



***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***

**Brief by**

**Luke's Place Support and Resource Centre, Durham Region, Ontario  
and**

**National Association of Women and the Law/Association Nationale Femmes et Droit (NAWL/ANFD)<sup>1</sup>**

and endorsed by the following organizations:

Action Canada for Sexual Health and Rights	La Maison
Action Ontarienne contre la violence faite aux femmes	The Manitoba Association of Women's Shelters
Barbra Schlifer Commemorative Clinic	The Native Women's Association of Canada
BC Society of Transition Houses	The New Brunswick South Central Transition House and Second Stage Coalition Inc.
Canadian Association of Elizabeth Fry Societies	The Ontario Association of Interval & Transition Houses
Canadian Centre for Policy Alternatives	The Ottawa Coalition to End Violence Against Women
Canadian Council of Muslim Women	Provincial Association of Transition Houses and Services of Saskatchewan
The Canadian Research Institute for the Advancement of Women	Québec Native Women Inc.
Canada Without Poverty	Regroupement des maisons pour femmes victimes de violence conjugale
The Canadian Women's Foundation	Rise Women's Legal Centre
Centre Novas-CALACS francophone de Prescott-Russell	South Asian Legal Clinic of Ontario
Centre Victoria pour femmes (Sudbury et Algoma)	Vancouver Rape Relief and Women's Shelter
DisAbled Women's Network of Canada	Women's Legal Education Action Fund
Fédération des maisons d'hébergement pour femmes du Québec	Women's Shelters Canada
The Feminist Alliance for International Action	YWCA Canada
Harmony House	

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## **Introduction**

This is a joint brief on 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* (hereinafter Bill C-78) by Luke's Place and the National Association of Women and the Law (NAWL). It is informed by multiple consultations with feminist lawyers, academics, advocacy and frontline service organizations.<sup>2</sup> Luke's Place is a community organization in Durham Region, Ontario, that works to improve the family court experiences and outcomes of women leaving abusive relationships. This work includes both direct service delivery to women in Durham Region and systemic work such as research, resource development, training and education and law reform advocacy at the provincial and national levels. NAWL is an incorporated not-for-profit feminist organization that promotes the equality rights of women in Canada through legal education, research, and law reform advocacy. NAWL has a long history of work and advocacy on women's rights in the context of the separation and on the Divorce Act in particular, and on violence against women. Both Luke's Place and NAWL use an intersectional and gender-based analysis that focuses on the lived realities of women in all their diversity. Other factors such as race, Indigenous identity, ethnicity, religion, gender identity or gender expression, sexual orientation, citizenship, immigration and refugee status, geographic location, social condition, age, and disability influence women's experiences. This is true in the context of violence against women, family violence, and divorce.

We recognize the devastating effects settlers' colonialism has had on Indigenous women and communities. Any discussion of violence against women must consider these ongoing impacts as well as the actions and absence of actions by governments and individuals that continue to perpetuate them.

In this Brief, we have used gender-specific language to refer to those who are harmed by violence within the family and those who cause that harm. We believe it is important to acknowledge that, in Canada, women in all their diversity, and transgender, queer and gender non-conforming people are overwhelmingly those who are subjected to abuse, and men are primarily those who engage in abusive behaviour. We also acknowledge the diversity of women and families in this country and acknowledge the continued adverse impacts of misogyny, homophobia, transphobia and heteronormative culture.

## **Comments:**

We congratulate the Government for the many positive changes introduced in Bill C-78, several of which are long overdue. It is extremely positive to see that the best interests of the child remains the only test to be used in determining arrangements for children post-separation. The addition of a list of factors is also positive, including the explicit reference to Indigenous upbringing and heritage, inasmuch as the factors can provide guidance and support to courts. We are also pleased to see an extensive and inclusive definition of family violence. It is especially good to see the use of the language of coercive and controlling behaviour, as well as of fear. Inclusion of threats or actual harm to animals is very positive, as is the explicit inclusion of financial abuse. We also commend the inclusion of the duty to consider other orders or proceedings, such as criminal and civil protection orders.

## **Context for recommendations:**

At the outset, we want to recall the international and domestic obligations of the Federal Government in relation to the rights of all Indigenous peoples in Canada, and to Indigenous women specifically. The Government of Canada has committed to reconciliation with Indigenous peoples. Reconciliation is only possible through the renewal of the relationship between Indigenous peoples and Canada, on a nation-to-nation basis. This undoubtedly includes the

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<sup>2</sup> This Brief was prepared by Suki Beavers and Anastasia Berwald (NAWL) and Pamela Cross (Luke's Place). NAWL and Luke's Place gratefully acknowledge the many contributions that informed the development of this brief, including those made by the following organizations: Action Ontarienne contre la violence fait aux femmes; the Barbra Schlifer Commemorative Clinic, the BC Society of Transition Houses, the Canadian Council of Muslim Women, the Canadian Women's Foundation, the DisAbleD Women's Network of Canada, Femmes Autochtones du Québec, Harmony House, LEAF (Women's Legal Education and Action Fund), Ontario Association of Interval Transition Houses, the Native Women's Association of Canada, Ottawa Coalition to End Violence Against Women, RISE Women's Legal Centre, the South Asian Legal Clinic, Vancouver Rape Relief and Women's Shelter, West Coast Leaf, Women's Shelters Canada. NAWL and Luke's Place also gratefully acknowledge contributions made by the following law firms and individuals: Athena Law, Equitas Law Group, Jenkins Marzban Logan LLP, Suleman Family Law, Professor Emerita Susan Boyd, Rachel Law, Hilary Linton, Professor Linda Neilson and Glenda Perry. Finally, special thanks to Lisa Cirillo, Lorena Fontaine, Martha Jackman, Anne Levesque, Cheryl Milne and Zahra Taseer (NAWL), and Carol Barkwell (Luke's Place) for their contributions.

consultation of Indigenous peoples, including indigenous women, during the law-making process, whenever new laws may affect them. To date, there is no evidence that the Department of Justice has engaged in meaningful consultation with Indigenous women's groups on the potential impacts of C-78 on Indigenous women, their children, families and communities. We urge the Federal Government to do so prior to the finalization and enactment of C-78, in order to ensure the cultural heritage, safety, security, autonomy and rights of Indigenous women and their children are respected, protected and fulfilled, and not further endangered or violated by any impacts (direct or indirect) of any of the provisions of C-78.

As mentioned, there are many welcome additions and changes in Bill C-78. Luke's Place and NAWL support having children and their well-being remain at the centre of the *Divorce Act*. We commend the important objective of reducing conflict, but note that care must be taken to ensure that conflict and family violence are not conflated, as this can be very dangerous. The requirements that are appropriate to place on parents in nonviolent, albeit conflictual, situations should differ from those that need to be put in place when an abused woman is involved in a divorce proceeding. Therefore, the majority of our recommendations focus on proposing specific changes that are required to help ensure that Bill C-78 will truly protect women at the end of an abusive relationship, as well as their children.

Our analysis identifies aspects of Bill C-78, including those that demand communication and cooperation between spouses, and the unintended ways in which some aspects of communication and cooperation expected of parents during divorce proceedings may obscure the realities of family violence and risk endangering women and children. The broad definition of family violence already included in the Bill demonstrates an understanding that family violence is complex and pervasive, and it is important that all aspects of the Bill are framed accordingly and with an understanding that the complexities and pervasiveness of the impacts of past violence, and indeed the ongoing occurrences of violence themselves, do not end simply because divorce proceedings begin. The evidence is clear that violence by husbands often intensifies in the months following a separation, making them the most lethal for many abused women. Consequently, requiring that mothers continue to communicate and cooperate with an abusive spouse is not only inappropriate, it is dangerous, and potentially lethal. Nonetheless, mothers who are legitimately incapable of or unwilling to cooperate with an abusive spouse are frowned upon by the courts and may even lose custody of the children to the abusive spouse. Therefore, cooperation and communication provisions need to be flexible and clearly indicate that they may not be appropriate and should not be required in cases where there has been any history of family violence.

The definition of family violence included in Bill C-78 rightly excludes self-defence. However, cases demonstrate a lack of understanding of the varieties of ways women resist and survive family violence. We hope that identification of patterns of coercion and control will help courts understand the dynamics of family violence and that acts of resistance and survival from abused women will cease to be considered acts of family violence.

We are in favour of maintaining rather than changing the habitual and clear terms of 'custody' and 'access' in the *Divorce Act*. In addition, we propose that the decisions that the parent with custody has the authority to make, and the types of decisions that can also be made by the parent with access, should both be further clarified in Bill C-78. We understand the sentiment behind the proposal to introduce new terms to replace 'custody' and 'access.' In principle, we agree that trying to shift the focus in divorce proceedings away from the perception that one parent wins a custody battle and the other loses it, to a focus on cooperation between parents so that the best interests of the child prevail, seems positive in cases where there has not been any violence. Unfortunately, the risks associated with the introduction of new language that will be subject to much interpretation and debate far outweigh the desired benefits, well-intentioned though they are. As we heard from lawyers and advocates who have been working with similar new language in some provincial family law regimes, there is no compelling evidence that the new language introduced has actually been effective in reducing conflict when the issues of custody, access and decision-making are in dispute. There is also legitimate reason to be concerned that this new language will cause interpretation conflicts in international matters, as it differs from the language used in the Hague Convention. This may prevent Canada from fulfilling its duties under the Convention. Moreover, the experiences of too many women who have been in abusive relationships reflect that abusive men exploit every angle of uncertainty and ambiguity they can find. Every ambiguity introduced into law can be turned into an opportunity for abuse, harassment and undermining of the mother. Therefore, it is safer for children and their mothers to have a clear, unambiguous allocation of custody, and clarity about who has the authority to make specific decisions about what is in the best interests of a child.

We have similar concerns about the proposed mandatory requirement that family dispute resolution processes be encouraged. Of course, some women find such processes empowering and/or better suited to their needs. However, family dispute resolution processes are not always better and particularly in cases involving family violence, they may not be appropriate at all. The flexibility of family dispute resolution processes serves some families extremely well, but in other circumstances, they can provide abusive partners with an opportunity to manipulate and continue being abusive. The *Divorce Act* should reflect and respect women’s autonomy and agency, and provide them with all the tools necessary to make free and informed decisions about which process is better and safer for them. Thus, rather than requiring legal advisers always ‘encourage’ dispute resolution, we recommend that Bill C-78 be revised to require all legal advisers to fully inform spouses about all processes available to them. This change will ensure that all women get information on the full range of processes available, so they can make a meaningful choice about which type of process is best suited to their circumstances and needs. We believe the current mention of “appropriateness” in the provision is not sufficient and will lead to family dispute resolution being the default process, including in cases of family violence in which it may be dangerous.

Finally, harmful myths and misconceptions about the realities and the dynamics of family violence still influence family law processes and decisions. Therefore, education on family violence and gender equality must be a crucial part of the reform of the *Divorce Act*, and implementation of Bill C-78. Consequently, Luke’s Place and NAWL recommend that Bill C-78 include education requirements for all actors in the family law system (including lawyers, legal advisers, paralegals, mediators, arbitrators, judges, etc.).

#### **Recommendations:**

##### **VIOLENCE AGAINST WOMEN/FAMILY VIOLENCE**

As mentioned, Luke’s Place and NAWL assert that protecting women and their children from family violence should be the key focus of all family laws, including C-78. To achieve this, laws must be interpreted and applied using an intersectional gender analysis. To clarify this, we recommend the addition of both a preamble, as well as additions to the definitions included in the Bill, so that Bill C-78 explicitly acknowledges that: i) as with all forms of gender-based violence, in the context of family violence, women are overwhelmingly the victims/survivors of violence perpetrated by a spouse, and men are overwhelmingly their abusers, ii) that women experience family violence as a form of violence against women, and iii) that women have diverse lived experiences of family violence. These additions would provide important clarification that Bill C-78 is intended to protect a parent and/or children from past, ongoing or future family violence, as well as mitigate the impacts of family violence (regardless of the form, frequency or how long ago the family violence took place), and that this approach is consistent with and in the best interests of the child.

- Recommendation #1: Include a preamble in Bill C-78

WHEREAS in Canada, women are more likely than men to be victims of gender-based violence, including sexual assault and intimate partner violence;

WHEREAS Indigenous women, be they First Nation, Métis or Inuit, are disproportionately affected by gender-based violence and intimate partner violence;

WHEREAS family violence has profound negative consequences on families, children and Canadian society;

WHEREAS men<sup>3</sup> continue to be the main perpetrators of family violence and women continue to be the victims/survivors of family violence;

WHEREAS violence against women is a form of gender-based discrimination rooted in systemic inequalities between women and men;

WHEREAS family violence is experienced by women in multiple ways shaped by other forms of discrimination and disadvantage, which intersect with race, Indigenous identity, ethnicity, religion, gender identity or gender expression, sexual orientation, citizenship immigration and refugee status, geographic location, social condition, age, and disability;

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<sup>3</sup> We have used gender-specific language to refer to those who are harmed by violence within the family and those who cause that harm. We believe it is important to acknowledge that, in Canada, women in all their diversity, and transgender, queer and gender non-confirming people are overwhelmingly those who are subjected to abuse and men are primarily those who engage in abusive behaviour.

WHEREAS transgender, queer, and gender non-conforming people are also disproportionately victims of family violence;

WHEREAS divorce proceedings and the family law system should protect women from violence and not ignore or exacerbate family violence;

WHEREAS it is in the best interest of children to protect them and their mothers from family violence;

Whereas the Government of Canada is encouraged to continue to monitor the progress, across departments and agencies, of the status of women in Canada;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

- Recommendation #2: Include a definition of violence against women

***Violence against women:***

is a form of gender-based discrimination, a manifestation of historical and systemic inequality between men and women;

includes any act, intention or threat of physical, sexual or psychological violence that results in the harm or suffering of women in all their diversity, including restrictions on their freedom, safety and full participation in society;

is inflicted by intimate partners, caregivers, family members, guardians, strangers, co-workers, employers, healthcare and other service providers;

occurs in the home, at work, online, in institutions and in our communities; and

is experienced by women in multiple ways shaped by other forms of discrimination and disadvantage, which intersect with race, Indigenous identity, ethnicity, religion, gender identity or gender expression, sexual orientation, citizenship immigration and refugee status, geographic location, social condition, age, and disability.

- Recommendation #3: Amend the definition of family violence to highlight its gendered nature

***family violence***

means any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is 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 any incident or pattern of;

...

*Family violence perpetrated against women, is a form of violence against women.*

- Recommendation #4: Amend section 16 to further protect children, by clarifying that keeping their mothers safe will also serve to protect and benefit children (see below)

As mentioned, encouraging communication and cooperation between spouses as well as penalizing abused mothers who cannot do so is dangerous. We recommend removing the sections that encourage it. We believe the other factors relating the best interests of the child are sufficient to ensure no child be unduly kept from a relationship with a good parent. Alternatively, we recommend family violence be made a clear exception to these factors.

- Recommendation #4.1: Remove section 16(3)(c), maintenance of relationship with other spouse or add exception of family violence.
- Recommendation #4.2: Remove section (16)(3)(i), communication and cooperation with other spouse, or add exception of family violence.

(c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse, *except in cases of family violence, or when it is otherwise contrary to the child's best interests to develop or maintain a relationship with the other spouse;*

...

**(i)** the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child, *except when such communication and cooperation are contrary to the child's best interests, including in cases of family violence involving either the other spouse and/or the child.*

The impacts of family violence could be made stronger. The focus should be on the actual ability to parent in the best interests of the child, rather than any willingness to do so. In addition, research demonstrates that children of abused mothers do better when their mothers are safe. Thus, it is in the child's best interests that their mother be protected from ongoing and/or future family violence, and steps be taken to minimize and mitigate the impacts of past family violence as much as possible.

- Recommendation #4.3: Improve section 16(3)(j)

**(j)** any family violence, and in particular, but not limited to:

- (i) its impact on the child;*
- (ii) its impact on the child's relationship with each spouse;*
- (iii) its impacts on the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child;*
- (iv) the importance of protecting the physical, emotional and psychological safety, security and well-being of the spouse not engaging in family violence (noting that self-defence does not constitute family violence);*
- (v) its association with negative parenting practices on the part of the person who engaged in a pattern of family violence;*
- (vi) the demonstrated capacity of any person who engaged in family violence to prioritize the best interests of the child and to meet the needs of the child.*

- Recommendation #4.4: Require clear demonstration of improvement when steps have been taken to prevent family violence (16(4)(g))

**(g)** evidence that the person engaging in family violence has taken steps both to ensure he does not perpetrate further family violence, and to prevent family violence from occurring and to improve their ability to care for and meet the needs of the child and that the steps have resulted in positive changes in behaviour

Putting an end to family violence requires an acknowledgment of its dynamics of power and gender-based discrimination. This is also what a gender-based analysis requires. As such, we recommend an explicit recognition in C-78 of family violence as a form of violence against women. It is also important to frame family violence this way to ensure acts of self-defence or resistance by the abused spouse, be understood as such. Currently, there is an erroneous tendency to qualify certain hostile actions by mothers (who are facing family violence), as family violence, when, to the contrary, they are actually acts of resistance and self-preservation.

- Recommendation #4.5: Include acknowledgment of gendered nature of family violence within the factors to be considered in best interests of the child test

### **Factors relating to family violence**

**(4)** In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account:

- (a.0)** family violence experienced by women is a form of violence against women;
- (a.01)** society's interest in ending all forms of violence against women;
- (a.02)** systemic power imbalances between men and women and the actions that may constitute resistance or self-defence against patterns of coercion and control, and incidents of family violence;

The proposed section dealing with past conduct should note that all family violence, regardless of when it took place, the form it took, its the severity and/or its frequency, will always be relevant and should be taken into account when determining the best interests of the child.

- Recommendation #4.6: Clearly state that family violence is always relevant past conduct (16(5)and (6))

### **Past conduct**

(5) In determining what is in the best interests of the child, the court shall take into consideration all past conduct relevant to the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order.

### **Family violence always relevant**

(5.1) In applying section 16(5), courts shall always consider family violence relevant, regardless of when it occurred, its form, frequency, and pattern.

Harmful myths and misconceptions about the realities and the dynamics of family violence are still widely held and may influence legal advice and decision-making in divorce proceedings. Therefore, adding a section to Bill C-78 that dispels these myths and misconceptions will help guide actors in the legal system in making decisions that do not endanger children or their mothers

- Recommendation #4.7: Include a new section (see below) that prohibits the court from relying on or being influenced by myths and stereotypes that deny, mischaracterize or minimize the impacts of family violence and/or blame the non-abusive spouse.

### **The court shall not infer**

4.1 In considering the existence and impacts of family violence, the court shall not draw any adverse inferences based on myths or stereotypes about family violence, including, but not limited to:

1. The court shall not infer that because the relationship has ended, or divorce proceedings have begun, that the family violence has ended.
2. The court shall not infer that the absence of disclosure of family violence prior to separation, including reports to the police or child welfare authorities, means the family violence did not happen, or that the claims are exaggerated.
3. The court shall not infer that the absence or recanting of criminal charges, or the absence of intervention of child welfare authorities means that the family violence did not happen, or that the claims are exaggerated.
4. The court shall not infer that if claims of family violence are made late in the proceedings or were not made in prior proceedings, they are false or exaggerated.
5. The court shall not infer that inconsistencies between evidence of family violence in the divorce proceedings and other proceedings, including criminal proceedings, mean the family violence did not happen, that the claims are exaggerated, or that the spouse making the claims is unreliable or dishonest.
6. The court shall not infer that, if a spouse continued to reside or maintain a financial, sexual, business relationship or a relationship for immigration purposes, with a spouse, or has in the past left and returned to a spouse, that family violence did not happen, or that the claims are exaggerated.
7. The court shall not infer that leaving a violent household to reside in a shelter or other temporary housing is contrary to the best interests of the child.
8. The court shall not infer that fleeing a jurisdiction with the children, with or without a court order, in an effort to escape family violence, is contrary to the best interests of the child.
9. The court shall not infer that the absence of observable physical injuries or the absence of external expressions of fear means the abuse did not happen.

### **BEST INTERESTS OF THE CHILD/MAXIMUM PARENTING TIME**

The inclusion of factors to be considered by the court, including those relating to family violence, are a very welcome addition to the Act. However, there are a few places in the Bill that may continue to inadvertently entrench the idea that it is always in the child's best interest to spend a maximum amount of time with both parents. There is no credible evidence to support this assumption and, on the contrary, there is a growing evidence base that this is not the case in family violence situations. The best interests of the child test would be made stronger if it also included references to: "the importance, in recognition of the uniqueness of First Nations, Inuit and Métis cultures, heritages and traditions, of preserving the child's cultural identity and connection to community."<sup>4</sup> Finally, it should be made explicit that maximum contact is not always

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<sup>4</sup> *Child, Youth and Family Services Act*, 2017, SO 2017, c 14, Sch 1

in the child's best interests. On the contrary, the section should clarify that the best interests of the child should always be determined on a case-by-case basis.

- Recommendation #5: Include in the best interests of the child test in (16(2)), recognition of the importance of preserving Indigenous children's cultural identity and connection to community.
- Recommendation #6: Ensure that no presumption in favour of maximum contact is applied
  - Recommendation #6.1: Include provision specifying presumptions not to be considered by the courts
  - Recommendation #6.2: Remove Maximum Parenting time section (16.2(1))

### Primary consideration

**(2)** When considering the factors referred to in subsection (3), the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being, and in the case of Indigenous children the importance of preserving their cultural identity and connection to community and the rights of Indigenous peoples to raise their children in accordance with their cultures, heritages, and traditions;

### The court shall not presume

**(2.1)** In determining the best interests of the child, the court shall not presume any particular arrangement to be in the best interests of the child and without limiting this:

- (i) it must not be presumed** that custody/decision-making responsibilities should be allocated equally between spouses;
- (ii) it must not be presumed** that custody and access/parenting time should be shared equally between spouses;
- (iii) it must not be presumed** that each spouse should be allocated as much parenting time as possible;
- (iv) it must not be presumed** that decisions regarding the child should be made either by one spouse or jointly
- (v) it must not be presumed** that there should be maximum contact between a child and parent

We are concerned that the expression "strength" in section 16(3)(b) reflects situations in which an abusive father uses his control to strengthen the relationship with his own family, while cutting ties with the mother's. We believe the word 'quality' would better reflect the types of relationships worth preserving for the child's best interests.

- Recommendation #7: Replace "nature and strength" by "quality in section 16(3)(b).

**(b)** the ~~nature and strength~~ *quality* of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life.

### CUSTODY AND ACCESS/DECISION-MAKING RESPONSIBILITY AND PARENTING TIME

As mentioned, we believe removing the clear and familiar terms of 'custody' and 'access' will cause confusion and ambiguity, and that abusive fathers are likely to exploit that ambiguity. In addition, there is currently no evidence in other jurisdiction that a change in language reduces even non-violent conflict. We recommend maintaining and further defining the existing terms.

- Recommendation #8: Keep the terms of custody and access and amend the definition of custody to provide further clarity. Alternatively, if the new language is accepted, the meaning of decision-making responsibilities needs to be further clarified as follows:

**Custody/decision-making responsibility** means the responsibility for making all significant decisions about a child's well-being, including:

- (a)** making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child, including;
- (b)** making decisions respecting where the child will reside;
- (c)** making decisions respecting with whom the child will live and associate;
- (d)** making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;



- (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;
- (f) giving, refusing or withdrawing consent to medical, dental and other health-related treatments, including mental health treatments, such as counselling or therapy, for the child;
- (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
- (h) giving, refusing or withdrawing consent for the child, if consent is required;
- (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
- (j) requesting and receiving from third parties health, education or other information respecting the child;
- (k) starting, defending, compromising or settling any proceeding relating to the child, and
- (l) identifying, advancing and protecting the child's legal and financial interests;
- (m) exercising any other responsibilities reasonably necessary to nurture the child's development.

In addition, we believe it should be clarified that day-to-day decisions cannot conflict with decisions made by the parent with custody/decision-making responsibility. As it is currently worded, section 16.3(3) may provide abusive fathers with the opportunity to exploit the decision-making responsibilities to make decisions not in the child's best interests and to undermine and threaten or otherwise exert control over the mother.

- Recommendation #9: Amend section 16.2 so that that day-to-day decisions cannot conflict with decisions made by the parent with primary decision-making responsibility and remove "exclusive authority."

#### **Day-to-day decisions**

(3) Unless the court orders otherwise, a person to whom parenting time is allocated under paragraph 16.1(4)(a) ~~has exclusive authority to~~ *may, subject to compliance with best interests of the child principles set out in this Act, make, during that time, day-to-day decisions affecting the child.*

#### **Day-to-day decisions shall not conflict**

(4) Notwithstanding, section 16.2(3) a parent shall not, during allocated parenting time, make decisions that conflict with decisions made by the parent with custody/decision-making responsibility, or that are contrary to the best interests of the child.

The language surrounding contact orders is not specific enough, could be open to multiple interpretations and would therefore be made stronger if it directly referred to the best interests of the child.

- Recommendation #10: Add clear reference to best interests of the child for contact order determinations (16.5(4))

#### Section 16.5

##### **Factors in determining whether to make order**

(4) In determining whether to make a contact order under this section, *after having considered factors referred to in section 16(3)*, the court shall consider all *other* relevant factors, including whether contact between the applicant and the child could otherwise occur, for example during the parenting time of another person.

#### RELOCATION

Women in or attempting to flee abusive relationships need to be able to do so, with their children, unencumbered by any provisions in Bill C-78 (or any other legal process). In many cases, their safety can only be ensured if the abusive spouse does not know where they relocate to. The provisions on relocation should reflect these realities.

- Recommendation # 11: Make the family violence exemption from the notice requirement clearer and more effective and clarify that the application for the exemption can be done in the absence of any other party

#### **Notice**

**Section 16.9 (1)** A person who has parenting time or decision-making responsibility in respect of a child of the marriage and who intends to undertake a relocation shall notify any other person who has parenting time, decision-making responsibility or contact under a contact order in respect of that child of their intention.

...

(3) The court may grant an exemption from all or any part of the requirements to give notice under subsection (2) if it is satisfied that

- (a) notice cannot be given without incurring a risk of family violence by the other spouse or a person having contact with the child, or
- (b) there is no ongoing relationship between the child and the other spouse or the person having contact with the child.

(4) An application for an exemption under subsection (3) may be made in the absence of any other party.

Preventing a mother’s relocation is a way for an abusive spouse to maintain coercive control. As such, escaping family violence should be clearly provided for in the relocation section. In addition, the section should reflect that ensuring the mother’s well-being is in the child’s best interests.

- Recommendation #12: Add factors relating to family violence to relocation factors
  - Recommendation #12.1: Clearly state that family violence should be taken into account, including if opposition to relocation is an attempt to maintain coercive control
  - Recommendation #12.2: Include the mother’s safety as a factor for authorizing relocation

**16.92 (1)** In deciding whether to authorize a relocation of a child of the marriage, the court shall, in order to determine what is in the best interests of the child, take into consideration, in addition to the factors referred to in section 16,

...

- (h) any family violence and the factors in section 16(4);
- (i) whether the relocation would protect the parent seeking the relocation order from the risks and/or ongoing impacts of family violence;
- (j) whether the opposition to relocation by a parent is an act of coercive control and/or will perpetuate family violence.

We are concerned the burden of proof sections are unnecessarily ambiguous, in particular the expression “substantially comply.” However, we do not recommend defining compliance by using percentages. We suggest some changes below, but believe the section deserves further clarification.

- Recommendation #13: Amend section 16.93 to clarify the language.

**Burden of proof — person who intends to relocate child**

**16.93 (1)** If the parties to the proceeding substantially comply with an order, arbitral award, or agreement that provides that a child of the marriage spend ~~substantially~~ equal time in the care of each party, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child.

**Burden of proof — person who objects to relocation**

**(2)** If the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child of the marriage spends the ~~vast~~ majority of their time in the care of the party who intends to relocate the child, the party opposing the relocation has the burden of proving that the relocation would not be in the best interests of the child.

At this point we would also like to highlight that we support the **Factor not to be considered** in section **16.92(2)** as well as the delay to oppose the relocation set out in section **16.91(b)(i)**.

**FAMILY DISPUTE RESOLUTION PROCESSES**

Though diversity in dispute resolution processes is positive, Bill C-78 must respect women’s freedom and agency by allowing them to make fully informed choices about what processes best suit their needs. Special attention needs to be paid to what processes should be recommended in family violence cases, where alternative dispute resolution processes can provide abusers with ongoing contact with and the opportunity to continue abusing the other spouse.

- Recommendation #14: Remove the duty for parties to resolve matters through family dispute resolution and include reference to family violence.

### Family dispute resolution process

**7.3** To the extent that it is appropriate to do so, *especially with regard to the risks that ongoing contact between spouses may pose in cases of family violence*, the parties to a proceeding shall ~~try to resolve~~ *consider resolving* the matters that may be the subject of an order under this Act through a family dispute resolution process, if it is relevant and appropriate to do so.

Those involved in the family law system should have a duty to prevent violence against women and their children. This duty extends to the advice to be given on the process options that are available in relation to divorce. Before advising in favour of any particular legal process, legal advisers should be required to screen for family violence. In addition, they should fully inform their clients on all available processes and advise them based on the facts of their situation. The blanket duty on legal advisers proposed in section 7.7 to ‘encourage’ a family dispute resolution process may put abused spouses and/or children at risk of family violence.

- Recommendation #15: Include a duty to screen for family violence and inform clients on all available processes.

### Section 7.7

#### Duty to discuss and inform

**(2)** It is also the duty of every legal adviser who undertakes to act on a person’s behalf in any proceeding under this Act **(a)** to assess whether family violence may be present, using an accredited family violence screening tool, and the extent to which the family violence may adversely affect

- (a) the safety of the party or a family member of that party, and
- (b) the ability of the party to negotiate a fair agreement.

**(a.1)** to inform the person of all the available processes to resolve the matters that may be the subject of an order under this Act, including family dispute resolution processes.

### EDUCATION

As mentioned, advocates and service providers identify that misunderstandings and misconceptions about family violence and gender equality continue to cause problems in divorce proceedings. The successful implementation of Bill C-78 will depend on providing legal advisers and decision makers with education and resources to ensure they understand the complexities of family violence and have access to an education on how to use appropriate family violence screening tools so they can take family violence into consideration at every stage of divorce proceedings.

- Recommendation #16: Under Duties, include an education requirement for all those involved in the divorce proceedings.

### Education

**7.9** Family law services, courts, and legal advisers must complete family violence and family violence assessment training and practice requirements set out in the regulations.

### FUNDING

Lastly, many of the issues women face in family court are triggered or exacerbated by a lack of resources required to face an onerous and complex system. In this context, it is also important to recognize that women are often less financially secure than men, and financial imbalances between spouses exacerbate women’s vulnerable position. Bill C-78 as well as our recommendations are much less likely to have the desired positive impacts on women, and on poor women particularly, if the positive changes reflected in C-78 are not accompanied by serious investments in legal aid funding of family courts.

- Recommendation #17: Under a scheme to be set out in regulations, provide that the federal government transfer sums to the provincial government that are to be allocated specially to ensure sufficient levels of legal aid funding in family law courts.