FOLA's Submission to the Attorney General on Expanding the Definition of Child in the Children's Law Reform Act

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Submitted on: January 8, 2021

Submitted by:

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Thank you for providing this opportunity to The Federation of Ontario Law Associations (Hereinafter referred to as "FOLA") to provide comments with respect to expanding the definition of a child in the Children's Law Reform Act.

FOLA is an organization that represents the associations and members of the 46 local law associations across Ontario. Together with our associate member, The Toronto Lawyers Association, we represent approximately 12,000 lawyers, most of whom are in private practice in firms across the province. These lawyers are on the front lines of the justice system and see its triumphs and shortcomings every day.

This Report serves as FOLA's views and comments regarding the proposed and whether similar language should be adopted within the provincial legislation, specifically the Children's Law Reform Act. R.S.O. 1990, c. C.12. (Hereinafter referred to as "CLRA")

FOLA is grateful for all the significant efforts made this far by the Attorney General, and the continued dedications to ameliorate access to justice issues including the consideration in expanding the definition of child and the possibility to harmonize Ontario's CLRA that will similarly echo the federal Divorce Act.

FOLA supports the proposal to expand the definition of "child". The definition of "child" in the proposed section 18(2) of the CLRA is limited to a child who is a minor. It is our view this definition is inconsistent with the definition of "child" pursuant to the Divorce Act and section 31(1) of the Family Law Act for child support purposes.

FOLA submits that the definition shall include children who are "unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents". We also believe it is of utmost importance for the CLRA to be aligned with the federal Divorce Act in order to avoid having dissimilarities between the two separate regimes.

At the receiving end of this ambiguity are the children, where the Divorce Act applies to children who are of married and divorced or divorcing parents; and does not proffer same to disabled adult children of unmarried parents in the CLRA.

Furthermore, the two separate regimes may pose a constitutional challenge similar to that in the case of Coates v. Watson, 2017 ONCJ 454 (CanLII) where Justice W. Sullivan found the previous section 31(1) of the Family Law Act violated the children's section 15 (1) Charter rights and made a finding that the Family Law Act discriminated against children with disabilities of unmarried spouses given that it did not provide for support when they are no longer minors as is the case with the Divorce Act was.

Justice Sullivan[1] Found that the Family Law Act means a child who:
(a) is under the age of majority and who has not withdrawn from their charge, or
(b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.

In contrast, Justice L. Bale in Simons v. Crow, 2020 ONSC 5940 noted the following:[2]

[1] Supra, paragraph 229 (CanLII)
[2] Supra, paragraph 36 (CanLII)

However, as noted above, this case has not been commenced under the Divorce Act, but rather under the provincial Children's Law Reform Act. This court does not have jurisdiction under the provincial legislation to order custody or access in respect to a child who is not a minor: see for example Ciolfe (Caravatta) v. Ciolfe: 2006 ONCJ 118. As a result, this court does not have jurisdiction to grant the relief sought by the Applicant as it pertains to the custody and access raised in this action in relation to Geoffrey, Michael Jr. and Richard. Likewise, this court would not have jurisdiction to order the enforcement of the extra-provincial custody and access order of the Supreme Court of Bermuda under s. 41 of the CLRA because the order must pertain to the custody of, or access to, a "child" as defined under Part III.

In conclusion, the overall principle that is applied around the world revolves around the realm of political, economic, and social interests of the child whenever policies, laws, and decisions are made that directly or indirectly affect children. More so, significant weight is applied in disputes such as decision making, parenting time, support, child protection, and other issues.

Currently, as it stands in making an order for decision making, parenting time pursuant to the federal Divorce Act or the Children's Law Reform Act, the court will consider only the best interests of the child and having two legislations of similar language would provide the courts with great flexibility rather than the court concluding to not have a jurisdiction to grant the relief sought.

FOLA recommends the following amendment to the definition of "child" in the proposed section 18(2) of the CLRA

A reference in this Part to a child who:
(a) is a minor; or
(b) is unable by reason of illness, disability, or other cause to withdraw from the charge of his or her parents.

FOLA is grateful for the opportunity to provide its submissions and welcome any opportunity to work with the Ministry of Attorney General as it continues its commitment in improving Ontario's justice system.

Yours very truly,

Rasim Sam Misheal, Family Law Chair
Federation of Ontario Law Associations