the change

The amendment specifies which courts can exercise jurisdiction in “urgent cases,” consistent with Article 11. These are the courts that would otherwise have jurisdiction under sections 3 to 5 of the Act.

Reason for the change

Article 11 provides for an exceptional basis for jurisdiction, where a timely decision is required to protect the child. It allows the authorities of a Contracting State in whose territory a child is present to take necessary measures of protection in all cases of urgency, including where the presence of the child in that State results from a wrongful removal or retention.

This jurisdiction could be exercised, for example, when a child who is habitually resident in a State Party is visiting a parent who is habitually resident in a province or territory where the Convention applies and there is an urgent need to make a decision about a medical procedure or if there are concerns about the safety of the child.

When

On a day to be fixed by order of the Governor in Council.

Recognition

Recognition by operation of law

(s 31.1(1), *Divorce Act*)

New section

Recognition

Recognition by operation of law

31.1 (1) For the purposes of Article 23 of the 1996 Convention, a measure taken by a competent authority of a State Party is a measure that has the effect of varying, rescinding or suspending a parenting order or contact order.

What is the change

The amendment specifies that for the purposes of Article 23 (recognition of foreign decisions), the decisions or “measures” that are relevant for *Divorce Act* purposes are those, which have the effect of modifying a previous parenting or contact order under the Act.

Reason for the change

Provincial and territorial laws generally address the recognition of foreign parenting (custody and access) or contact orders. However, when a parenting or contact order is made under the Act and later modified by a State Party having jurisdiction under the 1996 Convention, the foreign modifying decision (measure) must be recognized under the Act, so that it has the effect of overriding the original order.

When

On a day to be fixed by order of the Governor in Council.

Measure taken deemed to be variation order

(s 31.1(2), *Divorce Act*)

New section

Measure taken deemed to be variation order

(2) A measure taken by a competent authority of a State Party that is recognized by operation of law under Article 23(1) of the 1996 Convention is deemed to be an order made under section 17 of this Act.

What is the change

This provision treats a foreign order that: 1) has the effect of modifying a *Divorce Act* order; and 2) has been recognized by operation of law, as a variation order under the Act.

Reason for the change

Article 23 provides for the recognition by operation of law in Contracting States to the 1996 Convention, of measures (decisions) taken by other Contracting States. Recognition by “operation of law” means that decisions are automatically recognized and that a court need not recognize the measure for it to have effect.

Section 31.1(2) treats a foreign measure that has been recognized as if it were a variation order under the Act.

When

On a day to be fixed by order of the Governor in Council.

Extent of validity

(s 31.1(3), *Divorce Act*)

New section

Extent of validity

(3) Despite subsection 20(2), the measure referred to in subsection (2) is valid only in any province to which the 1996 Convention applies.

What is the change

This provision clarifies that despite s 20(2), when a foreign measure is recognized by operation of law, it applies only in provinces and territories where the 1996 Convention applies.

Reason for the change

Normally, when an order is made in a province or territory in respect of corollary relief or a variation of corollary relief under the Act, it has legal effect in every province and territory as a result of s 20(2).

The provisions of the Act in respect of the 1996 Convention apply only in provinces and territories for which Canada has made a declaration extending the application of the Convention. In such a situation, under provincial family law, measures must also be recognized by operation of law (without a decision of a court), ensuring consistent treatment of the foreign measures.

In provinces and territories where the 1996 Convention does not apply, only a measure recognized by a court under the Act would have legal effect, which is similar to existing practices under provincial and territorial legislation.

When

On a day to be fixed by order of the Governor in Council.

Jurisdiction respecting recognition

(s 31.2(1), *Divorce Act*)

New section

Jurisdiction respecting recognition

31.2 (1) For the purposes of Article 24 of the 1996 Convention and on application by an interested person, a court in a province has jurisdiction to decide on the recognition of a measure referred to in section 31.1 of this Act if there is a sufficient connection between the matter and the province.

What is the change

The amendment specifies that a court in a province or territory has jurisdiction to decide on the recognition of a measure if there is a sufficient connection between the matter and the province or territory.

Reason for the change

Article 24 provides that any interested person may ask a court to decide on the recognition or non-recognition of a measure taken by a Contracting State under the 1996 Convention. The amendment clarifies that for the purposes of the Act, these applications can be made to a court in a province or territory that has a sufficient connection to the matter of recognition. For example, a sufficient connection would exist if one of the parties, or the child subject to the measure, resides in the province or territory and the measure would need to have effect there.

When

On a day to be fixed by order of the Governor in Council.

Effect of recognition

(s 31.2(2), *Divorce Act*)

New section

Effect of recognition

(2) The court's decision recognizing the measure is deemed to be an order made under section 17 and has legal effect throughout Canada.

What is the change

The amendment specifies that an order recognizing a measure is deemed to be a variation order and has legal effect across Canada.

Reason for the change

Decisions recognized by operation of law have effect only in provinces and territories where the 1996 Convention applies. In contrast, when a court makes a determination under the Act, it has legal effect across Canada.

When

On a day to be fixed by order of the Governor in Council.

Effect of non-recognition

(s 31.2(3), *Divorce Act*)

New section

Effect of non-recognition

(3) The court's decision refusing to recognize the measure has legal effect throughout Canada.

What is the change

The amendment provides that a decision of the court to refuse recognition has legal effect across Canada.

Reason for the change

If a court determines that a measure should not be recognized, based on one of the grounds in Article 23(2), the decision has legal effect across Canada. This prevents the issue of recognition from being re-litigated in another province or territory.

When

On a day to be fixed by order of the Governor in Council.

Enforcement

(s 31.3, *Divorce Act*)

New section

Enforcement

31.3 For the purposes of Article 26 of the 1996 Convention, a measure taken by a competent authority of a State Party that is enforceable in that State Party and that is to be enforced in a province may, on application by an interested person,

(a) be declared to be enforceable by a court in the province and enforced in that province as an order of that court; or
(b) registered for the purposes of enforcement in the court in that province and enforced in that province as an order of that court.

What is the change

The amendment specifies that when a measure taken in another State Party is enforceable there, upon application a court in a province or territory may declare it enforceable, or it may be registered in the court. In either case, it would be enforced as if it were an order of that court. An interested person may make the application.

Reason for the change

While a foreign decision may be recognized by operation of law, if an individual wishes to have the foreign decision enforced, they must take the extra step of either registering the decision with a court in a province (or territory) or seeking a declaration from the court that the decision is enforceable. The particular procedure is determined by the provinces and territories. The registration or declaration could be refused on the same grounds as those applicable to the recognition of a foreign decision (Article 23(2)). When it is enforceable, a foreign decision may be enforced in the same way as an order of a court in the province or territory.

When

On a day to be fixed by order of the Governor in Council.