



**National Association of Women
and the Law**

**Association nationale de la
femme et du droit**

**Brief to the Federal, Provincial, Territorial
Family Law Committee on
Custody, Access and Child Support**

**Prepared by the Ontario Women's
Network on Custody & Access**

June 2001

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ISBN #: 0-895996-66-X

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Contributors to this document, while enhancing our understanding of particular aspects of family law, may not necessarily endorse the entirety of the positions taken by the principle authors.

French translation facilitated by:

Action ontarienne contre la violence faite aux femmes

National Association of Women and the Law

Coordination:

National Association of Women and the Law

We would like to thank the Ontario Women's Network on Custody & Access for allowing us to print this document.

NAWL would like to thank Status of Women for their financial contribution for this project.

Ce document est disponible en français

This brief was endorsed by

National Association of Women and the Law

Metropolitan Action Committee on Violence Against Women and Children (METRAC)

Ontario Association of Interval and Transition Houses (OAITH)

DisAbled Women's Network (DAWN) Ontario

Education Wife Assault

Faye Peterson Transition House

Northwestern Ontario Women's Centre

Action Ontarienne Contre la violence faite aux femmes

London Battered Women's Advocacy Centre

CALACS Francophone of Ottawa

Women's Resources of Simcoe County, Midland

My Friend's House, Collingwood

Chadwic Home, Wawa

The Status of Women Office, Equity Services, Carleton University, Ottawa

Muskoka Interval House

Women's Habitat, Etobicoke

Provincial Association of Transition Houses of Saskatchewan (PATHS)

Sexual Assault Services of Saskatchewan

Women's Centres CONNECT! (Provincial Association of Women's Centres in Nova Scotia)

YWCA of/du Canada

Solidarité Femmes, France

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RECOMMENDATIONS

General Principles

1. The *Divorce Act* must begin with a preamble, supported by the wording within the *Act* itself, about the social and economic disadvantage of women. The *Act* must specifically acknowledge the prevalence of violence against women and children within families including physical, emotional, sexual, psychological and social abuse. This preamble must provide a gendered definition and analysis of violence within families, and must acknowledge that control and abuse issues are present in significant numbers of families, particularly in those families appearing in family court.
2. Violence against women and children must be an overriding consideration in all aspects of family law.
3. Women's historic and ongoing role as primary caregivers in families must be openly acknowledged when custody and access decisions are made.
4. Legislation must reflect women's and children's diverse realities and the differential impacts of violence and poverty among women. In particular, it must acknowledge and address the specific situations of Aboriginal women, women of colour, immigrant women, women with disabilities and lesbians.
5. Family law legislation must respect and promote the constitutional equality rights of women and children. The equality rights framework must refer to the substantive equality rights of historically disadvantaged groups, as mandated by the Supreme Court of Canada. The "formal equality" model that is proposed by the fathers' rights groups should be rejected.

Custody and Access

6. Given the high incidence, but low reporting in family court files, of violence against women and children, and given that family court personnel fail to identify the impacts of violence when it is disclosed, every case before the family court must be examined for the possible existence of violence and coercive control.
7. There must be a rebuttable presumption against custody and for limited parental contact and decision making in cases of woman abuse. This must be accompanied by strong direction about the criteria by which courts can vary orders to prevent abusers from using family law to harass and abuse their former partners.
8. Court-ordered shared parenting must be rejected, as it is not in the best interests of either children or women. Rather, custody and access decisions should be made with reference to the material reality of each family, the relationships within it and the

factors that have positive and negative impacts on children and the primary caregiver at the time of separation and divorce.

9. The maximum contact “principle” set out in section 16(10) of the *Divorce Act* must be eliminated and the “friendly parent rule” must also be set aside. In addition, any alternative provisions within the *Act* for maximum contact must specifically state an exception for cases in which violence and coercive control are present against either the children or the primary caregiver.
10. There should be consistency in determining the best interests of the child. This consistency should be achieved by establishing a list of clear criteria to include:
 - a presumption against custody or unsupervised access by the abuser where a child has been abused by a parent¹;
 - a presumption against custody or unsupervised access by the abuser where a child has been exposed to the abuse of his/her mother;
 - a presumption that there is significant potential for future and potentially escalating abuse where there has been past abuse and that this must be taken into consideration when making determinations about custody and access;
 - past history of primary caregiving;
 - the child’s views and preferences where it can be clearly ascertained that the child has not been manipulated, threatened or otherwise coerced and where the child will not experience negative effects from expressing her or his wishes. The child’s views and preferences should not represent the deciding factor in custody and access decision-making;
 - a commitment to minimal disruption to the child’s existing routine, including place of residence, except where the mother must relocate to protect the children and/or herself from an abuser;
 - a recognition of the importance of maintaining pre-existing relationships with extended family where this does not jeopardize the children’s or mother’s safety and without attaching legally entrenched rights to these relationships;
 - a recognition of the diverse realities and parenting practices of families in Canada, and a respect for Aboriginal, immigrant and Black cultures, traditions and ways of life, as well as those of persons with a disability, lesbians and working class people.
11. Any reference to the ability of parents to meet children’s ongoing needs must make clear that any economic disadvantage of one parent compared to the other will not be a factor in making this determination.
12. All discrimination on the basis of the sexual orientation of a parent must be explicitly prohibited, and in particular sexual orientation must be considered irrelevant in determining the best interests of the child.
13. The fact that a parent has disabilities should not be the basis of a finding that it is not in the child’s best interests to be in the custody of that parent.

14. The denial of access for malicious reasons must be acknowledged as arising in a very small percentage of custody and access disputes.
15. The *Divorce Act* must recognize the right of custodial parents to withhold access when they feel that it would not be in the best interests of the children or where it would endanger either the children or the primary caregiver. Withholding of access in the best interests of the child must not be limited by fear of criminal or other sanctions.
16. Failure to exercise access must result in consequences for the access parent, including a variation in access orders, in recognition of the fact that failure to exercise appropriate court-ordered access is not in the best interests of the children.
17. Supervised access and access exchange services must be expanded so as to be available to all those who require them, especially those families where there has been past abuse of the mother or the children. These services should routinely be provided as part of the family court system. Federal, Provincial and Territorial governments must ensure that supervised access services are accessible, secure and provided by supervisors with specific expertise in cases of child abuse and violence against women. Access and exchange services must be racially, culturally and linguistically appropriate to the diverse families in Canada.
18. Legislation must openly recognize that there will be cases where no access at all is appropriate in order to protect the safety and well being of both the mother and children.
19. Any parent education programs for separating parents must be based on a gendered analysis of the material realities within families and of violence. Parent education programs must be placed in the appropriate context, outside the decision-making process of family court. Attendance at an educational session must not be used by abusers to support their claims for custody or access.
20. The family law system and all levels of government must acknowledge the importance of providing comprehensive support services for women and children experiencing violence and appropriate programs for abusers. However, these services and supports should be community-based and not linked specifically to the family court decision-making process.

Child Support

21. Section 1(a) of the *Child Support Guidelines* should be amended to identify the first stated objective as being “to ensure a level of support which meets the basic needs of children.”
22. In order to ensure that the *Guidelines* are not used as a ceiling rather than a floor to the amount of support to be paid, the table amount should be used in combination

with the special child-related expenses provisions to determine the appropriate level of support.

23. The obligation to provide ongoing income information should be joined with a simple administrative mechanism for requesting and providing such information and recalculating support through a third party. This could be done through the courts or the support enforcement programs in each province.
24. Table numbers in the schedule must be revised on a regular and ongoing basis, ideally annually and minimally every two years.
25. Table amounts should reflect that children at different ages cost different amounts of money to raise.
26. The priority given to child support should not mean that spousal support is ignored. Section 15.3 of the *Child Support Guidelines* should be amended to be clear that despite the priority given to child support, a court shall consider the need for and the entitlement to spousal support in accordance with the goals set out in the Divorce Act.
27. Adequate support, particularly in the form of legal aid, must be made available to ensure that women are able to access the benefits of the *Child Support Guidelines*.
28. The definition of income must be broadened and different deductions allowed from those used for income tax purposes.
29. The *Guidelines* should be amended to eliminate the time calculation in shared custody, replacing it with a calculation based on responsibility.
30. In shared custody situations, child support calculations should aim to equalize standards of living in each house.
31. Access costs should not be taken into account when determining child support for the average family.
32. Child support should not be paid directly to children over the age of majority, but should continue to be paid to the custodial parent.
33. Children over the age of majority should not be required to disclose their financial information to the payer parent.
34. The *Guidelines* should not include any greater direction than they do now with respect to payment of support by non-biological parents.

Access to Justice

35. There should be an expedited family law process for women and children in abusive relationships. Prior to the implementation of such a process, appropriate standards and tools must be developed by anti-violence and equality-based experts to determine how courts can make an effective “finding of family violence” or distinguish abuse from so-called “high-conflict relationships.” No specific differentiation of “high conflict” relationships and relationships where violence exists must take place until this examination is complete.
36. Women have a right to high-quality legal representation regardless of their economic status, and where this requires access to legal aid, those services must be viewed as a right and made available to all women who require it. Legal aid services must also ensure that additional support is provided without cost to remove barriers to access, such as language interpretation, literacy issues and barriers for women with disabilities. The federal government must provide funding for legal aid to provinces and territories for family law matters.
37. Lawyers, judges and all family court personnel must receive mandatory training on the realities and dynamics of women’s poverty and violence against women and the differential impacts of poverty and violence among women, especially in the context of ongoing family court proceedings.
38. All systems — criminal law, family law and child protection — must implement legislation and other measures to hold the perpetrators of woman and child abuse accountable and not continue to blame the victim. Systems must be put in place to prevent abusers from using the family court system as a means of continuing the abuse and harassment of their former partner.
39. Mediation must never be mandatory. Where a woman discloses past abuse/control issues, she should not be expected to enter or continue with mediation. Mediation is not counselling, it is a process with serious legal implications for the participants. Therefore, mediation should not be recommended as a form of therapeutic intervention for so-called “high conflict” family law disputes. Use of any form of alternative dispute resolution must never be a required prerequisite to family court access nor a requirement for receiving legal aid or any community support services related to family law issues.
40. The minister of justice should convene a national consultation with women’s equality-seeking organizations on the reform of the *Divorce Act* and of family law, where women from the diverse communities will be invited to participate. She should also hold a separate consultation exclusively for Aboriginal women (First Nations, Métis and Inuit) on the specific dynamics involved for women of these communities.

INTRODUCTION

Any changes to custody, access and child support legislation in Canada will have a profound impact on Canadian families. Given the social realities of most families, that impact will be felt most deeply by women and children.

This brief examines the consultation document prepared by the Federal, Provincial and Territorial Family Law Committee entitled *Custody, Access and Child Support in Canada: Putting Children's Interests First*, from the perspective of women and children and the many realities they face in their lives. It would have been inappropriate to comment on the proposed legislative changes without first placing the lives of women and children in their social and economic context. However, the format of the *Response Booklet* circulated by the government does not allow for a proper contextualization of women and children's experiences. For this reason, we have chosen to frame our response to the consultation document in the format of a brief.

The overriding theme of this brief is that the best interests of children can only be met by ensuring the well-being of the women who are their mothers. This, in turn, requires that women's equality become a reality and that any law reforms carefully assess the impact of proposed changes on women's human rights.

Ignoring Women's Realities

The consultation document does not make one single reference to women. Although it contains some positive recommendations, this is an astounding omission given that women have overwhelmingly been and continue to be the primary caregivers of children.

The consultation document discusses parenting after separation or divorce in a social, economic, political and legal vacuum, where parents are without gender and are presumed to be equal. This is not the case. If women's diverse realities are not taken into account and if women's equality is not integrated as a central objective of family law reform, any proposed legislation will be seriously flawed.

Indeed, a “neutral” approach to law reform may end up exacerbating women’s subordination in the family and in society, and make women more vulnerable to control tactics, violence and abuse. Some of the approaches that are being proposed to the Canadian public in this consultation document could have that effect.

The need for a gender-based analysis

Equality is the law of Canada. The Canadian government has committed itself, domestically and internationally, to evaluating the impact of its laws and policies on women, by doing a gender-based analysis. Indeed, in May 1995, the federal, provincial and territorial ministers responsible for the Status of Women agreed “on the importance of having gender-based analysis undertaken as an integral part of the policy process of government.” A few months later, Status of Women Canada published *Setting the Stage for the Next Century: The Federal Plan for Gender Equality*, which stated “the federal government will, where appropriate, ensure that critical issues and policy options take gender into account.”² More specifically, this document states:

A gender-based approach ensures that the development, analysis and implementation of legislation and policies are undertaken with an appreciation for gender differences. This includes an understanding of the nature of relationships between men and women, and the different social realities, life expectations and economic circumstances facing women and men. It also acknowledges that some women may be disadvantaged even further because of their race, colour, sexual orientation, socio-economic position, region, ability level or age. A gender-based analysis respects and appreciates diversity.³

Internationally, Canada participated in the development of the 1995 Commonwealth Plan of Action on Gender Development that called for a gender-based management system. It also endorsed the Beijing Platform for Action (Beijing PFA) that calls on governments to “seek to ensure that before policy decisions are taken, an analysis of their impact on women and men, respectively, is carried out.” More specifically, the Beijing PFA calls on

governments to “review policies and programmes from a gender perspective” and to “promote a gender perspective in all legislation and policies.”⁴

Finally, Canada endorsed “further actions and initiatives to implement the Beijing Declaration and the Platform for Action”, that was adopted by the Special General Assembly of the United Nations on June 10, 2000. This document calls on governments to “mainstream the gender perspective to accelerate the empowerment of women in all areas and to ensure commitment to gender equality policies” (par. 76), to “create and maintain a non-discriminatory and gender-sensitive legal environment”, to “develop, review and implement laws and procedures to prohibit and eliminate all forms of discrimination against women and girls”, “ensure that national legislative and administrative reform processes... promote women’s rights” (par. 68), and “as a matter of priority, review and revise legislation, where appropriate, with a view to introducing effective legislation, including on violence against women, and take other necessary measures to ensure that all women and girls are protected against all forms of physical, psychological and sexual violence, and are provided recourse to justice.” (par. 69).

Without a comprehensive gender equality analysis and strategy, any forthcoming legislation on custody and access will promote women’s continued inequality. It will not enable women to act in their own best interests or in the best interests of their children in matters of custody and access; interests that are inextricably linked. In fact, as long as women remain the primary caregivers of children, women’s equality is in the best interests of children, and law reform can and must simultaneously take into account and promote both the best interests of children and the equality interests of women.

Ensuring constitutional outcomes

Rendering invisible women’s realities in this consultation document allows for the presentation of options that in appearance seem equitable, but in reality reinforce women’s dependence and subordination vis-à-vis their spouses, as well as threaten their security, their dignity and their freedom.

Some women's realities are not addressed in the consultation document, which assumes that separating parents are always heterosexual couples. Because at this time, lesbians and gay men are denied the freedom to marry in Canada, the *Divorce Act* currently has no application to resolving issues of custody and access for the children of same-sex spouses. There are many same-sex parents in Canada, and these families require the same benefits and protections of the law. The federal government must grant lesbians and gays the freedom to marry.

Both the Canadian Charter of Rights and Freedoms and the Supreme Court of Canada jurisprudence have established that the constitutionality of legislation must be evaluated by its impact on historically disadvantaged groups, and in particular on women. Legislation will be deemed discriminatory if it has the effect of exacerbating pre-existing disadvantage, depriving these groups of equal protection or equal benefit of the law.

An undemocratic consultation process

The structure of this consultation is of grave concern. A feedback booklet has been devised which does not request or provide a space for the respondent to give his or her name, gender, occupation, or organizational affiliation. It would not be difficult for any one individual or organization to fill out large quantities of this booklet, and thereby distort the consultation process. This casts doubt on the legitimacy of the consultation process, and makes one question the logic behind this extensive questionnaire. Of even greater concern, no gender analysis of responses received will be possible since the gender of respondents is not requested.

Finally, the consultation document and feedback booklets are not available in alternative format, only on paper copy or electronically by PDF format. PDF documents require Acrobat Reader and more to the point, are not accessible to individuals who are visually impaired as screen readers are unable to read PDF documents. Secondly, in terms of the traditional "paper" copies, unless they are also available in Braille, these copies are useless to blind individuals who can only read documents in Braille format.⁵ Many

women with disabilities who expressed an interest in participating in the consultations on child custody and access have been excluded from doing so.

Many women will not be comfortable using the feedback booklet as their primary means of input, and will not fill them out. This will most likely result in a significant limitation and resulting bias in the feedback results that will be compiled. To complicate matters, the roundtables that are being established to seek input from organizations across the country, roundtables which might have mitigated a feedback response heavily weighted in one direction, require that both fathers' rights advocates and women's representatives sit at the same table at the same time. This scenario is not appropriate, given the very different perspectives these groups represent and the very real power imbalances that exist between them. Indeed, this was done in 1998, for the Special Joint Committee on Custody and Access hearings, and the results were disastrous: meetings that broke into open hostility, jeering, shouting, and heckling. These meetings were angry, unprofessional and inappropriate, and did not accomplish the goals of the consultation. The proponents of the fathers' rights groups characterized feminists and women's advocates as man-hating women, and ex-wives as vindictive and malicious in their attempt to destroy men and their relationships with their children⁶. As witnessed during the Special Joint Committee on Custody and Access hearings, representatives of the women's groups were insulted and disrespected.⁷

Caving into a fathers' rights agenda

Since 1997, the policy reform agenda on family law has been taken over by fathers' rights groups. Indeed, the minister of justice at the time committed to reforming the *Divorce Act* provisions on custody and access in exchange for a truce in the war against his proposed *Child Support Guidelines*. The fathers' rights groups had significant support in the Senate -- particularly in the person of Senator Ann Cools -- who were openly threatening to block the passage of the bill. This was the impetus behind the creation of the Special Joint Committee on Custody and Access in 1997, as well as the current consultation document.

The fathers' rights groups initially organized around a crass and openly self-interested discourse: if they were going to have to pay for increased child support as a result of the child-support *Guidelines*, then they should have a right to have access to the children.⁸ However, as fathers' rights activists became aware that the *Guidelines* provided them with a means to reduce or eliminate these payments altogether, this discourse changed. Indeed, if a parent assumes visiting rights with a child 40% or more of the time, his child support payments may be reduced, if not eliminated. The major demands from the fathers' rights groups hence became joint custody, shared parenting and other variations on the theme of having "equal" access to the children. While some groups had already been advocating for such reforms in 1984 and 1985, when the *Divorce Act* was last amended, various fathers' rights groups from across Canada all supported a presumption of joint custody before the Special Joint Committee on Custody and Access in 1998.⁹

The fathers' rights groups have legitimated their claim by representing themselves as the objects of sexual discrimination, in a legal system that holds biases in favour of women. Using a "personal troubles discourse"¹⁰, they have successfully positioned themselves as victims, using to their advantage the public consultations of the Special Joint Committee on Custody and Access, other public forums and the media. They have also been organizing a vigorous and strong-armed lobby on both national and provincial levels, as well as a network of local grassroots groups.

The policy options advocated by the fathers' rights groups were by and large adopted by the Special Joint Committee on Custody and Access in its report entitled *For the Sake of the Children*: shared parenting (more specifically "shared decision-making and even substantially equal time sharing", maximum contact with both parents, parenting plans or mandatory mediation, a strengthening of the friendly parent rule and programs and coercive sanctions targeted at the "non-co-operative" parent.

These and other similar shared parenting models are now being proposed in most of the law reform options presented in the consultation document. The federal, provincial and territorial ministers of justice may be unduly swayed by the vociferous and

well-organized fathers' rights lobby. Law reform must not be guided by ideological premises but must take into account the very real patterns of inequality that exist within the family, within family law and within society.

PART 1: Taking into account Women's (In)Equality

Mothers are women, and any law reform that will affect women as dramatically as family law reform must be evaluated in the context of the real, material conditions of women's lives. "A woman with children is always a mother, whether in the workforce or at home with her children. The presence of children affects women's lives differently from the way it affects most men, in terms of both her life choices and her life chances."¹¹

Family law reform should take into account the social, economic, legal and political disadvantage of women, and it should promote women's equality within the family and society at large. It should not be limited to devising access schemes with the ancillary effect of decreasing men's child support obligations, thereby increasing women's post-separation poverty. All law reform must take into account the material realities of women's and children's lives.

1.1 The general context: What are the material realities of women's lives?

In the vast majority of cases, women remain the primary caregivers for children, and do most if not all of the housework. Indeed, housework and the caring of children is evenly shared between parents in only 10% of cases, while 28% of women do most of this work, and 52% do it all.¹² These rates vary according to the number of children that are present; 83% of women who have four or more children do all of the housework and caring for children.¹³ Not only does marriage reduce men's share of housework, while increasing women's, men's participation in caring for the children does not increase when women are working in the labour market.¹⁴ As a recent Statistics Canada report indicates: "Although total working time is similar for women and men - in fact, both women and men averaged a total of 7.2 hours per day on paid and unpaid work in 1998 - there is a distinct division of labour between the sexes. For example, women spend an average of

2.8 hours daily on paid work and 4.4 hours on unpaid work, whereas the situation for men was the reverse; they spend 4.5 hours on paid work and 2.7 hours on unpaid work. Indeed, women undertake the larger share of unpaid work, an estimated 65% of all hours spent on these activities in 1992. As well, despite the increased participation of women in the labour market, women's share of unpaid work hours has remained quite stable since the early 1960s, at about two-thirds of the total."¹⁵

The load of unpaid housework and caring that falls on women in the family is increasing dramatically as government cost-cutting measures take effect, eliminating programs and services in the health care sector, education, and a host of specialized programs for persons with disabilities, for recent immigrants, for the elderly, for children, etc.¹⁶

The burden of unpaid work in the family is made heavier by the fact that women remain grossly underpaid in the labour market. Indeed, Statistics Canada found that "the average earnings of employed women are still substantially lower than those of men. In 1997, employed women had average earnings of just over \$21,000, a figure that was only 64% of that of all men with jobs. Even when employed on a full-time, full-year basis, the earnings of women remain well below those of their male counterparts. In 1997, women working full-time, full-year had average earnings of just under \$31,000, or 73% of what men employed full-time, full-year made that year."¹⁷

Most mothers work in the paid labour force; indeed, in 1994, seven out of 10 mothers with children under 16 worked outside of the home.¹⁸ However, many women have to accept part-time or temporary work, they are rarely unionized and consequently are subjected to minimal labour standards and wages that fall below the poverty line.¹⁹

Current neo-liberal policies, free trade and the privatization of public services have also exerted a downward pressure on women's wages.

Wage discrimination, the devaluing and exploitation of female labour and, consequently, poverty rates are much higher among Aboriginal women, women of colour, immigrant women and women with disabilities. Indeed, one in seven Canadian women have a

disability, and with this double disadvantage, they face higher unemployment, higher abuse and higher exploitation rates than the rest of the working population. In 1995, the rate of poverty for working-age women (those aged 15 to 64) with a disability in Canada was twice that of working-age women without a disability: 36% compared to 18%.²⁰ Statistics Canada reports that a large percentage of Aboriginal women have low incomes. In 1996, 43% of Aboriginal women aged 15 and over had incomes below Statistics Canada's Low Income Cut-offs, compared to 35% of Aboriginal men and 20% of non-Aboriginal women.²¹

Women of colour generally earn less at their jobs than do other women. Among females aged 15 to 64 who were employed on a full-time, full-year basis in 1995, women of colour earned an average of \$27,500, about \$3,000 less than the employment earnings of other women (\$30,500) that year.²² Women of colour are nearly twice as likely as other women in Canada to have low incomes. In 1995, 37% of women of colour living in private households had incomes below Statistics Canada's Low Income Cut-offs compared with 19% of other women.²³ Immigrant women generally earn less at their jobs than other women in Canada. Immigrant women aged 25 to 44 earned an average of \$28,700 for full-year, full-time work in 1995, while Canadian-born women in the same age group earned about \$30,700. Recent immigrant women had particularly low earnings, averaging only \$21,900 on average for full-year, full-time employment.²⁴

It is important to note that immigrant women face lower pay despite higher qualifications²⁵, and they face huge obstacles in entering the paid labour market, with a 51% employment rate, compared to a rate of 73% for women born in Canada.²⁶ They are for the most part confined to subaltern jobs in the manufacturing sector, the restaurant industry, domestic labour and the service industry, most notably in the health and social services sector, and are subject to racism and unfair disciplinary sanctions.²⁷ In addition, immigrant women have a higher unemployment rate than women born in Canada (21% compared to 14%, in Toronto, in 1999²⁸). Access to employment is particularly difficult for Francophone African women, who often experience a downward shift in their professional category when they immigrate to Ontario, and have to contend with part-

time jobs, contractual work and few, if any, benefits.²⁹ Nearly three in 10 immigrant women living in Canada have incomes that fall below Statistics Canada's Low Income Cut-offs. In 1995, 27% of all immigrant women lived with low incomes; this was much higher than the 19% of Canadian-born women living in low-income situations that year.³⁰

The inequality and disadvantaging of women in the labour market, in tandem with the heavy load of unpaid housework and caring for children and other family members, places women in a situation of social and economic inequality compared with their husbands, and increases their dependency. The economic dependency of women in turn exacerbates their vulnerability to the power and control that may be exercised by a spouse after divorce, and their vulnerability to the volatility and violence exhibited by former spouses.

Wife assault and other forms of male violence against women in the family are indeed still being perpetrated on a massive scale. The 1999 General Social Survey on Spousal Violence established that 8% of women had been subjected to spousal violence in the five-year period prior to the study. While this points to a vast number of women, this survey has been criticized for underestimating the actual number of women who are victimized by a spouse.³¹ The 1993 Violence Against Women Survey, monitoring a longer timeframe, had established that 29% of all women would experience spousal abuse at one time or another in their lives. In another study, 21% of women reported that they had experienced spousal violence during pregnancy.³² The 1993 Violence Against Women Survey clearly established a link between women's social and economic disadvantage and their vulnerability to spousal violence.³³ Indeed, poor women are more vulnerable to abuse: the survey showed that women with a household income of \$15,000 and over reported 12-month rates of assault consistent with the average, while women with household incomes below \$15,000 indicated a rate twice the national average. Women with disabilities experience increased rates of violence: 39% of ever-married women with a disability or a disabling health problem reported physical or sexual assault by a partner over the course of their marital lives, compared with 29% of the total female population.

While anti-feminist proponents like to point out that women also can abuse their spouses, the 1999 General Social Survey on Spousal Violence establishes that more than twice as many women as men reported being beaten, five times as many reported being choked, almost twice as many reported having a knife or a gun used against them, and more than six times as many women as men reported being sexually assaulted by a spouse.³⁴ Other research shows that women are three times more likely to be murdered by their spouses than men.³⁵ In other words, male violence against women is more frequent and more serious in its nature and effects than alleged female violence.

The economic inequality of most women in marriage and the frequency with which their male partners subject them to violence is also exacerbated by the structure of the sponsorship regime in Canadian immigration law and policy. Indeed, by providing that sponsoring husbands must undertake responsibility for the essential needs of their wives for 10 years, in exchange for their receiving permanent residence in Canada as a family class immigrant, the sponsorship regime often introduces or reinforces an unequal power relation in the couple, and often consolidates the traditional relation of male dominance in marriage.³⁶

Other types of legislation also instill or maintain unequal relations in marriage for women, such as the *Indian Act*, which still inhibits women's ability to exercise claims to property held on land covered by the *Indian Act*.³⁷

Cuts to social programs such as welfare, the elimination of specialized programs for the integration of immigrant women or the autonomy of women with disabilities, and privatization of public services are also making it even harder for women to leave abusive relationships.³⁸ The social, economic, political and legal inequality of women exacerbates their inequality in the family vis-à-vis their spouses.

1.2 The situation of mothers after separation or divorce

In contrast to the marriage rate, which has been steadily decreasing, the incidence of divorce in Canada has risen. In 1997, there were 225 divorces for every 100,000 people in Canada, compared with 55 per 100,000 in 1968.³⁹ Recent estimates show that if trends observed continue, 40% of all marriages in Canada could end in divorce, and that percentage could conceivably reach 50%.⁴⁰ Statistics Canada indicates that the long-term increase in divorce rates has affected, in part, the growth in the number of women who are lone parents. In 1996, there were 945,000 female-headed lone-parent families in Canada, representing 19% of all families with children. In fact, the latter figure is almost double that in 1971, when 10% of families with children were headed by female lone-parents.⁴¹ Women also continue to make up the large majority of lone parents. In 1996, 83% of all one-parent families were headed by women, a figure that has remained relatively constant since the mid-1970s.⁴² As Statistics Canada notes, one reason why women make up such a large proportion of lone parents is that mothers generally get custody of the children when marriages break down.

In 1998, the Child Support Team of the Department of Justice Canada commissioned an analysis of data relating to custody, access and child support from the “Family History and Custody” section of the National Longitudinal Survey of Children and Youth. This analysis showed that 80 % of children under the age of 12 are placed in their mother’s care through court orders and only 7 % in the custody of their fathers. The remaining 13 % are covered by court orders for joint physical custody. However, almost 70 % of children subject to a shared physical custody order actually lived with their mother only.⁴³

After separation or divorce, women’s standard of living falls drastically, their ability to participate in the labour market is decreased, their everyday expenses are increased and, as a consequence, the majority of single mothers with young children live below the low-income cut-off. A significant number of women are forced to rely on welfare after separation or divorce. Indeed, 28 % of all female welfare recipients in Canada are single-parent mothers (compared to only 2 % of male welfare recipients).⁴⁴ In 1997, the

National Council on Welfare estimated that 57.2% of single mothers live under the poverty line, and that this proportion goes up to 80% for those who have children under 7.⁴⁵ A recent study in Durham, Ontario, suggests that women who experience abuse during their relationship suffer an even more dramatic loss of income after separation: while 89 % of the women interviewed for this research described themselves as being “economically comfortable” during their marriage, 84 % identified as being “low-income” after their separation.⁴⁶

In addition, there exists very little support for single mothers: day care is extremely costly, in insufficient supply, not adapted to the needs of working mothers; and it can be difficult if not impossible to get culturally and linguistically adequate services. In addition, very few quality, publicly funded services exist for children with disabilities. Access to affordable housing is also a very serious issue for single mothers, even more so women of colour and immigrant women. As one researcher notes: “in situations of wife assault or child abuse, women who leave abusive male partners are almost always in immediate need of housing... racial minority immigrant women repeatedly stressed that the main problem for abused women with children is to find affordable housing in a decent neighbourhood”.⁴⁷

The Supreme Court of Canada has recognized the ongoing disadvantage of women after divorce in *Moge v. Moge*⁴⁸ and the need for family law to address this situation. Notwithstanding the huge difficulties faced by women after separation and divorce, most women find the strength, resilience and imagination to cope with the challenges of raising their children on their own. It is essential that family law reforms not create additional obstacles and burdens for women, but rather acknowledge the social and economic context of women’s lives and promote their well-being and their equality rights. Indeed, studies indicate that the first and most important factor in ensuring the well being of children is ensuring the well being of their mothers.⁴⁹

1.3 General principles

The consultation document sets out a series of “guiding principles” that have been agreed to by representatives of federal, provincial and territorial governments. These principles are intended to guide reforms in the area of custody, access and child support, yet they have not been submitted to public consultation, and the response booklet does not ask for any comments or suggestions on their formulation. As stated, these principles are incomplete, unduly restrictive and sometimes even contradictory. They do not acknowledge the diversity of women’s lives or the specific needs of certain communities of women.

While there may be some appeal to saying that “the needs and well-being of children come first”, it is unwise to completely sever children’s needs from those of the primary caregiver, in most cases, the mother. This risks creating a false dichotomy where mothers are positioned as having conflicting interests with those of their children.

Securing and enhancing stability and security in a mother’s life, ensuring her basic needs, fostering equality and respect for women -- for all women -- will be in the best interests of children, since women remain the main custodial parents of children. Indeed, “children of divorce do better when the well-being of the primary residential parent is high. Primary residential parents who are experiencing psychological, emotional, social, economic or health difficulties may transfer these difficulties to their children and are often less able to parent effectively.”⁵⁰

Family law reform must take into account the fact that, as a group, mothers are at a social and economic disadvantage, especially so if they belong to another historically disadvantaged group, and they are usually in a situation of financial dependency on their spouse and are vulnerable to abuse of power and violence.

Family law reform must strive to avoid exacerbating this disadvantage and this relation of inequality, and work towards the promotion of women’s equality rights, security and dignity. Family law reform must recognize and respect the work that women have done

and continue to do in relation to their children and their spouses and the social and economic context in which they do it. It must acknowledge and address the specific situations of women of colour, immigrant women, women with disabilities and lesbians. Family law reform must recognize the need to consult with Aboriginal women – First Nations women, Inuit and Métis – on whether it would be appropriate to establish a specific, distinct regime that would be applicable to them. Any changes to family law in Canada must take into account both the pervasiveness and seriousness of woman abuse and wife assault. Custody and access legislation must specifically and unequivocally set out the significance of woman abuse and wife assault within intimate relationships and acknowledge the role this abuse plays even after the relationship has ended.

Women and children need real and substantive access to justice. Within the framework of this consultation, women's access to justice must be a primary consideration in the development of amendments to legislation regulating custody, access and support. However, the consultation document adopts the principle that non-adversarial dispute resolution mechanisms should be promoted and that court hearings should be a mechanism of last resort, a principle that may be applied in a way that will prevent women from having access to public justice.

Finally, while there may be some merit in providing legislative clarity to the legal responsibilities of caring for children, such a process must be guided by a gender-based analysis of family law. In the absence of such an analysis, law reform will result in an increase of responsibilities that will be placed on the shoulders of the primary caregivers of children, in most cases, mothers.

PART 2: A critical assessment of the proposed reform options

The consultation document proposes a series of reforms to the *Divorce Act* and family law on custody and access of children, by defining the roles and responsibilities of parents after separation or divorce, proposing measures to ensure that parents meet their access responsibilities and proposing specific criteria for interpreting the best interests of

children. The consultation document also includes a series of measures relating to family violence and high conflict relationships, that will be discussed in Part 3 of this brief.

2.1 The shared parenting model

The consultation document advances the principle that “children and youth benefit from the opportunity to develop and maintain meaningful relationships with both parents.” It is on that basis, presumably, that a majority of the proposed reform options presented in the document suggest joint custody, joint parental responsibility, or shared parenting, and seek to bolster and sanction the access rights of non-custodial parents, who are, in most cases, fathers. In this regard, there is a strong policy bias in the proposed models in favour of extending paternal authority over children (and by extension over their ex-wives) after divorce and separation. This policy bias is not supported by empirical research, it does not correspond to current parenting patterns and, in many cases, not only is it contrary to the best interests of children, but it may also imperil the security and equality interests of women. It is important to take advantage of the research material that is available on the experience with shared parenting regimes in other jurisdictions, where it has been shown that these policies have not advanced children’s interests but have hurt them.

2.1.1 A model that cannot be imposed on parents

The shared parenting model has an “insidious appeal”⁵¹ because “the rationale for joint custody is so plausible and attractive that one is tempted to disregard the disappointing evidence and support it anyway.”⁵² While this model finds its origin in therapeutic and professional circles, it has been rapidly introduced in many common law jurisdictions since the late 1980s. In Canada, the concept was introduced in the 1993 federal discussion paper on Custody and Access⁵³ and, more recently, by the Special Joint Committee on Custody and Access in its report entitled *For the Sake of the Children*.⁵⁴

Shared parenting models can be empowering for women, when these models actually work.⁵⁵ But they only work when parenting was truly shared in the course of the marriage and there was previous co-operation between the parents, when ex-spouses can get along

and actually collaborate, and when shared parenting is willingly engaged in. As Furstenberg and Cherlin note; “Joint physical custody should be encouraged only in cases where both parents voluntarily agree to it... imposing joint physical custody would invite continuing conflict without any clear benefits.”⁵⁶

Joint custody requires a great deal of contact between the parents, coupled with shared decision-making. This level of contact and co-operation is, in fact, antithetical to most parents’ notion of separation. Many separated parents are simply not suited to this level of continuing contact and continuing shared decision-making. This is especially true for families where the woman has been assaulted or abused, but it is true for other families as well. Many high-conflict families cannot continue to have frequent contact between the parents. As Diane Lye, Ph.D, who undertook an exhaustive study of the *Washington State Parenting Act* for the Washington State Court Gender and Justice Commission and the Domestic Relations Commission, concludes after an extensive analysis of existing literature on the subject, “highly conflicted parents tend to remain in conflict or disengage from each other. They do not become low conflict, cooperative parents.”⁵⁷ As well, efforts to impose shared decision-making on separated parents are often at odds with the style of decision-making used by the family when it was intact, which is that the mother usually had responsibility for caregiving and the decisions that resulted from that responsibility. Many claims for joint custody by fathers are based on a desire to share in decision-making or at least to control the mother’s decision-making, rather than a desire to share in the day-to-day caregiving of children. Many mothers would be happy to agree to joint custody arrangements if those arrangements resulted in actual shared quality caregiving.

While the consultation document puts a lot of emphasis on shared parenting models, the reality is that many men continue to avoid their parental responsibilities, often not taking even the minimal amount of time agreed to “visit” the children, and begrudging the financial support that they have to pay to meet their share of the child’s needs. The National Longitudinal Survey of Children and Youth (NLSCY) indicates that 40 % of

separated or divorced fathers never visit their children or visit them irregularly, 16 % visit every two weeks and only 30 % visit every week.⁵⁸

The fact is that mothers are the primary caregivers of children during the relationship, and continue to be so after the divorce or separation. The NLSCY shows that even in cases where parents have a shared custody order, most children in fact live with their mother. “Equally shared physical custody arrangements were reported in a very small proportion of cases, regardless of whether parents said there was a custody order or not. Less than 2 % (9 % of the 13 % of children for whom a shared physical custody order existed) of children who were covered by court orders for shared physical custody actually shared residences with both parents.”⁵⁹ Experience in other jurisdictions has shown that even when laws are changed to favour shared parenting, it does not dramatically change the way parents divide up their parenting responsibilities, as the consultation document acknowledges. In other words, changing the law does not result in changing behaviours.

An evaluation of California legislation favouring joint physical and joint legal custody concluded that “only a minority of our families – about 30%... were able to establish cooperative co-parenting relationships.”⁶⁰ A recent evaluation by Helen Rhoades, Reg Graycar and Margaret Harrison, for the University of Sydney and the Family Court of Australia, of the *Australian Family Law Reform Act* of 1995 that favours a shared parenting model, shows that:

There is no evidence to suggest shared caregiving has become a lived reality for the children of separated parents who have engaged the family law system since the coming into force of the Reform Act. Interviews with, and surveys of, lawyers and counsellors suggest that there have been no real changes in practice as a result of the reforms. Most respondents agreed that mothers continue to do the bulk of the caregiving work after separation, and that, as one respondent commented, ‘many fathers still do not consistently make themselves available to the children.’⁶¹

Studies that were conducted on the implementation of the *Washington State Parenting Act* of 1987 that centred on shared parenting, also indicate that there was no significant shift in residential patterns following the adoption of this Act.⁶² Indeed, Diane Lye's study finds that most children resided with a primary residential parent, generally the mother, with an alternating-weekends schedule for the non-primary parent dominating the majority of parenting plans. This study concludes that even when divorcing parents intended to share decision-making authority and concluded shared parenting plans to that effect, few parents actually follow through, and the primary residential parent continues to make most of the major decisions affecting the children. The Lye study concludes that, although 75% of all parenting plans examined in the study specified joint decision-making, very few parents were actually able to sustain joint decision making because their relations were so discordant that they could not communicate well enough to do so.⁶³

The Advocates' Society of Ontario, an Ontario association of trial lawyers, in a brief to the Special Joint Committee on Custody and Access regarding custody and access pointed out that judges, when they apply the custody provisions of the Divorce Act, are dealing with a population of litigants in which high-conflict parents are greatly over-represented. This is confirmed by the recent National Longitudinal Survey of Children in Youth: "Cases in which a great deal of tension was reported appear five times more likely to have a court order for custody than cases in which no tension was reported."⁶⁴ In other words, those parents who are most likely to be able to make a shared parenting arrangement work are not fighting in court. And those who are in court are less likely than most parents to be able to successfully co-parent.

The 'core business' of the courts involves violence and child abuse, and those are the cases most likely to be litigated and least likely to settle. The consultation document discusses "high conflict" cases as if they were a special minority of cases a judge is going to see. What evidence there is suggests that the opposite is the case: of the cases that not only come to court, but do not settle and require a judge to make a decision, a high percentage are high conflict. "High conflict" means cases in which, as far as decisions

concerning their children, the parents have a post-separation history of persistent disagreement and of not being able to resolve the disagreement, and where that lack of agreement has negative effects on the stability and continuity of the children's lives. Often this pattern is linked with an effort by one parent to control many aspects of the other parent's life. The majority of those before the courts with unresolved custody and access issues are, by virtue of being there, relatively high conflict and therefore not good candidates for any presumptive shared parenting regime.

2.1.2 Shared parenting may not be in the best interest of the child

The consultation document, in its general principles, presumes that children benefit from maintaining meaningful relations with both parents. However, it would appear that this presumption is not grounded on social science research.

Diane Lye concludes, after reviewing the highest quality studies that have been conducted in the United States, "only one finds higher child well-being among children who have more contact with their non-residential father; four find no impact of the level of contact with the non-residential father; and one finds reduced well-being among children who have more contact with their non-residential father."⁶⁵ She points to recent studies that indicate "joint physical custody and frequent child-non-residential parent contact have adverse consequences for children in high conflict situations."⁶⁶ In these situations, the presumption that maximum contact between the child and both parents is beneficial is simply wrong.

When shared parenting presumptions become the basic working assumptions that judges, lawyers, mediators, counsellors and other institutional actors rely on, the outcome of proceedings are often not in the best interests of children. The Rhodes study of the Australian legislation clearly shows that children's welfare is being threatened by shifts in approaches at interim hearings, favouring parental "equality" in their access to children, despite clear jurisprudence on "existing arrangements." Decisions are made on the basis that the courts must not give a "tactical advantage" to one parent over the other. In other words, decisions are made on the basis of the parents' interest -- in most cases,

the father's interest -- rather than on the basis of the best interests of the child. The Australian study also finds that the principle that a child has a right to maintain "contact" with both parents is being used to shift the focus at interim hearings from asking whether access should be ordered, to asking how to maintain contact until the final hearing. This study found that in cases involving allegations of violence in interim hearings, decisions in favour of unsupervised access doubled after the introduction of the "right of contact" principle in the *Family Law Act* of 1995. Decisions denying access fell to less than half of those made before the *Act* was introduced.⁶⁷ However, two years later at the final hearings, the "no contact" order rate remained the same, suggesting that there is a significant proportion of cases where the interim arrangements were not in the child's best interest.

The authors conclude, "the Court's approach to contact when domestic violence allegations are raised represented the most significant shift in practice associated with the reforms. This related particularly to orders made at interim hearings. Some attributed the change in practice directly to the "right of contact" principle, which was blamed for having "turned back the clock" to the days before the Full Court's decisions about family violence."⁶⁸ The authors note that this constitutes "a retreat from the Family Court's acknowledgement, in the years before the reforms, of the adverse psychological effect of spousal abuse upon children's welfare."⁶⁹ In Australia, there is now an effective presumption (although not a legal one) operating in favour of contact with the child for the non-resident parent, despite the express requirement in the legislation to consider the best interests of the child. This presumption has extended fathers' access rights to children even in cases of domestic violence; there is a trend away from ensuring the child's safety until trial and toward arranging for access rights through neutral hand-over arrangements.

2.1.3 Shared parenting can make women more vulnerable to abuse

A family law model based on principles of shared parenting and shared decision-making will very likely make more women vulnerable to spousal abuse and control. This is certainly the lesson to be learned from the experience in other jurisdictions.

Indeed, the Australian study points to the fact that the courts are making more joint custody orders in contested hearings, and in circumstances where there is a high level of conflict between the parties. The study shows that reforms based on the shared parenting presumption give a greater scope for an abuser to harass or interfere in the life of his ex-partner, by challenging her decisions and her choices. Specific issues orders have now become commonplace and are sometimes used to impose standards of caregiving expected of the mother. Women are also being faced with a barrage of applications for having breached a parenting order, despite the fact that most of these applications are found to be without merit by the courts.

In separated families where parenting plans have been imposed on warring parents, there are increased disputes and litigation. Diane Lye's study of the Washington State legislation also concludes that "because joint decision making in the parenting plan forces ongoing negotiations and discussions between the victim and the abuser, it provides the abuser with an occasion to sustain the abuse."⁷⁰ She reports that a "substantial minority" of primary residential parents, mostly women, reported that their ex-spouses had used the provision for joint decision-making to harass or psychologically abuse them. She notes: "often the harassment occasioned by joint-decision making is severe and constitutes continuing emotional abuse. This type of behaviour includes making arbitrary or capricious decisions and changing the decision multiple times, insisting on certain decisions, linking one decision to another, and making threats. Sometimes the perpetrator of this type of harassment is able to use the justice system to increase the harassment by filing numerous court papers."⁷¹ The use of court-related procedures by abusive men to harass their ex-spouses is already a very widespread and worrisome problem,⁷² and would no doubt increase with the introduction of a shared parenting presumption in Canadian law.

2.1.4 Parenting Plans

It is useful to consider why people need and how they use court orders relating to custody and access. Orders have at least two functions—dispute resolution between parents and guidance for third parties who deal with children of separated parents as to who has the right to make decisions with respect to a child and what the child's schedule is. For parents in conflict, court orders settle the dispute and determine who is going to make important decisions with respect to a child and the child's schedule. The virtues of the system are not obvious without an examination of the problems in separated families where parenting plans have been imposed on parents engaged in ongoing conflict.

Any issue not determined by the plan with absolute clarity necessitates an expensive return to court or the mediator. Indeed, the court-ordered parenting plan does not settle the dispute between the parents and lead to a diminution of hostilities; instead the battlefield is widened (e.g., Can the child play hockey? Can she start dating? Can she get counselling? Who should the counsellor be?). No parenting plan can be comprehensive when you are dealing with parties where there is little or no good will and one or both is motivated to try to control.

Parenting plans are also problematic for third parties such as schools, doctors, daycare providers, and immigration officials who deal with children from separated families. These institutions know what a custody order means.

They do not have the expertise or the inclination or the time to interpret myriad different parenting plans in the event of a parental disagreement as to what one clause means. Possible areas of disagreement that could involve third parties include the right to apply for a passport for a child; to authorize an operation or psychological testing; to go on a school trip; to play on a sports team; to remove a child from daycare. A mother dealing with a controlling ex-spouse needs to have clarity in custody orders so that she can access the assistance of these authorities when required.

Finally, it is important to note that low-income women who cannot afford legal representation, but are not sufficiently poor to have access to legal aid, will have great difficulty in developing adequate parenting plans. As a result, they may have to arrange their everyday lives according to boilerplate parenting plans that correspond neither to the best interests of their children nor to their own needs and security concerns.

2.1.5 Conclusion

The use of joint custody or shared parenting presumptions in custody and access legislation was fully debated and rejected in 1985 at the time of the hearings on the introduction of the current Divorce Act, after extensive consultation. Other jurisdictions that have moved toward joint custody or shared parenting models have later moved away from this model.

It would be irresponsible to impose a new legal parenting structure on the children of separated parents when there is no research to indicate that such a regime is in their best interests unless it is chosen by the parents. The reliable research indicates that it is not a beneficial regime for children, and that it also increases women's vulnerability to abuse and violence. The results from other jurisdictions need to be examined carefully before undertaking revolutionary change.

2.2 Men's Access "Rights"

As in the remainder of the consultation document, there is no mention of gender in the context of the access discussion and proposals. However, the underlying theme, which is part of a larger cultural discourse of sexism, is that mothers, who most commonly have the primary custody of the children, frequently and maliciously withhold them from their fathers and must be punished into complying with access orders and agreements. The articulation of a crisis of "access denial" feeds into a misogynist myth that mothers act selfishly and destructively, denying fathers access to their children for no good reason. The consultation document identifies two problems with "access responsibilities": the failure to exercise access and the denial of access pursuant to a written agreement or order.

Although the consultation document claims to be "putting children's interests first", and says that "access is the child's right", the analysis of access is framed from the perspective of those denied the "right" to exercise access. Access problems are configured as between the two parents. It is not acknowledged that a child may have feelings and views of his or her own, or that the child might make decisions that affect the situation. The child is entirely voiceless and disempowered in the consultation document. If access is "denied", one possible solution proposed in the consultation document is to fine or imprison the other parent. The child is simply an entity to be exchanged, and any problems must be the result of a "non-complying parent". This analysis is a huge over-simplification of what is often a complex situation. It pretends and presumes that the sole custody parent has enormous influence over the child. It suggests that the child brings nothing to the situation. Accordingly, in the consultation document, a child's illness that prevents him or her from comfortably visiting a parent is presented as an access problem. Unless one looks at the situation only from the perspective of the access parent, access is not "being denied" when a child is ill. The situation is not an "access problem" from the perspective of the child, but is a period in which a child may require rest from the imperative of being physically exchanged between households.

The consultation document imagines a "parent-child bond" being disrupted through a parent's failure to exercise access. The presumption of a "bond" is problematic in a context in which a parent has no desire to see a child. No remedies are offered for this situation. "The prevailing view appears to be that it is not generally in the best interests of children to force an unwilling parent to visit them". However, the consultation document presumes that it is in the best interests of children to force visits where the child is unwilling.

The consultation document suggests that serious problems with access are much more likely in situations of abuse or "high conflict". There is no gendered analysis of violence; no identification of a victim and perpetrator. The effects on children of "access enforcement" are unexplored, except to note that it may not be in a child's best interests to

have the caregiver parent imprisoned. However, readers are still invited to check a box approving of imprisonment as an option for access denial. This, despite the fact that even courts are moving away from this sanction as an appropriate answer to conflicted access or to a child who does not want to or will not visit the other parent. The consultation document does not recognize that sometimes the "access problem" will be the access parent.

Situations of conflicted access frequently occur when a custodial parent tries to protect a child's welfare. For example, a custodial parent may restrict access when the access parent is under the influence of alcohol or drugs, is abusing the child, is threatening abduction or is violent. In these situations, it is not in the child's best interests that access occur, and the custodial parent is simply protecting the child from harm. The consultation document fails to acknowledge the possibility of these realities.

Conflicted access may also arise when there has been a consistent, long-term failure to exercise access. When an access parent who has missed visits for months suddenly arrives for a visit, the children may have a special educational or social activity planned. Inadequate supervised access exchange options may also result in conflicted and denied access. Where a woman's safety is endangered, access may be denied as a result of her legitimate safety concerns.

The assumption is that access is automatically a good thing, ignoring the research, which shows that access is not always in a child's best interests.⁷³ There should be a positive reference that will allow courts to consider 'no access' as a possibility.

If there are access problems, the proposed solutions generally involve means of enforcing the access, rather than reconsidering the consequences to the child of access. The consultation document assumes that an existing access order or agreement, even one that may be out-dated, must be in the best interests of the child. The onus to return to court to seek a variation if the access schedule is not working is on the custodial parent, who will bear the attendant financial and emotional costs.

Moreover, the standard for variation of access orders and agreements is not easily met. The parent seeking to vary the access schedule must show that there has been a material change in circumstances such that the existing order is no longer in the child's best interests. In some cases, there will be no material change: the problem is that the original order was never in the child's best interests. The assumption is that, if both parties agreed to an access schedule, or a court ordered it, it must be in the child's best interests. However, in the immediate aftermath of separation, a parent may be desperate for a resolution. The access schedule may be a compromise based on a parent's emotional or financial exhaustion, rather than the child's best interests. A parent may agree in order to obtain a needed property or support payment. Access may be negotiated in the context of violence, threats and intimidation. An original court decision may not have been well founded on the lived realities of the family situation, but an appeal unsuccessful or financially impossible. Where an existing access schedule is unworkable, but a parent cannot point to a material change, it may be difficult to obtain a variation.

In *Looking at the Law*, the consultation document lists legislative approaches, almost all of which are specifically directed at the failure to allow access. Many of the measures proposed to deal with access denial are extremely punitive, and no measures are proposed which specifically address the reasons for the conflicted access, or the failure to exercise access. Instead, the consultation document presents failure to exercise access as an insurmountable barrier. Although reimbursement of costs, fines and imprisonment are proposed as remedies for access denial, none of these are mentioned as options to examine for a failure to exercise access.

The consultation document fails to consider whether conflicted or denied access may reflect larger problems with the way agreements and orders are made. Children are not treated as human beings who bring their own wishes and desires into the access context. Instead, they are merely objects of an exchange, which is to be enforced at any cost. This is not "putting children's interests first", it is giving men's access rights absolute priority.

2.3 The best interests of children

2.3.1 The need to define the “best interest” test

Decisions with respect to custody, access and even child protection (cases in which the state removes children from a parent’s custody) in Canada are presently made by applying the “best interests of the child” test. Unfortunately, this test is not uniform in either its legislative descriptions or its application. The federal *Divorce Act*, for instance, merely sets out that decision about custody and access are to be made by taking into account what is in the child’s best interests. Ontario’s *Children’s Law Reform Act* is more specific and provides, in section 24(2), seven criteria to be considered when determining the best interests of a child for the purposes of a custody or access application. This list is not exhaustive, and other factors may be considered in addition to those set out in the legislation. Other provinces and territories have similar legislation, with variations from jurisdiction to jurisdiction. But all jurisdictions in Canada rely on the “best interests” test for these determinations.

Although not a focus of the present consultation, it is significant that child protection legislation establishes its own set of criteria for determining the best interests of the child. In Ontario, the *Child and Family Services Act* section 37(3) lists 10 criteria for consideration, the final one being “any other relevant circumstance.” This list of criteria does not correlate precisely with the best interests test used in custody and access proceedings in Ontario.

The inconsistency extends beyond statutory differences. Since all of the “best interests” tests are directive and not proscriptive, decisions made in custody and access cases are also subject to the individual attitudes, beliefs, life experiences and biases of the judges who make them. While this can allow, in an ideal situation, for judges to carefully consider the very specific realities of individual families and custom make custody and access decisions that really do reflect the best interests of the particular child, it also allows judges to reinforce outdated and inappropriate belief systems about families in a way that clearly does not support the best interests of the children.

There is a need for consistency in determining the best interests of children in custody and access disputes. For this reason, specific factors to be taken into account by judges in determining the best interests of children should be set out in the legislation. Some jurisdictions in Canada already do this. Careful consideration must be given to the reality of families in Canada today in creating such delineation.

Clearly, when children are the direct targets of violent behaviour by a parent, this is, and must continue to be, a factor for determining the best interests of the child. Yet direct child maltreatment is barely mentioned in the consultation document. The framers may have wrongly assumed that Canadian courts are clear on the negative impact on parenting by a child abuser, but this assumption would be ill-founded. The recent high-profile case of an Alberta mother who was court-ordered to arrange visitation in prison with the sex-offender father of her two children, a man who had sexually assaulted the woman's older daughter, is one example of the ongoing need to better address child abuse in family law decisions.⁷⁴

Even in cases of child abuse, many judges remain insensitive to the impact on children of having been sexually, physically and/or emotionally abused, and this is not discussed in the consultation document. Judges routinely grant supervised access to acknowledged abusers. While this arrangement may protect the children from immediate physical harm, it ignores the emotional damage suffered by children forced into an ongoing relationship with the abuser.

Further, judges often dismiss allegations of child abuse that are raised by mothers in the course of custody and access proceedings and make joint custody or unsupervised access orders that place children at risk of ongoing harm. There is a tendency by many professionals to disbelieve mothers and to see their statements as self-interested attempts to gain the sympathy of the court. Even many child protection agencies and workers refuse to become involved in abuse claims made during custody and access proceedings, seeing them as somehow suspect. Sadly, studies have established that allegations of child

abuse are almost always true, and false claims, when made, are more often made by fathers than by mothers.

Proposals to reform family law must also acknowledge the gender realities of child abuse in the family. Girls are more often the victims of both physical and sexual assaults by family members than boys and are the victims in 80% of sexual assaults. Fathers represent 80% of parents accused of assaulting their children, accounting for 98% of sexual assault complaints and 73% of physical assault complaints to police. Girls were the victims in 88% of incidents in which fathers were accused of sexual assault.⁷⁵

The high incidence of child exposure to “spousal violence” and its impact must also be taken into account in determining the best interests of children, along with its gendered nature. A very large percentage of children witness life-threatening violence in the family, primarily against their mothers. The 1993 Statistics Canada survey on “wife assault” found that children witnessed the violence in more than half of the incidents in which women feared for their lives.⁷⁶

The impact of exposure to violence is now widely known to be as damaging for many children as direct child maltreatment. Children who are exposed to violence against their mothers can experience elevated levels of depression, aggression, anxiety, low self-esteem and other emotional difficulties. In addition, they may have problems with social and school adjustment and carry the effects of the violence into their adult lives. For example, children — especially boys — who are exposed to violence against their mother are more likely to repeat the violence in their adult lives, thereby perpetuating violence against women into the next generation.⁷⁷

Increasingly, professionals who work with children have come to understand the impact on children of witnessing the abuse of their mothers. As Peter Jaffe, executive director, London Family Court Clinic, London, Ontario, writes:

Almost forgotten are the children of these relationships; the silent victims of this violence who often fade into the background as if they were mere furniture in the home, or bystanders who happened to be there. Think for a moment about the terror experienced by these children when they wake up to raised voices, screams from their mother and the unmistakable sounds of punching, tearing, pushing and even weapons.⁷⁸

The work of Jaffe and others clearly establishes that children exposed to the abuse of their mothers by their fathers may demonstrate all of the characteristics and problems experienced by children who are physically abused themselves, and that these problems are just as longstanding.

Safeguarding the well-being of the primary caregiver in cases where there is violence against women is also a critical aspect of determining best interests of children. The well-being of the primary caregiver of the child—primarily the mother—is negatively affected by violence. The traumatic impacts of abuse against women and the resultant stress have implications for mothers who are struggling to provide safe and effective parenting in the midst of violence. Violence undermines women's ability to provide this support and care for their children.⁷⁹ Recent research conducted by the Muriel McQueen Fergusson Centre for Family Violence Research in New Brunswick confirms the importance of considering the impact of violence on both the child and the child's caregiver, stating: "[Studies indicate] that the best predictors of children's well-being after separation and divorce, in high conflict families, are the psychological well-being of the primary caregiver and the children's freedom from continued exposure to conflict and abuse."⁸⁰

Those working with abused women and their children have known about the impact of violence against women on children for years. Unfortunately, this knowledge has been largely ignored by legal professionals and the courts, particularly in the context of custody and access disputes. There has been a firmly held, and false, belief that abuse of the mother by the father is irrelevant in deciding on custody because it will stop once the

two adults live separate and apart from one another. Judges hearing requests for custody in these cases still ask (wrongly) “Did he hit the child?”

There has been almost no acknowledgement, in family court decisions, that this abuse has an enormous impact on the children while the family remains together and, at least equally important, that the abuse is likely to continue, and may even escalate, after separation. As a result, custody and access decisions often place both the mother and the children at ongoing risk of abuse and violence. A second false belief accompanies the first; that the abusiveness of a man towards his partner is not an indication of his parenting ability—that, in fact, it is not related to parenting at all. This, too, is reflected in custody and access decisions that allow abusive men unrestricted access to their children.

The new understanding by mainstream professionals of the serious impact on children of witnessing their mother’s abuse is reflected in some jurisdictions in the area of child protection, where this is now considered to be a factor in determining whether children have been or are at risk of emotional harm. The same consideration must be given in custody and access cases. A good place to begin is to include past history of abuse as one of the criteria in the “best interests” test.

2.3.2 Proposed Factors to be included in the Determining Best Interests

a) Factors Related to the Children Themselves

It is important to make children and their views and preferences part of the process of determining custody and access. From a practical point of view, there is little value in making an order that a child opposes. If the order mandates access the child does not want, the custodial parent, most often the mother, is placed in the untenable position of either forcing the child to do something the child is adamantly opposed to or making herself potentially liable for not supporting the father’s access.

Children’s views and preferences are important for more than practicalities, and should be listened to carefully to determine other family dynamics that may not have been

expressed by the parents. Often, a child is unenthusiastic about spending time with a particular parent for important reasons. The child may not wish to spend time with the father because of past abuse (either of the child, another child or the mother).

However, an important cautionary note must be sounded. If the child's views and preferences are to be included as one of the "best interests" factors, safeguards must be spelled out to ensure the child is not being subjected to manipulation, coercion or intimidation by the abuser. Children often identify with the abuser because they believe it is safer to do so or because they feel angry that their mother is not able to protect herself or them. Abusers are masters of manipulation—they control the adult partner, and controlling a child is, literally, child's play by comparison. Unfortunately, too many judges take the children's wishes as the final determining factor. While their views and preferences are of some importance, children must also be protected from inappropriate pressure by an abusive parent, and their wishes must be considered in the context of a number of other factors.

b) Factors Related to the Children's Relationships with Others

There is no doubt that, where appropriate, the less disruption to the child's existing routine the better for the child. However, where violence is a factor, ensuring the safety of the mother and her children is paramount and outranks any and all other considerations. For example, the child's relationships with the community should only be considered if it is safe for the mother to remain in that community. If her safety requires her relocation, the abuser father cannot be allowed use this to "weight" his claim for custody: he is the reason for her need to relocate, and he cannot benefit from this.

The issue of grandparents' "rights" merits some discussion under this heading. Children benefit from healthy, appropriate relationships with their extended families and their pre-existing relationships with extended family members should be taken into account. However, the right to a relationship with extended family is the child's right, not the adult's right and should not become an entrenched legal right on the part of extended family members to automatically secure court ordered and enforced access. With rare

exceptions (for example, death of the parent) access by extended family members should flow from the time the children are with the relevant parent.

Where there has been violence, the mother has a right to be protected from inappropriate relationships between her children and members of the abuser's family. If the children are likely to be exposed to abusive discussions about their mother by their paternal grandparents or other paternal family members, or if those family members will allow contact with an abusive father who has been denied access, those relatives should not have access.

c) Factors Related to Parenting of the Children in the Past and Factors Related to the Future of the Children

It is absolutely imperative that both child maltreatment and spousal violence/abuse be specific factors in both of these categories. A past history of abuse should create a rebuttable presumption that the perpetrator is not an appropriate custodial parent and that access shall be determined in such a way as to keep both the mother and children safe from harm and from the threat and fear of harm.

The best interests test must clearly acknowledge the negative impact on children of witnessing the abuse of their mothers by their fathers, as well as of their own direct abuse. Past conduct of abuse must be included as part of the parenting history presented to the court. The best predictor of future behaviour is past behaviour. The presence of past abuse, therefore, must also create a (rebuttal) presumption that there is a significant potential for future conflict and violence that will affect the children. This violence will include, of course, violence towards the children's mother, but could also include potential future partners of the abuser as well as the children themselves. The possibility of violence during access exchanges, as well as during the ongoing litigation, must be a consideration.

Just as past abuse must be a consideration in custody and access decision-making, so must the past history of caregiving. It is clearly in the best interests of the children, in all

but the most extraordinary of cases, to be placed in the custody of whichever parent-- most commonly the mother--has been the historic primary caregiver. Courts and mental health professionals who work in family law have long acknowledged the importance to children of continuity, primary attachment and stability, particularly at the time of separation, a time of crisis and upset for many children. It is inappropriate and potentially dangerous to focus all attention on future possibilities.

In looking at the children's future, little reliance should be placed on parenting plans. The court should presume that whichever parent has provided primary care to the children in the past is capable of continuing to provide that care in at least an adequate manner. Fathers, who are often the non-primary caregiver during the years of cohabitation, generally have greater financial resources than mothers. This gives them access to legal and other representation that will allow them to design and present parenting plans that "promise the moon" but that have no foundation for.

In short, the best interests of the child test should rely on past parenting, both the past role of a father as an abuser of either the children or the mother, and the past role of the mother as primary caregiver, and should pay much less attention to promises made about plans for the future.

The consultation document proposes that the ability of parents to meet their children's ongoing needs be a criterion in the best interests test. This carries an implicit message that the parent who is better situated to meet the child's needs economically should be preferred over the parent who is less well situated financially. However, this inequity should properly be addressed through appropriate child support orders. If the best interests of the child test were to include even an implied financial criterion, it would disproportionately and negatively affect women, specifically poor and low-income women. As a result of economic inequities among women, Aboriginal women, women of colour, immigrant women and women with disabilities would be further disadvantaged.

The best interests of the child test must be developed and interpreted in a manner that is respectful of the diverse realities of families in Canada. A white, middle-class standard must not be used to determine what kinds of parenting are appropriate or to evaluate “parenting plans.” The standard must take into account the specificity of Aboriginal as well as diverse racial and ethno-cultural communities and immigrant experiences.

It is also imperative that the sexual orientation of a parent be recognized in legislation as irrelevant in determining the best interests of a child. While being gay or lesbian in and of itself is no longer - at least openly - considered a bar to custody, gay and lesbian parents continue to experience discrimination on the basis of their sexual orientation in custody and access cases.

Despite some encouraging progress, many courts still demand “discretion” from gay and lesbian parents, in order to try to enforce the concealment of the parent’s sexual orientation from the child. Consequently, lesbian and gay parents may be less successful in custody and access cases when they participate in their cultural community, are viewed as an “activist” for their human rights, or fall in love. This situation is discriminatory and unacceptable. It attempts to force lesbian and gay parents to demonstrate “appropriate” shame. It is also contrary to the best interests of children. The American Psychological Association notes that, by being open with their children about their relationships and by living with their same sex spouses, gay and lesbian parents assist their children to become well-adjusted adults.⁸¹ There should be no discriminatory limitations on custody or access on the basis of the sexual orientation of a parent. It is contrary to Charter principles of equality and contrary to the best interests of children.

Finally, the fact that a woman has disabilities should not negatively affect the determination of whether or not it is in the best interests of the children to be in her custody. Rather, in cases where she requires supports to care for her children, those supports should be ensured. This should be equally true for women who are undergoing or who have undergone mental health treatment: only strong evidence that her health per se will affect her parenting ability should be considered relevant.

d) The presumption of maximum contact

Section 16(10) of the *Divorce Act* must be removed. It is a “principle” that is based on myths about the dynamics of families and the reality of woman abuse. It is not in the best interests of all children to have maximum contact with their parents. It is not in the best interests of children to have maximum contact with abusive fathers, even when the abuse has been directed at their mothers and not at them. It is incorrect to place the best interests of children and the well-being of their mothers (most often the custodial parents) in apparent conflict. Children should have as much contact with both parents as is appropriate in the circumstances of that family. For some children, that will mean spending equal amounts of time with both parents. For some, it will mean spending most of their time with their fathers and having access time with their mothers. For some, it will mean no access by their fathers.

However, for the vast majority of children, their best interests will be met by living with their mothers, who were the pre-separation primary caregivers, and spending time with their fathers. Arrangements for this access time must take into account safety for the mother as well as for the children. Where there has been a history of violence, “maximum contact” is not appropriate. It is not a principle that applies to all families, and it is certainly not a principle that should be perpetuated through legislation. The presumption behind the maximum contact principle is untested and wrong.

Part 3: Violence Against Women and High Conflict Relationships

Sections of the consultation document addressing violence and high-conflict relationships provide some positive proposals for consideration of violence and abuse in the family within the context of family law and the *Divorce Act*. Women’s equality groups have long called on the department of justice to recognize the effect of family law processes on women experiencing violence and children exposed to violence against their mothers. The entirely gender neutral approach of the consultation document, however, is both

factually false and dangerous to women and children who are most at risk from violence against women.

Flaws in both the approach to violence and high conflict as well as in the proposals for overall reform of the *Divorce Act* and family law process overshadow the positive aspects suggested regarding violence in the consultation document. The overall approach which, as discussed earlier, favours a shift to “shared parenting”, privatizing of family law processes and the gender neutralizing of family realities in Canada, poses a danger to women and children leaving violent situations which effectively eliminates any progress made on the inclusion of violence. As the experience in Australia demonstrates, this approach effectively creates a presumption in favour of contact/access, which ultimately overrides concerns about violence and coercive control.

3.1 Defining violence

There has been a dangerous trend in Canada for some time now to determine the presence of violence with a checklist of behaviours-referred to as “conflict tactics” - including physical and sexual assault, threats, coercion and other psychological and emotional tactics. The consultation document continues this trend by using only these tactics as its foundation for proposals on violence and “high conflict” in family law decision-making. While the consultation document does not specifically define “family violence” or “high conflict”, it lists examples of the tactics as a kind of de facto definition.

The sole use of behaviour lists in determining violence endangers women and children because it removes from consideration the critical context of violence, as well as any consideration of power imbalance or domination underlying the use of them. For example, actions that women take in self-defence can be just as legitimately labeled ‘violence’ as assault intended to harm. Moreover, the simplistic “definition” offered by the consultation document not only ignores the root of violence--women’s inequality--it also fails to take into account the increased vulnerability to violence for women experiencing additional forms of inequality and discrimination.

Without a full understanding of the context and roots of violence, how can the impact of violence on children be effectively assessed by the court? Definitions of violence that ignore issues of domination and control in the family lead to the common belief that separation of parents in relationships where violence is present will eliminate any further exposure of children to violence. Abused women and their children have suffered as a result of this assumption, and children have continued to be negatively affected by parental role modeling that reinforces male domination and hatred of women.

The failure of the consultation document to acknowledge and state the root cause of violence as a mechanism to establish and maintain male power in the family is a flaw that negatively contaminates the proposals and reforms following it. This failure serves only to reinforce male domination by implying that women are equally violent and abusive and that violence in the family is gender neutral. Continuing to use this approach may serve to mislead the family court system and result in decisions that are not only at odds with the best interests of children, but which further jeopardize the safety and security of both children and their mothers.

3.2 Violence in divorce and separation cases

The false premise that “family violence” is a gender-neutral reality is compounded by the implicit suggestion that violence is an issue in a small minority of divorces and separations coming before the courts. This may be the result, in part, of a failure within the family law system to both identify violence in custody and access cases and to disclose it within the case files. The Muriel McQueen Fergusson Centre found, for example, that although researchers suggest between 40% and 60% of separating partners disclose abuse, overwhelmingly against women, the information is not included in most files. Instead, it may often be screened out because lawyers have not been able to distinguish violence from conflict or make a decision discouraging the disclosure of abuse evidence in legal proceedings.⁸² The researchers found that “information about abuse and irresponsible parenting is excluded or omitted at each stage in the legal process: during lawyer-client interviews, during legal interpretations of those interviews, during preparation of court documents, during negotiations between lawyers, and during

the presentation of evidence to judges. Thus, by the time cases reach judges, for decision or confirmation of 'consent' orders, much of the evidence of abuse and irresponsible parenting has been screened from the process."⁸³

Given the high prevalence of violence in cases of divorce and separation, therefore, it is critical that any proposed reform of the *Divorce Act* and other family law processes feature consideration of violence against women (properly defined) and the impact of child exposure to it as an overriding consideration in all aspects of family law.

3.3 Proposals for inclusion of violence in the law

Clearly, it would be inappropriate to make no change in the *Divorce Act* with regard to violence against women. For many years, experts in women's equality rights, violence against women and the impact of witnessing violence on children have urged governments to recognize the high incidence of violence against women in the family emanating from women's inequality and the serious impacts male domination of the family has on children.

The department of justice has been made well aware of the abuse of women and children through the family and through family law, the pervasiveness of mythology and minimization of the impacts of violence in family courts and the need for a critical analysis of family law legislation and practice in Canada. The suggestions outlined in the consultation document on specific approaches to violence, however, do not go far enough to counteract the ideological basis of the overall approach embedded in other proposals within the consultation document. In short, without a serious emphasis on violence against women throughout the *Divorce Act*, token clauses about "family violence" and considerations of the impact on children will not keep women and children safe.

A general statement of acknowledgment regarding the impact of violence on children who experience or are exposed to violence will not be enough. Of course, a statement regarding the impact of child exposure must be included in the *Divorce Act*. Indeed, in 1997, a national consultation on violence against women, women's equality-seeking

groups asked the department of justice to include a preamble to the *Divorce Act* on the incidence and effects of violence against women in the family as a frame of reference for judicial decision-making. More is clearly needed, however, to effectively protect children and women in abusive situations. Similarly, inclusion of violent past behaviour in the family as a factor affecting “best interests of the child” will not, in itself, suffice to keep children and women safe. These statements were included in legislation in Australia’s *Family Law Act*, but had little impact on the consideration of violence, especially at interim hearings and during periods after separation when women and children are most at risk.⁸⁴

The proposal to move the “maximum contact” provision of s. 16(10) to the section of the *Divorce Act* dealing with “best interests of the child” will not be effective when counterbalanced with the numerous factors directing judges to maintain a child’s contact with each parent, grandparents and their community, as well as the expectation that cooperation between parents be a factor in determining best interests. Research has shown that implementation of “shared parenting” approaches are not in the best interests of children, do not change parenting practices and endanger the safety of both children and their mothers. If proposals for “shared parenting” or “shared parental responsibility” are implemented as outlined in the consultation document, any shifting of s. 16(10) will only serve to further reinforce the “maximum contact” principle, regardless of where it appears in the *Act*. Women’s equality-seeking and anti-violence groups have called, on numerous occasions, for the removal of s. 16(10) entirely from the *Divorce Act*, and its removal is still required to protect the safety and security of both women and children.

The establishment of a rebuttable presumption against custody and for limited parental contact and decision-making in cases of “domestic violence” is a positive step that should be implemented in any new family law legislation. This presumption is in keeping with the Charter rights of women to safety and security and would serve the best interests of children to be free from exposure to both violent behaviours and the values and attitudes of domination that represent inappropriate and unhealthy parental role modeling for children. The positive effects of this proposal, however, depend largely on how violence

is defined and determined. For example, since violence against women often occurs in private and only 26% of women will ever call police⁸⁵, a criminal standard or any other standard requiring police involvement would counteract any good that might flow from inclusion of violence as a factor in family law decision-making.

A rebuttable presumption must be accompanied by strong direction about the criteria and type of evidence by which courts can vary an order under these circumstances so that abusers are not able to use family law courts to continually harass and abuse their former partners with vindictive variation requests.

3.3.1 Looking at the Services

Clearly there is a need for education throughout the family law system with regard to violence against women and the impact of violence on children exposed to it. If, however, education is based on the premise that violence is de-gendered and without context, any educational efforts will only serve to reinforce domination of women and children in the family by the use of violence. The definitions of violence and high conflict relationships in the consultation document cause serious concerns about whether information services suggested there can be effective in educating parents, children or family law professionals in any way that could effectively provide protection for children or their mothers in family law decisions.

Similarly, with regard to support services, there is obviously a need to increase the provision of community-based supports such as counselling for women and children and women's shelters to address violence and protect women and children experiencing it. However, the wisdom of connecting counselling, parenting education and other therapeutic services to the intersection of violence and family law processes is very questionable. The suggested uses outlined in the consultation document are troubling. Counselling services suggested for abusers, for instance, list underlying counselling bases, such as anger, conflict resolution skills, substance abuse, debt and employment, which are not at the root of violence against women. These approaches can only serve to undermine progress to address violence against women and its impact on children.

Furthermore, if abusers can use attendance at a counselling or parenting education groups as a factor in arguing for “shared parenting” options or unsupervised access, the connection of these support programs directly with family law legal decisions could jeopardize the safety of children and their mothers. Decisions on custody and access should be made with reference to the material reality of the family, the relationships within it and the factors that have positive and negative impacts on children and the primary caregiver of the children at the time of separation and divorce.

Supervised access services are more properly placed within the family law system than parenting education and counselling services, and should be increased with respect to situations of violence against women. However, organized, independent community-based access and exchange services are rare in Canada. More often, supervised access is provided by family members or other individuals in the community who have neither training nor experience in dealing with violence against women and children or the impact of child exposure to violence. In many cases, the supervision is not culturally or linguistically appropriate and supervisors are unaware of negative interactions occurring between the parent and children during visits. Women should never be left with the responsibility of arranging for supervised access or be penalized for not being able to do so. Access should not begin until appropriate supervision is put in place. The department of justice needs to more closely examine how access supervision is provided in Canada, how safe access exchange can occur and how movement from supervised to unsupervised access can be appropriately evaluated.

Legal aid is not a service, but a right, a right that is essential to obtain equal access to justice and equal treatment under the law. In cases involving violence against women, in particular, all family law matters should be covered by legal aid. Legal aid must also ensure that women whose first language is not English, women with disabilities and women with literacy issues have additional legal aid support as required.

3.4 Expedited family law process

An expedited family law process would be a positive step for women and children in abusive situations. As we have seen, the Rhoades et al study of the implementation of the *Australia Family Law Act* in 1995 demonstrates the dangers of combining notions of “shared parenting”, encouragement for maximum contact of children with both parents and consideration of violence in family law decisions. In summary, the results show that consideration of violence will be a secondary consideration to the perceived “rights” of non-custodial parents, primarily men. In particular, decisions made in interim hearings will favour maximum contact until trial. Since many of these family law cases experience delays of months (even years) before final orders are written, women and children are left vulnerable to continuing and sometimes escalating violence in the name of “fathers’ rights.”

Much still needs to be done, however, before courts can establish an expedited process for cases in which violence is a factor. In particular, the criteria and definitions that will form the basis for screening cases in or out of an expedited process are critical. Given the continuing difficulties of lawyers and other court officials to distinguish violence and abusive control from other conflict during separation and divorce, much remains to be done before women can be confident that an expedited process would provide greater safety for themselves and their children. Furthermore, such processes will not be effective if they are founded on gender-neutral definitions of violence, on failure to include the differential impacts of violence on diverse groups of women and children or on an inappropriate approach to determining a “finding of family violence.”

3.5 High Conflict Relationships

Although there is clearly a strong need to distinguish relationships in which violence and coercive control is present from those where there is only strong disagreement between parties in a family law case, the consultation document, very much like the courts themselves, fails utterly to do that. The result is that all of the proposals suggested in the section are problematic and even dangerous.

The section on “high conflict” begins with an implicit definition, which clearly confuses conflict with violence. Violence is not an aspect of “high conflict”; it is behaviour, often criminal, with the goal of controlling the woman. To suggest that “vicious verbal attacks and threats of violence to the emotional well-being and physical safety of the children or either parent” is merely a description of high conflict is to betray all abused women and children exposed to violence and condemn them to further abuse within the family law system. This is particularly true in light of the subsequent suggestions for addressing “high conflict” in the consultation document’s proposals.

Once again, there is no gender or equality analysis of how “high conflict” relationships evolve, what dynamics occur within the family as a result or the differential impacts of such conflict on women, children and men. The issue of false allegations is given undue legitimacy; it has been shown conclusively that the vast majority of allegations of abuse are substantiated.

The implicit suggestion that child abduction is primarily a factor in high conflict, not abuse, is extremely worrisome. Although extensive research on parental abduction is limited, some available studies indicate that fathers are more likely to abduct their children than mothers, and that parental abductions may occur four times as often where there is an existing custody and access order.⁸⁶ Other researchers have indicated that abductions by fathers and mothers are about equal, but that there are important gender differences that occur in parental child abductions.⁸⁷ According to studies conducted by the United States department of justice in 1998, parental child abductions most often occurred after the issuance of a child custody order. Fathers were much more likely to use force to abduct children than mothers; mothers who abduct were more likely to be poor and not receiving child support and to be without legal representation than other separating and divorcing mothers; and child abuse or domestic violence was a dynamic in many abductions. Another important factor was the ending of a relationship in which one parent was the citizen of another country and abducted the child back to the country of origin.⁸⁸

Child abduction must not be seen, therefore, as merely a function of a high conflict relationship. The consultation document examines neither the gender aspects of child abduction nor its potential link with either child abuse or violence in a relationship, and its inclusion in a discussion of high conflict relationship behaviours minimizes the seriousness of this issue.

Indeed, parental child abduction does have significant links to court-ordered child custody decisions, child abuse and violence against women as well as inadequate legal representation for poor women. A more thorough and thoughtful examination of it should be undertaken by the Department of Justice Canada.

3.5.1 Looking at the law and the services

The danger of taking the previous description of high conflict relationships and using it to formulate law or policy is, as we have demonstrated above, that most courts will not distinguish violence from conflict; that is, will not be able, in fact, to make that distinction. Taken together with current practice and proposed changes to the Divorce Act, cases of violence will be streamed into the so-called “high conflict” category, where it is proposed that there be orders for mandatory mediation, “therapeutic” mediation, various forms of counselling and psychological assessments which often pathologize violence and the women who experience it, and which promote processes and agreements which will only create more opportunities for abuse and control by violent men.

It would be better for courts to acknowledge that, by virtue of being before the court, unresolved custody and access issues involve relatively high levels of conflict, if not abuse, and that in these cases, consideration of shared parenting arrangements is not in the best interests of children.

In any case, responses to the proposals in this section cannot be evaluated as responses to relationships in which there is a high level of disagreement and conflict, since these relationships have not properly been described in this section. The department of justice,

therefore, must re-examine the whole issue of conflict before making any proposals specifically geared for high conflict separation and divorce.

Part 4: Access to Justice for Women

No changes to family law legislation, even good ones, will be of any value unless women have adequate access to justice. Such is not the case at the present time. Lack of access to legal aid, professionals in the legal system who remain unaware of the complex dynamics of family violence and court systems that still do not hold perpetrators of violence against women and children accountable, among other factors, continue to create barriers for women in accessing justice.

4.1 Legal Representation

Legal aid is not a “service.” Women have a right to high-quality legal representation regardless of their economic status and regardless of where in Canada they live. This is not the case at the present time. Women generally experience a drop in their standard of living post-separation. In addition, they may be unemployed or underemployed, have limited ability to obtain credit and may have few assets. Men, on the other hand, generally experience an improvement in their standard of living after separation, in many families are the sole or principal breadwinner and are often the one who has had most of the credit and assets. This reality has a significant impact on men’s and women’s respective abilities to retain counsel. Legal aid plans across Canada must be expanded to allow all those who require it to have access, especially abused women, and to compensate lawyers who take legal aid clients appropriately. Unfortunately, legal aid services and resources are being cut significantly – especially in the area of family law, which has a disproportionate negative impact on the safety of women and children. In this area, as in so many others, working poor women often slip through the cracks.

Under the present regime in Ontario, for instance, all but the poorest do not pass the financial test. Services are limited. The hourly fee paid to lawyers and the cap on hours they may bill are so low as to discourage many from taking legal aid cases; and those

who do, have no choice but to spend less time on these files than they should. In rural and remote areas, it can be extremely difficult to find a lawyer who will accept legal aid clients.

Lawyers who accept legal aid cases and who work as family court duty counsel must be trained to understand the issues of child abuse and violence against women. This training should include a component dealing with the different service needs of abused women so that lawyers can amend their usual practice style appropriately.

There should be a prohibition on increasing the use of duty counsel in family court cases. In such cases, no one can be adequately served by even the most dedicated, hard-working duty counsel. The cases of abused women contain dynamics and complexities that absolutely require individual, specialized representation.

Finally, it is imperative that the federal government provide adequate funding for family law legal aid.

4.2 Actors in the Legal System

Women have the right to be represented by (and opposed by) lawyers, to deal with court personnel and to appear in front of judges who understand the issue of woman abuse. Unfortunately, at the present time many women who have left an abusive partner are greeted with disbelief at every turn. They hear old myths about woman abuse and wife assault from everyone from legal aid staff to their own lawyer and everyone in between (“You haven’t ever said anything about this before”; “It can’t be all that bad”; “You must be making it up”; “It’s too bad you don’t have bruises, it would make your story more believable”; “Arguing is just part of any relationship”). Appropriate education and training must be provided to all professionals working within the court system (including judges, lawyers and assessors) on the dynamics of violence against women as well as on women’s ongoing inequality within the family.

4.3 Holding the Perpetrator Accountable

Present systems (criminal law, family law, child protection law) do not hold the perpetrators of woman and child abuse accountable. Abusers can, in fact, use the family court system in particular as a means of continuing their abusive contact with and control of their former partners. Minimal consequences for failing to respond in a timely manner to court documents, failing to provide requested/required financial information, failing to pay court-ordered support, breaching restraining orders and access orders all reinforce the ongoing abusive behaviour of these men long after the time of separation.

Holding perpetrators accountable is not just a job for criminal law; there is a critical role for family law as well. Legislation must spell out that woman abuse and wife assault will be a consideration in custody and access determinations. Restraining orders and supervised access/access exchange orders must be written to allow for proper enforcement if and when they are breached. Child support orders must be truly enforced, and those responsible for their enforcement must be provided with sufficient financial and human resources to allow them to achieve appropriate outcomes.

4.4 Alternatives to Litigation

There is a trend, reflected in the consultation document, towards promoting alternatives to litigation in family law proceedings. Indeed, one of the “guiding principles” set out in the consultation document is to “promote non-adversarial dispute resolution mechanisms and retain court hearings as mechanisms of last resort.” These alternatives include such options as mediation, counselling, arbitration, parent education courses, and the like.

While there is no doubt that some families are well served by avoiding litigation, this entails significant dangers for many women, especially those whose partners are or have been abusive. Unfortunately, the consultation document does not adequately identify the dangers of these non-judicial options for abused women. The consultation document takes the position that court should be viewed as a last resort, when for many people, particularly abused women and their children, court should be their first and only resort.

The consultation document sets up counselling and mediation as “alternatives” to retaining lawyers. This is an incorrect juxtaposition. Even where counselling and/or mediation are appropriate, they do not replace legal representation and legal advice. These alternatives essentially re-privatize family law and along with it, woman abuse and wife assault. Women’s legal rights are being removed from the public arena of the courtroom and placed behind the closed doors of mediators, arbitrators and lawyers. These professionals usually do not use an equality-based analysis and can fail to protect women adequately. As a result, women’s and children’s safety is jeopardized.

Mediation is promoted in the consultation document as “impartial”, when in fact most mediators have an open bias in favour of joint or shared custody. Given the pro-joint-custody philosophy of many mediators, many abused women are likely to “agree” to custody arrangements that are far from what they think would be in the best interests of their children.

Mediation tends to be forward-looking in a way that excludes examination of the relevant past history. Parties are encouraged to move beyond difficulties in the marriage and look at new ways of relating to one another. Traditionally non-involved parents, usually fathers, are taken at their word when they say they want to be more involved with their children. Mothers who want to talk about the abuse they have experienced and about who has had the primary responsibility for the children in the past (usually them) may be discouraged from doing so and are told to put the best interests of the children (which always includes maximum contact with both parents) first and foremost in their minds. This is clearly inappropriate and potentially dangerous in situations of abuse and assault. Past history of abuse and assault, and past caregiving history should be paramount considerations in discussions about future custody and access arrangements.

Mediation can be very dangerous, both emotionally and physically, for abused women. It is agreement-driven and not rights-driven, with the result that the mediator (and abuser) are focused on achieving an agreement and are not necessarily concerned about protecting the rights of the “weaker” party. Abusers often promote mediation because it

suits their purposes very well. They can continue to have face-to-face contact with their victim and can use familiar control tactics (which may be invisible to the mediator or remain unaddressed) to manipulate the outcome of the mediation.

Alternative dispute processes work only when the parties have relatively equal bargaining positions. This is seldom truly the case between men and women and it is impossible in relationships where violence against women exists. A power imbalance that has developed over many years of abuse does not disappear just because the parties separate or a third party supervises their negotiations. Women remain vulnerable to the abusive tactics of their partners long after separation. Nowhere are these vulnerabilities more apparent than in mediation. Many abused women adopt compliance as a survival strategy and often experience difficulty in expressing an independent perspective on their wishes in mediation. Standing firm in the face of the abuser's opposition can be virtually impossible. Abusive men insist that their partners bend to their wishes. They are incapable of compromising or negotiating fairly with their ex-partners.

For these reasons, mediation should never be mandatory. Mediators should not be "screening" for violence; mediation should simply not be an option where the woman identifies that she has been abused or assaulted.

Part 5: Child Support

5.1 Overview : Did the *Guidelines* Accomplish the Goals?

The introduction of *Child Support Guidelines* in 1997 was one of the most significant reforms in the story of family law in Canada. The goal of the introduction of the *Child Support Guidelines* was to increase the amount of support available for children. This was confirmed repeatedly in the reports of the Federal Provincial Territorial Family Law Committee.

Any review of the *Child Support Guidelines* then, must start with the basic questions: did the *Guidelines* accomplish the goals? Did they correct the problem they were intended to solve?

If the *Guidelines* have not accomplished this goal, they are a failure. The primary question to ask is: is there more money being ordered, being paid and available for the support of children? If not, the *Guidelines* are a failure. These comments are not restricted only to those aspects of the *Guidelines* raised in the consultation document. The requirement to report to Parliament in 2002 was intended to be a report on all aspects of the *Guidelines*.

To ensure that the *Child Support Guidelines* achieve their goals, Section 1(a) should be amended to explicitly identify the first objective of the *Guidelines*

5.1.1 *Child Support Guidelines*: a Ceiling? Or a Floor?

There is great concern that the *Child Support Guidelines* have become a ceiling for child support, rather than a floor. This has certainly been the experience in American jurisdictions that have introduced *Guidelines*. This raises the question of whether *Child Support Guidelines* are the right solution to the problem of inadequate child support awards. The reports of the Federal Provincial Territorial Family Law Committee openly acknowledged that child support awards in Canada are too low.

The *Guidelines* are less likely to become a ceiling (rather than a floor) when the table amount is used in combination with the special child-related expenses permitted to be awarded (called add-ons or special and extraordinary expenses: these are expenses for child care, medical and health related expenses, educational expenses, and extraordinary expenses for extracurricular activities). The special child-related expenses are essential, and should be made mandatory, not discretionary. In effect, the *Guidelines* are a two-tiered structure: the table amount and the add-ons (special and extraordinary expenses).

The categories called "special and extraordinary expenses" should be included as mandatory or presumptive in determining child support awards under the Child Support *Guidelines*. The words "special or extraordinary expenses" are misleading and inaccurate to describe the categories of expenses covered by this section. It would be a rare family in which none of the enumerated categories of expenses was incurred. As the amounts shown on the *Guidelines* for child support for families of modest income (where the paying spouse earns \$40,000 a year or less) are lower than pre-Guideline court orders for child support, the addition of these special expenses are essential to prevent the *Guidelines* from becoming a ceiling for support rather than a floor.

5.1.2 Annual Changes to Child Support

There continues to be confusion about the method of ensuring that support agreed upon or ordered changes annually to keep up with inflation and the increasing money which may be available to the payor. Are cost of living increases to continue to apply to child support? Or, is the provision for requesting annual disclosure meant to replace cost of living adjustments? Many lawyers mistakenly believe that cost of living clauses are no longer available for child support.

An annual adjustment in the child support based on disclosure of the payor's current income is, in theory, a good idea. But there are implications for this process. Many women are unwilling or even (particularly assaulted women) unable to have the kind of continued contact with former partners necessary to obtain this information. As a result, the disclosure is not requested or offered, and the amount of support is never adjusted. The obligation to provide income information should be joined to a simple administrative mechanism for requesting and providing such information, and re-calculating support, through a third party. The courts or the support-enforcement programs in each province could accomplish this.

5.1.3 Problems with the Table Amounts

The table numbers in the Schedule need to be revised on a regular and on-going basis. At best, they should be revised annually, or every two years at most. Children should not have to wait five years for a re-examination of this regime.

In addition, schedule amounts do not reflect that children at different ages cost different amounts of money to raise; for example, two fathers earning \$40,000 per year will pay the same amount in child support, even though one father is supporting a three year-old and the other father is supporting a 14-year-old.

5.1.4 Spousal Support

The treatment of spousal support is cause for concern. Spousal support continues to be a more contentious issue than child support and, notwithstanding recent developments in case law, there are many other factors which already result in low awards or no spousal support awards. The priority for child support will exacerbate the current tendency to ignore spousal support altogether, or to award lower amounts. Circumstances which diminish the availability of spousal support should be avoided.

The priority given to child support should not mean that spousal support may be ignored. Section 15.3 should be amended to be clear that despite the priority given to child support, a court shall consider the need for and the entitlement to spousal support, in accordance with the goals set out in the *Divorce Act*.

5.1.5 Access to Justice for Women

Applications to court for variation of existing orders and agreements are now available to a large and diverse group. The proclamation of the *Child Support Guidelines* and the amendments to the *Income Tax Act* (which re-defined income to exclude child support) are deemed to be a material change in circumstances for the purposes of permitting either party to return to court to ask for a different amount. As a result, the payor spouse, the receiving spouse, the provincial and municipal governments who provide welfare and family benefits could all be requesting courts to vary existing orders. The right to go to

court and seek a variation is not the same as the ability to do so. Cutbacks to civil legal aid across Canada have dramatically reduced the availability of lawyers to women who have family law problems. As a result, the availability of access to courts for women in these circumstances is an access to justice issue. More funding must be made available to ensure that women are able to access the benefits of the *Child Support Guidelines*

5.1.6 Definition of income

The definition of income is too narrow and is inappropriate for the calculation of child support, and must be re-considered. Different policy considerations apply to deductions from income permitted for income tax purposes than should apply to accountability of parents for the support of their children.

5.2 The Issues in the Consultation Document

5.2.1 Child support in Shared Custody or Time Share arrangements

a) Determining Whether Shared Custody Rules Apply

Shared custody (or a time share arrangement), is not, in fact, the custody and access arrangement for the majority of Canadian families. The majority has a more straightforward arrangement: custody to one parent, usually the mother, and access to the other parent, usually the father. This most common arrangement may be called something else, but that is how it actually works.

Determining whether the shared custody rule in the *Guidelines* applies is, however, a problem. Making this determination using the time each parent spends with the child is not the right approach. The amount of time spent is not the issue; rather, the issue is the responsibility assumed by each parent. Time could be spent with the child without assuming any responsibility for the child. Some access parents function more like baby-sitters. As the consultation document notes, “there is more to parenting than just how much time parents spend with their child” (p. 38).

More than 40% residence may lead to a reduction or elimination of support even in circumstances where such a reduction is not appropriate and not in the child's best interests. The result of "shared custody" (i.e., shared time over 40%) under the *Guidelines* varies, depending on the parties' incomes, who is actually paying the children's expenses, and the jurisdiction and individual judge. In Toronto, for example, if the husband has the children more than 40% of the time but has income well in excess of the wife, he may well pay the whole guideline amount in support.

The more important point, now acknowledged by the bench and bar, is that a good deal of litigation regarding the time that children are scheduled to spend with a parent is fueled by a desire to possibly escape from paying *Guidelines* support. Under the current structure, some fathers are now motivated to seek more time with their children not because they want to spend more time, but because they want to pay less child support. The consultation document acknowledges this: "Parenting arrangements should be based on what is best for the child, not on what will benefit either parent financially" (p. 38).

Any system which gives more "wobble room" around scheduling and pushes closer to a standard of "equal time" and maximum contact promotes that litigation too. In many families, there is not enough money post-separation to adequately support two households on the income which previously supported one. The *Guidelines* are an effort to insure that children are put first in this squeeze. Provisions which actually weaken the *Guidelines* should not be strengthened.

Important questions not asked in the consultation document are: should different support rules apply where there are different custody and access arrangements? What evidence is there to suggest that this results in children's basic needs being consistently met? If different support rules should apply where there are different custody and access arrangements, what is the threshold to take a family out of the *Guidelines* table? Many parents ask their lawyers: "Where is the table for joint custody?"

The *Guidelines* should be amended to get away from the time calculation and go to a calculation based on responsibility: Who does the work necessary to keep the child's life in order? Who organizes their life around the child? In many families, that is relatively simple to determine.

b) Determining the Child Support Amount for Shared Custody Arrangements

The real problem here is that one size does not fit all. In families whose parenting arrangements are not the usual (sole custody to the mother with access to the father), the arrangements vary widely. Trying to come up with rules that would be fair in all circumstances would be very difficult and would be sure to result in inequities.

It is worth considering a structure of equalizing standards of living in each house. This puts the needs of the child first. Children notice and comment on the disparity that exists between the standards of living in the households of their parents. A structure which equalizes standards of living in the children's two homes also guarantees that no parent will seek this time share arrangement for their own selfish needs or to pay less support (as those who do seek it may actually pay more support). It is an equitable solution from the child's perspective, as it guarantees equality of circumstance for the child.

Neither parent paying anything in shared custody arrangements is inconsistent with well-known data that women's post-separation households have less money coming into them than men's post-separation households. This arrangement guarantees the child will have a lower standard of living in the woman's home than in man's home, and is not in the child's interests.

There is some appeal to the notion of crafting a formula for determining child support in shared custody arrangements. Shared custody does cost more than the family all living together and it costs more than sole custody with access. Families need to be aware of that when making these decisions. But a formula ignores the very real situation that there are many different kinds of shared parenting arrangements. One size does not fit all when

it comes to custody and access arrangements, and particularly when it comes to shared custody or joint custody arrangements.

The use of discretion for judges has some initial appeal. But it is important to remember that the vast majority of separating parents do not use a judge to help them design their custody and access arrangements nor to determine child support. The vast majority of separating parents do this on their own or with the assistance of lawyers or with other assistance. Judges are the place of last resort. The system in place needs to be one that also works for those many parents who do not want a judge involved with the decisions about their children.

5.2.2 Impact of Access Costs on Child Support Amounts

Access costs should not be taken into account when determining child support for the average separated parents. They should only be taken into account in exceptional circumstances. As the consultation document acknowledges, “an increase in the paying parent’s access time may have little or no impact on the receiving parent’s major expenses, such as housing”

When examining child support, meeting children’s needs is what matters most and matters first; everything else is secondary. It is hard to understand why access costs are even an issue in the consultation document. Access costs should not be raised to a higher place than custody costs, or even to an equal place with custody costs. Child support is about ensuring that the costs of caring for the child are met. Why isn’t the review enquiring as to whether or not the amounts in the table actually cover the cost of raising children?

The custodial parent bears the majority of the financial burden with respect to the child and the custodial parent also bears the burden of child care, planning, and organizing not only the child’s life but also organizing their life around the child’s life. It is important to put the question of access costs in a proper perspective. If access costs are to be taken into account, then it is only fair to also assign higher expenses for the custodial parent

when the access parent does not exercise access to the child, or exercises less access than the parties agreed on or anticipated, or cancels planned access on short notice. This is a direct and quantifiable cost to the custodial parent.

It is important to distinguish between the average separated family and those families in which parents or children have to travel long distances to see each other. Airfare as an access cost is the exception, not the rule. It is important to design a system that deals with the majority and allows for other ways of dealing with variants from the norm. High access costs are a variant from the norm, and very high access costs (airfare and hotel costs) are the exception, not the rule. In exceptional circumstances, the court can examine all the factors. A formula cannot take into account the variety of problems that may arise. For example, the cost to go to Australia may be affordable for one parent (*Gordon v. Goertz*), but the cost to travel from Toronto to Windsor for another parent may prevent access from taking place regularly. As difficult as this is to accept, some disputes may just need to be resolved in court. Cases of unusually high access costs affect a small minority of separating families. The undue hardship section in the *Guidelines*, while far from perfect, is adequate to deal with unusually high access costs. For judges to be involved in deciding on support by examining the costs of access, the threshold should be set at “unusual” or “exceptional” costs of access.

Balancing simplicity and predictability against fairness is what family law is all about. Those who work in the family law justice system have to do it all the time. The proposed changes in this area would result in more demands for more time with children to reduce the amounts of support; not necessarily more caring of the child, just more time. Indeed, the consultation document acknowledges that “Reducing child support amounts according to access time could lead to more litigation.” There is no question that any entry by the government into this area with attempts at legislation will result in increased disputes between parents and increased litigation. This is a fathers’ rights agenda item.

The rule should be that, in general, no special consideration be given to access costs. They are neither more important nor more significant than the costs of custody.

5.2.3 Child Support for Children over the Age of Majority

It is somewhat problematic that different provinces have different ages of majority, particularly if it means that a dependent 18-year-old child is treated differently regarding child support in Ontario than she is in British Columbia.

Paying child support directly to the child makes it sound like once a child is 18 or 19, the custodial parent is no longer incurring any costs for the child. This is not so. Children stay connected to their “home” even after they leave to go to school. They store their belongings there. They expect to return there in the summer to live there (for free), work at a summer job, and save money for the return to school in the fall.

The child still calls that home, uses it as her permanent address and still lives there. And even if the child is away at university, the custodial parent continues to incur costs for the child (housing, food, and clothing), over and above the actual costs of university (tuition, books, and room and board at school).

Paying the child support directly to the child is not a solution. The child will not necessarily spend the money on the university costs and then the custodial parent will be left, as usual, to pick up the tab. This is what happens now. The custodial parent picks up the tab for whatever is not covered by the support payments (both before and during university).

Paying child support directly to the child will put the custodial parent in the role of having to ask the child for a portion of the money paid to the child by the paying parent. That is likely to create conflict and unpleasantness for both parent and child.

Child support for older children should not go directly to the child. The *Guidelines* should not provide for that and the court should not be able to order it. Sometimes

children are drawn into the parents' dispute in ways that are inappropriate, and this will increase that risk.

5.2.4 Disclosure of Information Concerning Older Children

The school records of older children are the property of the child, not the parent. Even the custodial parent is denied access to school records of children over 16 without the child's consent.

The child should not be involved in the parents' dispute over money. The *Guidelines* should not be changed to require this level of proof regarding older children, unless the only proof required is an annual statement from the receiving spouse (signed and dated) that the child is still eligible for support. If that statement should later prove false, the paying parent can claim recovery based on that document.

The *Guidelines* should not be changed to provide that information regarding the child's finances has to be disclosed.

5.2.5 Child Support Obligations of a Spouse who Stands in the Place of a Parent

This is a challenging area of the law, particularly considering the speed with which separated parents repartner. Many more children than ever before are now living with, being parented by and being supported by adults who are not their biological parents. And a recent Supreme Court of Canada decision is clear that the spouse who stands in the place of a parent cannot unilaterally determine to end that legal relationship. That spouse cannot unilaterally determine to end that legal relationship just to avoid payment of support. The eligibility of a child for this support is now clear and unequivocal.

This is a good thing. This means that there will be more adults legally responsible to support children, not fewer. In this way, there is more chance for the child to attain a similar standard of living to that which they had when their parents were together. Also, there is nothing wrong with adults having to consider that, when they move in with each other, they may be creating legally enforceable rights and obligations with respect to

supporting the other spouse or the child of the other spouse. That has been the state of the law for some time and is nothing new.

The law cannot set out a formula or system for determining how much the stepparent should pay and how much the biological parent should pay. Every case is entirely different, and there are far too many variations. This issue needs individual determination. Some children have consecutive stepfamilies; some children have had no contact for many years with a biological parent who has never paid support, but have had a 10-year relationship with a stepparent. Many stepparents become the only other real parent the child has known.

The *Guidelines* should not be changed to provide more direction in this area. Parties are working this out or courts are determining it. Each paying parent should pay the table amount. Even those amounts, even if paid, are modest. Why shouldn't the child benefit from the income of all those who took a parental role in her life?

Conclusion: What Women Really Need

This brief has addressed only a limited range of issues that are of importance to women and children in the context of family law reform. In order to respond to the most troubling ramifications of the options that are proposed in the consultation document, other aspects of law and policy reform that would be essential to ensuring a truly egalitarian reform have had to be neglected.

However, if systemic gender discrimination and compounding inequalities among women serve to establish and maintain women's inequality in the family and women's increased vulnerability to male violence, then systemic supports for women in their role as primary caregivers to children are needed to reverse these inequalities. There are numerous reports, research studies and commissions conducted or funded by the Government of Canada which can guide the government with regard to the specific strategies required to remedy the economic, social and political inequality of women.

In the context of the World March of Women in the year 2000, the Canadian Women's March Committee developed an extensive series of policy recommendations to the Federal government in *It's Time for Change! Demands to the Federal Government to End Poverty and Violence Against Women*. This platform document contains 68 recommendations that address women's social, economic and cultural rights, the need to respect and honour women's paid and unpaid work, to respect and promote the human rights of immigrant women, women of colour, Aboriginal women, lesbians, and women living with disabilities. It proposes specific recommendations to ensure equality of women in the workplace, the eradication of violence against women, the respect and promotion of women's human rights and citizenship rights. Recommendations include pay and employment equity for women, universally accessible and affordable child care, adequate social assistance programs, comprehensive civil legal aid, comprehensive social programs, supports specific to the diversity of women's and children's needs and universal public health care, to name a few. Implementation of the demands of the Canadian Women's March Committee would provide the systemic change that is needed to ensure the equality of women in the family and the well being of their children.

Indeed, the increasing poverty of children in Canada is primarily the result of women's poverty. Women need to live with the security of knowing that their children will be able to live free from poverty. While the state attempts to privatize responsibility for the family in Canada, its children suffer from hunger, inadequate childcare and substandard housing and health care services.

A child represents the future for our society and is everyone's responsibility. No child should go without because her or his father is unable or unwilling to pay child support. The state has a responsibility to ensure that each child receives resources adequate to optimize the child's healthy development. When parents cannot provide these resources, governments must ensure the necessary financial support, programs and services that are essential to meet every child's basic needs. These and other issues need to be explored and discussed further, both between women and women's equality seeking organizations,

and with Federal, Provincial and Territorial governments. In the course of the National Women's Lobby that was organized for the World march of Women 2000 activities, the minister of justice promised to hold a national consultation for women. We urge her to do so in the very near future.

¹ It should be noted that some groups have expressed reservations with this specific proposal. They are concerned that it might give rise to abusive complaints and subsequent court harassment by disgruntled fathers, and that the courts may not be able to appreciate the real dynamics that are at play in the specific situation.

² Status of Women Canada, (1995), *Setting the Stage for the Next Century: The Federal Plan for Gender Equality*, Ottawa, SWC, par. 35.

³ *Id.*, par 23.

⁴ United Nations, Report of the Fourth World Conference on Women, Beijing, China, 4-15 Sept. 1995, A/CONF.177/20, 17 October 1995, Beijing Platform for Action, par. 204.

⁵ On June 4, DAWN – Ontario finally received a Braille version of “Putting Children First.

⁶ M. Laing, For the Sake of the Children: Preventing Reckless New Laws (1996) 16 Can. J. of Fam. L. 236.

⁷ Bonnie Diamond, “The Special Joint Committee on Custody and Access: A Threat to Women’s Equality Rights”, (1999) *Canadian Women’s Studies* 182.

⁸ C. Bertoia, J. Drakich, “The Fathers’ Rights Movement: Contradictions in Rhetoric and Practice” (1993) 14 *Journal of Family Issues* 592.

⁹ For the Sake of the Children, (1998) Report of the Special Joint Committee on Child Custody and Access, Public Works and Government Canada. p. 30.

¹⁰ C. Bertoia, J. Drakich, *supra*.

¹¹ Christa Freiler, Felicite Stairs and Brigitte Kitchen with Judy Cerny (2001). *Mothers as Earners, Mothers as Carers: Responsibility for Children, Social Policy and the Tax System*, Status of Women Canada, p. 5.

¹² Katherine Marshall, (1993), *Les parents occupés et le partage des travaux domestiques, Perspectives*, Statistiques Canada, cat. 75-001F, p. 28.

¹³ Denyse Côté, (2000), *La garde partagée; l’équité en question*, Montréal, Les éditions du remuéménage, p. 48.

¹⁴ *Ibid.* p. 49.

¹⁵ Statistics Canada., (2000), *Women in Canada 2000: A Gender-Based Statistical Report*. p. 97. Unpaid work is defined as including “housework such as cooking and washing up, housekeeping, shopping, child care, maintenance and repair and voluntary activities.”

¹⁶ Sheila M. Neysmith, (ed); (2000), *Restructuring Caring Labour*, Toronto: Oxford University Press.

¹⁷ *Women in Canada 2000*, *supra*, Pg. 141.

¹⁸ Francine Descarries et Christine Corbeil (dir.) (1994), *Travail et vie familiale: une difficile articulation pour les mères en emploi*, Montréal, Université du Québec à Montréal, Centre de recherche féministe, p. 1.

¹⁹ Judy Fudge, “Reconceiving Employment Standards Legislation: Labour Law’s Little Sister and the Feminization of Labour.” (1991) 7 *Journal of Law and Social Policy* 77.

²⁰ Gail Fawcett, (1996), “Living with Disability in Canada: An economic Portrait”, Ottawa, Minister of Supply & Services Canada.

²¹ *Women in Canada 2000*, *supra*, p. 259.

²² *Ibid.* p. 230.

²³ *Ibid.* p. 232

²⁴ *Ibid.* p. 203

²⁵ Monica Boyd. “Gender, Visible Minority and Immigrant Earning Inequality: Reassessing an Employment Equity Premise” in Vic Satzewich (Dir.), (1992), *Deconstructing a Nation: Immigration, Multiculturalism and Racism in 90s Canada*, Halifax, Fernwood. p. 279; Gertrude Mianda, “Être immigrante noire africaine francophone à Toronto: vécu et perception des rapports de genre” (1998) 4 *Reflets. Revue ontarioise d’intervention sociale et communautaire*, 34.

²⁶ Jane Badets & Linda Howatson-Leo, 1999, “Les nouveaux immigrants dans la population active”, *Tendances sociales canadiennes*, 19 at 22.

²⁷ Tania Das Gupta, (1996), *Racism and Paid Work*, Toronto, Garamond Press, p. 81.

²⁸ Badets-Leo, *supra*, p. 23.

²⁹ CONFANF, (1997), *Projet: Briser le circuit de la dépendance économique. Communauté des femmes africaines noires francophones*, Ottawa, p. 5.

³⁰ *Women in Canada 2000*, *supra* p. 205.

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