Brief concerning

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

Submitted to the Standing Committee on
Justice and Human Rights
November 2018
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Executive Summary

The purpose of these comments by the Chambre des notaires du Québec is:

A. To support Parliament’s efforts and collaborate with Members in order to secure better protection for children and vulnerable spouses;

B. To reduce the number of litigated cases and the associated costs to Canadian families, in the best interests of the child; and

C. To define the roles that legal professionals can play in preventing and resolving disputes, with the goal of improving access to justice for all Canadians.

The Chambre therefore makes the following recommendations:

Recommendations

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Amend new section 7.7 to provide that:  

(a) a legal adviser is required to act impartially, disinterestedly, truthfully and honestly toward all parties when representing both parties in a joint proceeding;  

(b) a legal adviser may have obligations to both spouses and not only to one of them; and  

(c) a legal adviser may, in their discretion, address the possibility of reconciliation with one or both of the spouses in an uncontested divorce. |
| 5 | **Provincial jurisdiction over uncontested divorce**  

Allow the provinces to authorize a neutral, impartial third party to grant an uncontested divorce. |
Preamble

The Chambre des notaires du Québec is a professional body whose membership is composed of over 3,900 notaries and legal advisers. Its principal mission is to protect the public by promoting the practice of preventive law, supporting innovative notarial practice and aiming for excellence, while promoting access to justice for all. In addition to that primary mission, by making representations to legislative bodies, the Chamber protects and promotes the values on which the Quebec legal system is based: equality, fairness, and individual and collective responsibility.

The Chambre is a member of the Federation of Law Societies of Canada.
Introduction

As part of the special consultations and public hearings, the Chambre des notaires du Québec (“Chambre”) is pleased to respond to the invitation by the Standing Committee on Justice and Human Rights and submits this brief concerning 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 (“C-78”).

Best interests of the child as primary consideration

To begin, the Chambre welcomes the proactive approach taken by Parliament to family law, by fully exercising its constitutional authority in respect of marriage and divorce. By introducing Bill Bill C-78, Parliament has made the best interests of the child the central issue in divorce proceedings and of family and support orders, and the Chambre applauds this move.

Incorporating sections 7.1 and 7.2 into the Divorce Act and codifying criteria, making it possible to define the best interests of the child, the spouses’ decision-making responsibility in respect of the child, and what constitutes family violence, should be noted as one more step in protecting the child, who is a vulnerable party, and that protection must be strengthened when the parents separate. The Chambre therefore welcomes the provisions designed to achieve that objective, that give the court clear guidelines so that the decisions made will be in the best interests of the child.

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1 Second reading, October 4, 2018, 42nd Parliament, 1st Session (hereinafter “C-78” or “Bill C-78”).
2 Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 91(21) [26 – Tr.]
3 See Civil Code of Québec, CQLR, chapter CCQ-1991, art. 33 para. 1
Role of the notary in family law

The Chambre’s interest in participating in this democratic exercise is based on one of the very foundations of Quebec’s notarial institution. Notaries, who are public officers and legal advisers, have special expertise in the law of persons, particularly in family law. To give but a few examples, they act as officiants for a civil marriage or civil union and draft marriage contracts, civil union contracts (two types of contracts that are required to be in notarial form *en minute*) and cohabitation agreements for *de facto* spouse. They may also dissolve a civil union, prepare draft agreements governing the consequences of separation from bed and board, divorce, or dissolution of the spouses’ civil union, and, since February 21, 2017, may prepare, draft, initiate proceedings and represent the parties before the court in a joint application for separation from bed and board or divorce.

As can be seen, notaries play a central role with families in Quebec through their professional practice. As specialists in preventive law, they have also developed expertise in dispute prevention and resolution and often act as family mediators in separation cases. In fact, the new *Code of Civil Procedure* of Quebec, which has been in force since January 1, 2016, in the spirit of promoting mechanisms for preventing and resolving disputes and litigation, now permits notaries not only to file a joint application in court on a draft agreement that settles the consequences of a separation from bed and board, a divorce or the dissolution of a civil union, but also to represent the parties before the court. This illustrates the Quebec legislature’s recognition of the contribution made by notaries, as impartial legal advisers acting in non-contentious matters, to limit

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4 *Notaries Act*, CQLR, chapter N-3, s. 10, para. 1.
5 *Civil Code of Québec*, CQLR, chapter CCA-1991, art. 366, para. 1
6 *Ibid*, arts. 440 and 521.8, para. 3.
8 *Code of Civil Procedure*, CQLR, chapter C-25.01, art. 303(7).
9 *Regulation respecting family mediation*, CQLR, chapter C-25.01, r. 0.7, s. 1.
10 *Code of Civil Procedure*, CQLR, chapter C-25.01, art. 303(7); Preliminary Provision, para. 2.
litigation and the costs associated with it, with the objective of improving access to justice for Quebeckers and enhance the protection of the public. The Chambre’s comments here are formulated from the perspective of reducing litigation and the costs for the parties.

**Citizens Commission on Family Law**

Because family law is a core component of many notaries’ professional practice, they obviously have an interest in seeing this area of the law develop and adapt to the realities that families face today. An impressive number of people who work in family law (notaries, lawyers, social workers, family mediators, etc.) have voiced strong criticisms of the anachronistic nature of Quebec’s family law, which has not been thoroughly revised since 1980. In fact, this is one of the main findings made by the Citizens Commission on Family Law, which delivered a thick report to the Minister of Justice in June 2015.\(^\text{11}\) The Commission, chaired by Alain Roy, a law professor and notary emeritus, and composed of a number of family law experts, produced a report that stressed the urgency of reforming family law in Quebec in order to provide a legal framework suited to the realities of modern families’ lives.

Given the provincial government’s inaction on initiating the proposed reform and the rise in dangerous situations experienced by families because of that inaction, the Chamber decided to act, creating the Citizens Commission on Family Law. The primary objective of the Commission, which was launched in May 2018 and chaired by notaries emeritus Alain Roy and Jean Paul Dutrisac, was to go out and meet with the public in order to learn their needs and hear their proposals for modernizing family law in Quebec. On September 11, 2018, after hearing over 200 organizations and individuals, the Commission delivered its report,\(^\text{12}\) which confirmed that a comprehensive reform of family law was needed and was hoped for by a large segment of the public, and that

\(^{11}\) CITIZENS COMMISSION ON FAMILY LAW, Alain ROY (Chair), *Pour un droit de la famille adapté aux nouvelles réalités conjugales et familiales*, Montréal, Éditions Thémis, 2015.

\(^{12}\) CITIZENS COMMISSION ON FAMILY LAW, Alain ROY and Jean Paul DUTRISAC (Chairs), final report, Montréal, Éditions Yvon Blais, 2018.
the Quebec legislature had to start this ball rolling in order to offer legal protection for as many people as possible, and particularly for couples living in *de facto* unions and children born to those couples.

The two commissions, one of which heard from experts and the other from the public, produced an accurate and realistic picture of the situation relating to family law in Quebec. **A number of findings relate to the legislation reformed by the bill under consideration here.** Obviously, some of these comments by the Chambre will be based on information that came out of the commissions, with the objective of offering Parliament the benefit of this experience, so that Bill C-78 provides Canadians with better access to the justice system and the best protection possible.
Comments

Clause 1 of Bill C-78 amends a number of the definitions in 2(1) of the Divorce Act\(^{13}\) (the “Act”) and introduces new definitions into that section. The comments in sections 1 (Best interests of the child) and 2 (Legal adviser) of this brief will therefore relate to certain terminological changes and additions proposed by C-78 that have particular legal consequences for divorce proceedings in Canada.

1. Best interests of the child

As noted in the introduction, the Chambre believes that the key measures in Bill C-78 are the ones that make the best interests of the child the central issue in the decisions that the courts must make in a divorce proceeding. A number of the provisions of C-78 therefore define key concepts that must be considered by the courts when they make a support, custody or contact order.

The Chambre therefore welcomes the various criteria added to define these concepts and provide guidelines, since we believe that this method will protect the interests of children of married spouses when their parents separate. The Chambre intends to make comments to improve those criteria and thus enhance the protection afforded to children when their parents divorce, since the child is the vulnerable party and must absolutely be protected.

Decision-making responsibility

Clause 1(7) of Bill C-78 defines that decision-making responsibility parents may have in respect of dependent children. The proposed definition of “decision-making responsibility” is as follows:

\[
\text{decision-making responsibility means the responsibility for making significant decisions about a child’s well-being, including in respect of}
\]

\(^{13}\) R.S.C. 1985, c. 3 (2nd Supp.).
(a) health;
(b) education;
(c) culture, language, religion and spirituality; and
(d) significant extra-curricular activities; (responsabilités décisionnelles).

While the Chambre congratulates Parliament for introducing that definition in Bill C-78, it believes that the definition is incomplete. Of the criteria set out in paragraphs (a) to (d), none refer to decisions concerning management of the child’s property. In Quebec, articles 209 and 223 of the Civil Code, which define parental authority, state: “the father and mother, if of full age or emancipated, are, by operation of law, tutors to their minor child for the purposes of representing him in the exercise of his civil rights and administering his patrimony” (emphasis added). Notaries also see situations where a child inherits a substantial amount on the death of a family member. Even though a tutorship council must be established for the minor when the amount is $25,000 or over and supervision and oversight mechanisms are then put in place to protect the minor’s interests, the parents must still administer the child’s property and make decision concerning his or her property.

In all cases, the decisions can have a significant impact on a number of aspects of a child’s life, in that they can influence the choices that will be made about the child’s education, health, extra-curricular activities, and so on. In short, the child’s well-being depends directly on the decisions made concerning the management of his or her property. If no decision is made, particularly where the parents have different opinions, it may cause the child significant harm.

The Chambre therefore recommends that management of a minor child’s property be included in the matters that fall under the parents’ decision-making responsibility, to ensure that children have the most financial protection possible in the event of a divorce.

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Recommendation

In clause 1(7) of Bill C-78, add management of the child’s property as a matter that should be included in the responsibility for making decisions about a child’s well-being.

Family violence

A little after that, also in clause 1(7) of Bill C-78, Parliament proposes to define family violence in order to guide the courts’ decision, particularly in relation to child custody orders in a divorce proceeding. The Chambre notes that the courts’ failure to consider spousal violence in awarding custody in the case of a parental separation was a problem often raised by many witnesses who testified at hearings of the Citizens Commission on Family Law. The Commission’s final report noted that the presence of family violence within the family that did not directly involve the child was often not a factor considered in awarding custody. They also talked about post-separation violence, when the violent spouse continued to assault his or her former spouse, even though they were separated. The Chambre therefore welcomes the introduction of this definition into the Act and is pleased to see that in doing this, Parliament has followed the example of Ontario and British Columbia.

Cumulative aspect of coercive and controlling conduct

The first paragraph of clause 1(7) reads as follows:

family violence means any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is

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15 *Family Law Act*, SBC 2011, c. 25
16 CITIZENS COMMISSION ON FAMILY LAW, Alain ROY and Jean Paul DUTRISAC (Chairs), final report, Montréal, Éditions Yvon Blais, 2018, pp. 30-31.
violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person — and in the case of a child, the direct or indirect exposure to such conduct — and includes … (emphasis added)

The Chambre believes that the passage “constitutes a pattern of behaviour” [par son aspect cumulatif] significantly diminishes the effects of the new definition. According to the Office québécois de la langue française, the term effet cumulatif [cumulative effect] means [translation] “gradual increase, by addition, of the effects of an outside agent on an organism, an individual or a society.19 The Chambre therefore understands that in order to be covered by the definition of family violence, coercive and controlling conduct would have to involve a cumulative aspect, that is, be repeated over a varying length of time. The Chamber believes that such conduct on the part of a family member toward a person in their family can lead to family violence even if it occurs only once. If we consider cases of serious threats we see that even if they occur only once in a family’s life, they can result in a court finding the presence of family violence. The English version of the bill reads “constitutes a pattern” and results in the same problem of requiring that the action be recurring.

The Chambre therefore believes that the Act must not limit the definition of family violence to only that coercive and controlling behaviour that constitutes a pattern, and should rather allow a single action to be considered to be family violence, even if it does not constitute a pattern. It therefore recommends that “or not” be added after “that constitutes a pattern of coercive and controlling behaviour” in the first paragraph of the new definition of “family violence” in clause 1(7) of Bill C-78.

Recommendation

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**Parental alienation**

At the hearings of the Citizens Commission on Family Law, a number of participants stated that the issue of parental alienation was a phenomenon that the courts completely disregarded in deciding on the effects of separation and its consequences for the child. Various individuals and organizations associated parental alienation with a form of violence committed by the former spouse and testified before the Commission about the destructive effects of parental alienation on children. The final report contains this passage:

[translation]… [P]arental alienation has devastating effects on the children who are its victims. A child who divorces a parent, they say, “is being asked to despise 50% of themself and to suffer significant short-, medium- and long-term psychological damage”. Children exposed to this phenomenon are said to be at greater risk of emotional distress, even after reaching adulthood, and to be predisposed to reproducing the alienating dynamic they suffered, to the detriment of their own children.20

Knowing that parental alienation is a more widespread phenomenon than we think and one that can take many forms (false statements about the other parent, harassment, manipulation, threats, and psychological mistreatment of the child), and that this form of violence is most often aimed at children, the Chambre recommends that the definition of

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20 CITIZENS COMMISSION ON FAMILY LAW, Alain ROY and Jean Paul DUTRISAC (Chairs), final report, Montréal, Éditions Yvon Blais, 2018, pp. 36-37.
“family violence” in clause 1(7) of Bill C-78 be amended by adding that denigrating another family member may be considered to be family violence.

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2. **Legal adviser**

Replace the term “lawyer” with “legal adviser”

To begin, the Chambre welcomes the introduction of the definition of “legal advisor” into the *Divorce Act*, in paragraph (7) of clause 1. The Chambre recognizes that, together with the repeal of section 9 of the Act, which used only the term “lawyer”, Parliament wishes all individuals who may be described as legal advisers under the law of their province, and particularly notaries in Quebec, to be subject to the obligations in the Act. This will also harmonize the French version of the Act with the English version, which already uses the term “legal adviser” in section 9.

As noted in the introduction to this brief, notaries play a central role in family law in Quebec. In relation to divorce, the introduction of article 303(7) into the *Code of Civil Procedure*\(^\text{21}\) confirms that a joint application on a draft agreement that settles the consequences of a divorce is an application according to the procedure for non-contentious proceedings and recognizes notaries’ authority to act in those matters. Since that article came into force, notaries have been able to represent the spouses in court on these applications.

\(^{21}\) CQLR c. C-25.01.
Duties of the legal adviser

New section 7.7 in Bill C-78 imposes obligations on legal advisers in divorce proceedings. Since notaries act as legal advisers in this area, the Chambre would like to make some comments about the proposed new section.

Role of the legal advisor in uncontested divorces

First, the Chambre notes that the proposed provisions refer to legal advisers’ obligations to only one party, the party who has retained the notary’s services and whom he or she represents. The Chambre believes that by defining the legal adviser’s services in this way, the provisions of proposed section 7.7 disregard the role that a legal advisor can play in preventing and resolving family law disputes. For example, the new section does not seem to take into account the fact that a notary who is acting in a joint application on a draft agreement under new article 303(7) of the Code of Civil Procedure must advise all parties impartially and remain disinterested.

The 2003 decision of the Supreme Court in Miglin held that if the parties retain a professional, particularly a legal adviser, in negotiating a support agreement, this could overcome and compensate for one party’s vulnerability in relation to the other. The presence of a professional in the negotiation of support agreements must therefore be taken into consideration by the courts when they assess the validity of settlement agreements.

Since the main purpose of the Chambre’s comments here is to reduce the volume of divorce litigation, we believe that Bill C-78 should encourage support agreements reached by the spouses with the help of one impartial legal adviser. The Chambre believes that encouraging the parties to use the services of a single legal adviser in order to reach a support agreement will significantly reduce costs and delays for the
parties. In addition, the Chambre is of the opinion that the insertion of a third party, no matter how competent, is not necessary and is, instead, a superfluous step when an impartial legal adviser is already involved in the case.

The Chambre therefore recommends that new section 7.7 in Bill C-78 reiterate that a legal adviser whose services are retained by both parties in order to reach a support agreement must advise both spouses impartially, to seek the best interests of the parties and the children. This addition will ensure that all Canadian legal advisers are subject to this rule for the greater benefit of the entire family. It will inevitably encourage the spouses to use this type of professional services as part of process of reducing litigation and will limit the volume of proceedings and the costs and delays for parties who wish to reach a settlement.

The Chambre also recommends that proposed section 7.7 specify that a legal adviser's obligations may be to one or both spouses. This will mean that the role of impartial legal adviser that a lawyer or notary can play in a joint application on a draft agreement that settles the consequences of a divorce will be fully recognized.

Reconciliation

The Chambre also wonders, regarding new section 7.7 in Bill C-78, about the appropriateness of reiterating the legal adviser’s duty, as now provided in section 9 of the Act, to discuss with the spouse the possibility of reconciliation. This provision puts legal advisers in a sensitive position: while they have to support the parties through what is often a highly emotional process, their training is in law, not psychosocial therapy.

In a joint application for divorce, that obligation seems even more incongruous, since the legal advisor is representing both spouse. He or she must then, in a sense, question what they are doing, and this may represent an intrusion into their private life, and overstep his or her role. The same is true when the spouses have already gone through
family mediation and reached a draft agreement. It is then inappropriate for a legal adviser to raise the possibility of reconciliation, which was already discussed in the mediation with a professional who had psychosocial training. In the Chambre’s opinion, the duty to discuss reconciliation with the parties is a moral question rather than a legal one. Legal advisers should have the necessary latitude decide, in their professional judgment and knowledge of their clients, whether or not to address the subject.

The Chambre therefore recommends that new section 7.7(1) specify that a legal adviser may, in their discretion, address the possibility of reconciliation with one or both of the spouses in an uncontested divorce.

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  (b) a legal adviser may have obligations to both spouses and not only to one of them; and

  (c) a legal adviser may, in their discretion, address the possibility of reconciliation with one or both of the spouses in an uncontested divorce.

To conclude, the Chambre welcomes the amendment made by new section 7.7(2)(a), which, unlike former section 9(2), changes the duty of a legal adviser who must now encourage and not merely discuss the possibility of using a family dispute resolution process.

Section 9(2) also refers to “mediation facilities”. New section 7.7(2)(a) refers to “a family dispute resolution process”, and the Chambre welcomes this extension to include other preventive processes and believes that this is a step in the direction of more preventive, more accessible justice.
3. *Family dispute resolution process*

While the Chambre notes the effort made by Parliament to promote family dispute resolution processes in various provisions, by terminological and legal, it believes that Bill C-78 lacks concrete measures to genuinely encourage the parties to use non-litigious approaches. For example, new section 7.3 in the bill, which contains a general statement of the principle that the parties shall try to use family dispute resolution processes, does not go far enough. The Chambre believes that in order to genuinely succeed in avoiding litigation in divorce cases, unclog the courts, reduce delays in hearing cases, and cut costs for the parties, Parliament should effect a paradigm shift in the case of uncontested divorce proceedings, in the best interests of the parties, and particularly of children.

**Allow uncontested divorce without the involvement of a judge**

One of the problems repeatedly raised in the final report of the Citizens Commission on Family Law was individuals’ lack of access to justice in family law cases. The reasons for this include long delays in the courts that some participants said [translation] “led to crystallization of parental alienation, while the winner-loser model on which the present system is based exacerbates spousal conflict between parents.”

Long delays are also experienced in uncontested divorce proceedings. Obviously, a child who finds themself right in the middle of their parents has a direct interest in an agreement between them being reached as fast as possible, even if the parents want an uncontested divorce.

A court does act as a neutral and impartial third party to ensure that the child’s interests are respected, in making a court order. That point was also made by people who spoke at hearings of the Commission who contended that children of *de facto* spouses were

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26 CITIZENS COMMISSION ON FAMILY LAW, Alain ROY and Jean Paul DUTRISAC (Chairs), final report, Montréal, Éditions Yvon Blais, 2018, p. 37.
less protected since an agreement between their parents was not subject to the approval of the court, even when it is the product of a settlement.\textsuperscript{27}

In the spirit of reducing litigation and unclogging the courts, the Chambre believes that a neutral and impartial third party other than the court could approve settlement agreements in which the spouses agree on all of the terms of their separation, including support, custody and contact with the child, and pronounce the divorce. That third party should review the same factors as the judges. This would mean that agreements would be enforceable faster, since the parties would not have to go to court to obtain a decision. Children’s family situation would be stabilized quickly, and this is obviously in their best interests.

To illustrate what this kind of system might look like, the Chambre would draw Parliament’s attention to the French model, in which, since January 1, 2017, the law allows an agreement between spouses, countersigned by each one’s lawyer, to be effective when it is deposited in a notary’s minutes.\textsuperscript{28} This enables them to avoid the obligation of obtaining a judicial decision pronouncing the divorce, by offering a definite date for a settlement agreement.

In Quebec, a notary already performs similar functions in relation to the dissolution of a civil union. A civil union, which produces the same legal effects between the spouses as a marriage, may be dissolved [translation] “by a judgment of the court or by a notarized joint declaration where the spouses’ will to share a community of life is irretrievably undermined.”\textsuperscript{29} In that case, the notary is acting as a court officer,\textsuperscript{30} performing judicial functions delegated by the Quebec legislature. It should be noted that a notary who dissolves a civil union by notarized joint declaration must follow certain rules, including the requirement for a notarized agreement settling the dissolution. The notary must also act with complete impartiality, inform the parties of the consequences of the

\textsuperscript{27} Ibid, p. 19.
\textsuperscript{28} Art. 229-1 Fr. Civ. Code.
\textsuperscript{30} Alain ROY. Déontologie et procédures notariales, Montréal: Éditions Thémis, [c2002]. - xxi, 335 para. 9.
dissolution, make sure that they truly consent, and make sure that the provisions of the agreement are not contrary to public order.\textsuperscript{31}

These examples demonstrate that it is possible to create a simple, inexpensive system that is accessible to individuals who want to obtain an uncontested divorce without going to court to obtain a judicial decision, and that provides the parties with legal security. The Chambre therefore recommends that Parliament, which has constitutional jurisdiction in respect of divorce\textsuperscript{32}, allow the provinces to legislation to this effect by authorizing a neutral, impartial third party to grant an uncontested divorce.

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\textsuperscript{31} \textit{Civil Code of Québec}, CQLR, chapter CCA-1991, art. 521.13 para. 3.

\textsuperscript{32} \textit{Constitution Act, 1867}, 30 & 31 Vict., c. 3 (U.K.), s. 91(26).
Conclusion
The Chambre des notaires du Québec reiterates its support for Bill C-78 and is pleased to see that Parliament is playing the full role assigned to it in matters under its jurisdiction, to provide better protection for children in family law and ensure that their best interests are central to the decisions made by the courts. It welcomes the introduction of key concept into the Divorce Act that will guide the courts in their interpretation and standardize their decisions in seeking the best interests of the child.

The Chambre notes, however, that in order to achieve a real reduction in the volume of litigation and in costs and delays in family law cases, Parliament must institute family dispute resolution processes and make them accessible to all parties.

Because jurisdiction over family law belongs to the provinces, most reforms remain to be brought about by the provincial legislatures. The Chambre therefore hopes that the proactive approach taken by Parliament in respect of divorce will serve as an example to the provinces and encourage them to follow suit in modernizing family law, which in some cases is no longer aligned with the realities faced by families today.

In conclusion, the Chambre would remind Parliament that it wishes to work with Parliament and all stakeholders in the field of family law in order to implement the recommendations made in this brief.