TAKING THE IMPACT OF FAMILY VIOLENCE INTO ACCOUNT
TO BETTER PROTECT ABUSED WOMEN AND THEIR CHILDREN DURING DIVORCE

“States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should: [...] Develop, in a comprehensive way, preventive approaches and all those measures of a legal, political, administrative and cultural nature that promote the protection of women against any form of violence, and ensure that the re-victimization of women does not occur because of laws insensitive to gender considerations, enforcement practices or other interventions.”
Excerpt from the Declaration on the Elimination of Violence against Women (UN, 1993)
This brief by the Fédération des maisons d’hébergement pour femmes (FMHF) on Bill C-78, An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act, is largely based on the brief submitted by Luke’s Place and the National Association of Women and the Law (NAWL), which was informed by consultations with lawyers, academics, and feminist advocacy and frontline service organizations.  

**Mission of the FMHF**

The FMHF was established in 1987 by various women’s shelters to fulfill a need for coordination and to form an association encompassing all the social problems associated with the many types of violence against women, including spousal abuse. Taking a feminist perspective to combatting violence against women, the FMHF brings together, supports and represents women’s shelters to promote and champion the rights of women and their children experiencing multiple social problems.

To get a clearer picture of how abuse and multiple social problems affect women, the social, political and economic circumstances in which they live must be taken into account. The various forms of oppression in our society also need to be considered. The multiple social issues are understood to be survival strategies for most women to cope with the abuse they are enduring (including social, economic and political inequity) and the consequences of that abuse. The various problems experienced by Indigenous women, immigrant women, racialized women and women with disabilities are all issues of concern to the FMHF. Hence, the FMHF is committed to promoting and championing the interests of women’s shelters, bearing in mind their independence, their specific characteristics and their similarities and differences, in a spirit of partnership and cooperation.

The FMHF’s missions are as follows:

1. champion the rights and develop the self-reliance of women coping with difficulties associated with the various forms of abuse (spousal violence, family violence, human trafficking, forced marriage, etc.) and multiple social problems (addiction, mental illness, homelessness, etc.);
2. provide member shelters with the support they need to carry out their missions through training and information;
3. represent member shelters in dealings with political authorities and public, quasi-public and private agencies; and
4. educate the public and the various authorities on the issues and consequences of the abuse experienced by women and children.

The FMHF’s 36 member shelters (out of about 100 in the province), located in 10 Quebec regions, support some 5,000 women and 2,000 children each year. The occupancy rate is nearly or even more than 100% every year. Because of the abuse, most of the women who stay in the shelters need that respite in their lives, a hiatus specifically tailored to their situation.

The FMHF’s member shelters respond to more than 50,000 calls to 24/7 hotlines and provide off-site services to some 60,000 women and children. They offer one-on-one and group counselling, youth counselling, accompaniment for various activities (immigration, learning French, physical and mental health, schooling, social and legal services, victim compensation, social and occupational reintegration, etc.) and many informal support sessions. They carry out some 7,000 training and awareness activities in communities. Every year, more than 5,000 women knock on their door without warning looking for help. They often have to turn people away because there are no resources or spaces available.

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1 This brief reproduces a very large portion of the joint brief prepared by Suki Beavers and Anastasia Berwald (of the NAWL) and Pamela Cross (of Luke’s Place). The FMHF acknowledges the many contributions of the following organizations: Action ontarienne contre la violence faite aux femmes, the Barbra Schlifer Commemorative Clinic, the BC Society of Transition Houses, the Canadian Council of Muslim Women, the Canadian Women’s Foundation, the DisAbled Women’s Network of Canada, Québec Native Women Inc., Harmony House, the Ontario Association of Interval Transition Houses, the Native Women’s Association of Canada, the COCVFF, the RISE Women’s Legal Centre, the South Asian Legal Clinic, Vancouver Rape Relief and Women’s Shelter, West Coast Leaf, the Women’s Legal Education Action Fund, and Women’s Shelters Canada. We also thank the following law firms and individuals for their contributions: Athena Law, Equitas Law Group, Jenkins Marzban Logan LLP, Suleman Family Law, Professor Emerita Susan Boyd, Rachel Law, Hilary Linton, Professor Linda Nielson and Glenda Perry. We are grateful to Lisa Cirillo, Professor Lorena Fontaine, Professor Martha Jackman, Anne Levesque, Cheryl Milne and Zahra Taseer (NAWL), and Carol Barkwell (Luke’s Place) for their input.
(between 6,000 and 10,000 annually because there are no spaces available at the time of the call).

**General comments on Bill C-78**

We commend the government for the many positive changes introduced in Bill C-78, several of which are long overdue. It is extremely encouraging to see that the only test to be used in determining arrangements for children after a separation is what is in their best interests. The addition of a list of factors to consider is also positive, including the explicit reference to Indigenous upbringing and heritage, as those factors can provide guidance and support to courts. We are also pleased to see a comprehensive and inclusive definition of family violence. It is reassuring to see explicit references to coercive and controlling behaviour and to fear. The inclusion of threats or actual harm to pets is very positive, as is the explicit inclusion of financial abuse. We are also happy with the inclusion of the duty to consider other orders or proceedings, such as criminal and civil protection orders.

**Context of our recommendations**

We would like to begin by pointing out the federal government’s international and domestic obligations regarding the rights of women, including Indigenous women. As mentioned, there are many welcome additions and changes in Bill C-78. The FMHF supports making children and their well-being the central elements of the Divorce Act. We commend the important objective of reducing conflict, but we stress that conflict must not be confused with spousal and family violence, as that can cause errors in assessing the effects of violence and the dangers of intrafamilial homicide. The requirements established for parents in non-violent conflict situations should differ from those needed when an abused woman is involved in a divorce proceeding. Consequently, most of our recommendations focus on specific changes to ensure that Bill C-78 will truly protect women and their children at the end of an abusive relationship.

Our analysis identifies aspects of Bill C-78, including those which require communication and cooperation between spouses, and the unintended ways in which some aspects of the communication and cooperation expected of parents during divorce proceedings may obscure the realities of family violence and run the risk of endangering women and children. The broad definition of family violence in the bill shows an understanding of the complex and pervasive nature of family violence, and it is important for all aspects of the bill to be framed accordingly and with an understanding of the complexities and pervasiveness of the impacts of past violence and even of ongoing violence, and of the fact that violence does not end simply because divorce proceedings have begun. There is abundant evidence that violence by husbands often intensifies in the months following a separation, and that the highest risk of homicide for many abused women and their children is during that period. Consequently, forcing mothers to continue communicating and cooperating with their abusive spouse is not only inappropriate but a threat to their safety. Yet, even today, mothers who are legitimately unable or unwilling to cooperate with an abusive spouse are frowned upon by the courts and may even lose custody of the children to the abusive spouse.

This state of affairs has been documented in the literature for decades. Studies show that in custody decisions, the courts seem intent on keeping the father in the picture for the sake of the children, ignoring his potential for violence or his inability to meet the children’s needs (Smart and Neale, 1999). The justice system has also adopted the new ideology of father “victimization,” blaming mothers when father-child relations were antagonistic: “Mothers who do not force their children to see their father or attempt to protect their children from the father’s abuse have been depicted as being, irrationally, implacably hostile, selfish and incapable of placing the children’s interests above their own” [Translation] (Harne, 2002: 18).

Moreover, in her master’s thesis, Manon Monastesse (2003) questions the use of the “parental alienation syndrome” concept and notes the risks it can present for abused women and their children. This concern is shared by other researchers, including Jaffe and Geffner (1998), who see increasing numbers of support workers questioning women’s account of the violence they have experienced. The women are suspected of claiming their husbands were abusive in order to deprive them of their custody rights. Jaffe and Geffner describe this as a “no-win situation” for abused women. If, in an effort to protect her children, an abused woman does not report that they witnessed abuse or were abused by their father, she may lose custody because she is supposed to be protecting them. On the other hand, if she reports the
father, she is accused of keeping the children from him and thus loses custody of the children to the abusive father: “In our professional experience in over 20 years of completing custody and visitation assessments, the non-identification of domestic violence in divorce cases is the source of the real problems that occur” (Jaffe and Geffner, 1998: 381).

Neilson (2000), cited in Dufresne and Palma (2002: 41), states that in matters of access or contact between the child and the abusive spouse, the abuse seems to have little impact on restricting contact or regulating it through supervision. Susan B. Boyd (2002) adds that the preference for having both parents involved in the child’s life may lead to the presumption that the prospect of living in a “broken” family is worse than that of staying in a home fraught with abusive behaviour (cited in Dufresne and Palma, 2002: 41). Consequently, cooperation and communication arrangements should be flexible, and it should be clearly indicated that they may not be appropriate and should not be mandatory in cases where there is any history of family violence.

The definition of family violence in Bill C-78 rightly excludes self-defence. However, some causes demonstrate a lack of understanding of the various ways in which women resist and survive family violence. We hope that identifying certain patterns of coercion and control will help the courts understand the dynamics of family violence and that acts of resistance and survival by abused women will cease to be considered acts of family violence.

We are in favour of keeping rather than changing the clear and commonly used terms “custody” and “access” in the Divorce Act. In addition, we suggest that the decisions the parent with custody has the authority to make and the types of decisions that can also be made by the parent with access should be further clarified in Bill C-78. We understand the idea behind the proposal to introduce new terms to replace “custody” and “access.” In principle, we agree that trying to shift the focus in divorce proceedings away from the perception that one parent wins in a custody battle and the other loses, to the concept of cooperation between parents so that the best interests of the child prevail, seems positive in cases where there has been no violence.

Unfortunately, the risks associated with introducing new terminology that will be subject to much interpretation and debate far outweigh the potential benefits, however well-intentioned the idea may be. As we heard from lawyers and advocates who have been working with similar new language in some provincial family law regimes, there is no compelling evidence that the new terminology has actually been effective in reducing conflict when matters of custody, access and decision-making are at issue. There is also legitimate reason to be concerned that this new terminology will cause interpretation conflicts in international cases, as it differs from the terminology used in the Hague Convention. This may prevent Canada from fulfilling its obligations under the Convention.

Moreover, the experiences of too many women who have been in abusive relationships demonstrate that abusive men will exploit any hint of uncertainty or ambiguity they can find. Any ambiguity in the law can be turned into an opportunity for abuse, harassment and undermining of the mother. Therefore, it is safer for children and their mothers to have clear, unambiguous custody allocation and clarity about who has the authority to make specific decisions about what is in the children’s best interests.

We have similar concerns about the proposed mandatory requirement that the use of family dispute resolution processes be encouraged. It is true that some women find such processes empowering and/or better suited to their needs. However, family dispute resolution processes are not always the best solution and, particularly in cases involving family violence, they may not be appropriate at all. The flexibility of family dispute resolution processes serves some families extremely well, but in other circumstances, they can provide abusive partners with an opportunity to manipulate and continue being abusive. The Divorce Act should reflect and respect women’s autonomy and agency and provide them with all the tools they need to make free and informed decisions about the safest and most effective process for them.

Thus, rather than requiring legal advisers to always “encourage” dispute resolution, we recommend that Bill C-78 be amended to require all legal advisers to fully inform spouses about all processes available to them. This change will
ensure that all women get information on the full range of processes available, so they can make a meaningful choice about which type of process is best suited to their circumstances and needs. We believe the current mention of “appropriateness” in this provision is not sufficient and will lead to family dispute resolution being the default process, even in cases of family violence, where it could jeopardize the physical safety and psychological security of mothers and their children.

The field experience of our shelters and support centres has shown how problematic the custody exercise is in situations involving spousal and family violence, even potentially endangering the safety of the abused women and children. Contrary to expectations, the end of a marital relationship does not necessarily mean the end of hostilities. Data from the General Social Survey (GSS, 1999 in Statistics Canada, 2001) confirm not only that violence may continue after separation but also that the initial instance of physical abuse may occur after separation (37% of cases). Moreover, the physical abuse that occurs following separation can be very serious: “The majority of women (57%) who first experienced violence after separation were beaten, choked, threatened with a gun or knife, or sexually assaulted” (GSS, 1999: 32 in Statistics Canada, 2001).

On the other hand, acts of violence are more likely to be reported to police if the woman is abused after separation: “In relationships with violence that continued or first occurred after separation, 55% of women reported having contact with the police compared with 37% if the violence ceased prior to separation” (GSS, 1999: 32 in Statistics Canada, 2001). Separation is also a factor that elevates the female homicide rate. Former partners are responsible for 28% of all homicides of women. In addition, about half of those homicides (49%) occur within two months of separation, 32% between 2 and 12 months after separation, and 19% more than one year after separation. 2

Furthermore, the situation of Canadian women stalked by an ex-spouse in 2006 was troubling, as they were more likely to experience threats and acts of violence by the ex-spouse (60% feared for their lives). 3 In 2007, there were 12 spousal homicides (11 women and one man) in Quebec. 4 That trend has continued over the years.

With regard to children who witness spousal and family violence, the Statistics Canada study (2001) shows that children’s exposure to violence in the family is the most common form of psychological abuse (58% of substantiated cases). Studies have demonstrated that children can describe acts of violence in detail even if they did not witness them directly or the parents thought they were unaware (Johnson, 1996). Other estimates are also available through the General Social Survey on Victimization (GSS, 1999 in Statistics Canada, 2001) and the National Longitudinal Survey of Children and Youth (NLSCY, 1998-1999 in Statistics Canada, 2001). According to the GSS (1999 in Statistics Canada, 2001), children saw or heard the abuse in 461,000 cases of spousal violence – 37% of all cases – in the five-year period preceding the survey. In addition, in 70% of cases of spousal violence witnessed by children, the mother was the victim, and in half of the cases, the violence was so severe that she feared for her life.

Moreover, as noted by Denyse Côté of the University of Quebec in the Outaouais, treating joint custody as the sole and perfect model for sharing parental responsibilities has certain dangers: “[...] a research study we conducted recently confirmed that joint custody is dangerous for abused mothers. It often prevents the victim from protecting herself from the abuser. The abuse continues or escalates after a joint custody arrangement is finalized. The abuse takes various forms: emotional, verbal (belittling, manipulation, control, harassment), physical and sexual (bodily harm or threats of bodily harm) and even financial (inadequate support). It usually occurs during contacts made necessary by the joint custody arrangement (custody changeover and discussions on the division of child care duties). The relationship with the ex-spouse is antagonistic, which makes it difficult if not impossible to build a new family life and jointly manage the children’s education and has a profound effect on the

3 Statistics Canada, Measuring Violence Against Women: Statistical Trends, 2006: 31, Figure 18.
4 Statistiques 2007 sur la criminalité commise dans un contexte conjugal au Québec, Department of Public Security, September 2008. [in French only]
In conclusion, it is safe to say that the custody and access process is a preferred way for abusive ex-spouses to maintain control and use legal intimidation in civil proceedings, which is substantiated by research, statistics and the field experience of our shelters and support centres.

Finally, harmful myths and misconceptions about the realities and dynamics of family violence still influence family law processes and decisions. Education on family violence and gender equality should therefore be an essential part of the reform of the Divorce Act and the implementation of Bill C-78. Consequently, the FMHF recommends that Bill C-78 include education requirements for all parties involved in the family law system (including lawyers, legal advisers, paralegals, mediators, arbitrators and judges).

Recommendations

VIOLENCE AGAINST WOMEN/FAMILY VIOLENCE

As mentioned, it is clear to the FMHF that protecting women and their children from family violence should be the main focus of all family-related laws, including Bill C-78. To achieve this, laws must be interpreted and applied using intersectional gender analysis. To make this clear, we recommend adding both a preamble and more definitions to ensure that Bill C-78 explicitly acknowledges the following:

1. as with all forms of gender-based violence, in the context of family violence, women are overwhelmingly the victims/survivors of violence perpetrated by a spouse, and men are overwhelmingly their abusers;
2. women experience family violence as a form of violence against women, and
3. women have diverse lived experiences of family violence that are part of the continuum of violence against women.

These additions would make it clear that Bill C-78 is intended to protect a parent or children from past, ongoing or future family violence and to mitigate the impacts of family violence (regardless of its form, its frequency or how long ago it took place), and that this approach is consistent with the children’s best interests.

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

WHEREAS in Canada, women are more likely than men to be victims of gender-based violence, including sexual assault and spousal abuse;
WHEREAS Indigenous women, be they First Nations members, Métis or Inuit, are disproportionately affected by gender-based violence and spousal abuse;
WHEREAS Canada is a party to a number of international violence-against-women instruments, including the Declaration on the Elimination of Violence against Women and the Convention on the Elimination of All Forms of Discrimination Against Women, which were ratified by Canada more than 20 years ago, and must honour its commitments under those instruments;
WHEREAS family violence has profound adverse effects on families, children and Canadian society;
WHEREAS men continue to be the main perpetrators of family violence and women continue to be the victims/survivors of family violence;
WHEREAS violence against women is a form of gender-based discrimination rooted in systemic inequalities between women and men;
WHEREAS family violence is experienced by women in multiple ways shaped by other forms of discrimination and disadvantage, which intersect with race, Indigenous identity, ethnicity, religion, gender identity or gender expression, sexual orientation, immigration and refugee status, geographic location, social status, age and disability;
WHEREAS transgender, queer, and gender-nonconforming people are also disproportionately victims of family violence;
WHEREAS divorce proceedings and the family law system should protect women from violence and not ignore or

6 We have used gender-specific language to refer to those who are harmed by violence within the family and those who cause that harm. We believe it is important to acknowledge that, in Canada, women in all their diversity, and transgender, queer and gender-nonconforming people are overwhelmingly those who are subjected to abuse and men are primarily those who engage in abusive behaviour.
exacerbate family violence;
WHEREAS it is in the best interests of children to protect them and their mothers from family violence;
WHEREAS the Government of Canada is encouraged to continue to monitor progress in the status of women in Canada
in all departments and agencies;

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

❖ Recommendation 2: Include a definition of violence against women (consistent with the definition in the 1993 UN
Declaration on the Elimination of Violence against Women)

**Violence against women**
- is a form of gender-based discrimination, a manifestation of historical and systemic inequality between men and
women;
- includes any act, intention or threat of physical, sexual or psychological violence that results in harm to or suffering
of women in all their diversity, including restrictions on their freedom, safety and full participation in society;
- is perpetrated by intimate partners, caregivers, family members, guardians, strangers, co-workers, employers, and
healthcare and other service providers;
- occurs in the home, at work, online, in institutions and in our communities; and
- is experienced by women in multiple ways shaped by other forms of discrimination and disadvantage, which
intersect with race, Indigenous identity, ethnicity, religion, gender identity or gender expression, sexual orientation,
immigration and refugee status, geographic location, social status, age and disability.

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

**Family violence** means any conduct, whether or not the conduct constitutes a criminal offence, by one family member
toward another family member that is violent or threatening or constitutes a pattern of coercive and controlling
behaviour or causes the other family member to fear for his or her own safety or another person’s safety – and in the
case of a child, the direct or indirect exposure to such conduct – and includes any incident or pattern of; ... *Family violence
perpetrated against women is a form of violence against women.*

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

Recommendation 4.1: In paragraph 16(3)(c), remove “maintenance of the child’s relationship with the other
spouse,” or add an exception for family violence.
Recommendation 4.2: In paragraph (16)(3)(i), remove the reference to communication and cooperation with
other spouse, or add an exception for family violence.

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

(c) each spouse’s willingness to support the development and maintenance of the child’s relationship with the other

Recommendation 4.3: Improve paragraph 16(3)(j)
Recommendation 4.4: Require a clear demonstration of improvement when steps have been taken to prevent
family violence (16(4)(g))
Recommendation 4.5: Include an acknowledgement of the gendered nature of family violence in the factors to be
considered in determining the child’s best interests
Recommendation 4.6: Clearly state that family violence is always relevant past conduct (16(5) and (6))

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

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

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

(g) evidence that the person engaging in family violence has taken steps both to ensure he does not engage in further family violence, to prevent family violence from occurring, and to improve his or her ability to care for the child and meet the child’s needs, and that those steps have resulted in positive changes in behaviour.

Putting an end to family violence requires an acknowledgement of its power dynamics and gender-based discrimination. This is also what gender-based analysis requires. Accordingly, we recommend that family violence be explicitly recognized in Bill C-78 as a form of violence against women. It is also important to define family violence in this way so that acts of self-defence or resistance by the abused spouse are understood as such. Currently, there is a misguided tendency to characterize certain hostile acts by mothers (who are dealing with family violence) as family violence, when they are actually acts of resistance and self-preservation.

Factors relating to family violence

(4) In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account:
(a) family violence experienced by women is a form of violence against women;
(a.1) society’s interest in ending all forms of violence against women;
(a.2) systemic power imbalances between men and women and the actions that may constitute resistance or self-defence against patterns of coercion and control, and incidents of family violence;
The proposed section on past conduct should indicate that all family violence, regardless of when it took place, the form it took, its severity and/or its frequency, will always be relevant and must be taken into account when determining the best interests of the child.

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

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

The court shall not infer

4.1 In considering the existence and impacts of family violence, the court shall not draw any adverse inferences based on myths or stereotypes about family violence, including, but not limited to, the following:
1. The court shall not infer that because the relationship has ended or divorce proceedings have begun, the family violence has ended.
2. The court shall not infer that the absence of disclosure of family violence prior to separation, including reports to
the police or child welfare authorities, means that the family violence did not happen or the claims are exaggerated.
3. The court shall not infer that the absence or withdrawal of criminal charges or the absence of interventions by child welfare authorities means that the family violence did not happen or the claims are exaggerated.
4. The court shall not infer that claims of family violence are false or exaggerated if they are made late in the proceedings or were not made in prior proceedings.
5. The court shall not infer that inconsistencies between evidence of family violence in the divorce proceedings and in other proceedings, including criminal proceedings, mean that the family violence did not happen, that the claims are exaggerated, or that the spouse making the claims is unreliable or dishonest.
6. The court shall not infer that, if a spouse continued to reside or maintain a financial, sexual, business or immigration-based relationship with a spouse or in the past left and returned to a spouse, the family violence did not happen or the claims are exaggerated.
7. The court shall not infer that leaving a violent household to reside in a shelter or other temporary housing is contrary to the best interests of the child.
8. The court shall not infer that fleeing a jurisdiction with the children, with or without a court order, in an effort to escape family violence, is contrary to the best interests of the child.
9. The court shall not infer that the absence of observable physical injuries or the absence of external expressions of fear means the abuse did not happen.

**BEST INTERESTS OF THE CHILD/MAXIMUM PARENTING TIME**
The inclusion of factors to be considered by the court, including those relating to family violence, is a very welcome addition to the Act. However, a few provisions in the bill may continue to inadvertently reinforce the idea that it is always in the child’s best interests to spend as much time as possible with each parent. There is no credible evidence to support this assumption; on the contrary, there is growing evidence that this is not the case in family violence situations. The “best interests of the child” test would be stronger if it also included references to “the importance, in recognition of the uniqueness of First Nations, Inuit and Métis cultures, heritages and traditions, of preserving the child’s cultural identity and connection to community.” It should also be made explicit that maximum parenting time is not always in the child’s best interests. On the contrary, the section should specify that the best interests of the child should always be determined on a case-by-case basis.

- **Recommendation 5:** Include, under the best interests of the child (16(2)), recognition of the importance of preserving Indigenous children’s cultural identity and connection to community
- **Recommendation 6:** Ensure that no presumption in favour of maximum contact is applied
  - **Recommendation 6.1:** Include a provision specifying presumptions not to be considered by the courts
  - **Recommendation 6.2:** Remove the subsection on maximum parenting time (16.2(1))

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

*The court shall not presume*
(2.1) In determining the best interests of the child, the court shall not presume that a particular arrangement is in the best interests of the child, and without limiting the foregoing,

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

it should not be presumed that there should be maximum contact between a child and a parent. We are concerned that the word “strength” in paragraph 16(3)(b) may reflect situations in which an abusive father uses his control to strengthen the relationship with his own family while cutting ties with the mother’s family. We believe the word “quality” would better reflect the types of relationships that should be preserved in the child’s best interests.

Recommendation 7: Replace “nature and strength” with “quality” in paragraph 16(3)(b)

(b) the nature and strength quality of the child’s relationship with each spouse, each of the child’s siblings and any other person who plays an important role in the child’s life;

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Lastly, many of the issues women face in family court are triggered or exacerbated by the shortage of resources required to cope with a costly and complex system. In this context, it is also important to recognize that women are often less financially secure than men, and that financial imbalances between spouses exacerbate women’s vulnerable position. Bill C-78 and our recommendations are much less likely to have the desired beneficial effects on women, and on poor women in particular, if the positive changes reflected in Bill C-78 are not accompanied by significant increases in funding for family court legal aid.

Conclusion

In our view, any legislative amendment concerning the legal custody of children in a family violence situation should be based on recognition of the gendered nature of violence and give priority to the safety and security of the victims, with due consideration for social and family circumstances.

Accordingly, socio-judicial practices should be updated first on the legislative front by recognizing in the Divorce Act and family law the social and structural inequalities experienced by women and the impact of violence against women and children in all its forms, especially in disputes concerning custody and access. In addition to embracing a gender-based analysis and definition of violence, family law should treat violence as an aggravating factor and establish predefined criteria to guide custody and access allocation and prevent the abusive spouse from using the justice system for harassment purposes.

In our opinion, the justice system’s current preference for joint custody is not necessarily in the best interests of the child, especially in family violence situations. In some cases, the abusive spouse’s access rights should be taken away for the safety and well-being of the mother and the children. Legislation in some countries, such as Australia, posits a direct connection between violence and psychological problems in children and recognizes the need to safeguard victims (Zorza, 1995) and impose appropriate conditions on the abusive spouse before he can even have contact with his children (APA Presidential Task Force on Violence and the Family, United States, 1996; Women’s Law Project, 1996; APA Ad Hoc Committee on Legal and Ethical Issues in the Treatment of Interpersonal Violence, 1996).

The Divorce Act’s “maximum contact” principle and the “friendly parent rule” to facilitate contact should be removed, and the associated legislation should contain an exception clause for family violence. Consideration of the abusive father’s rights should take into account his ability to recognize the violence he perpetrated against his partner, an assessment of the impact that violence has had on the mother and her children, and the development of a safety plan for the mother and children. Any future contact between the children and the abusive parent should be supervised or suspended for a specified period or indefinitely.

Abused women and their children must be able to exercise their right to life, liberty and security of the person as specified in the Canadian Charter of Rights and Freedoms. Moreover, the safety and protection of abused women and their children are among the nine key principles in the Quebec government’s spousal violence action policy (1995), which guides all government activities in this area.

In our view, any reform of the Divorce Act must take our reservations and recommendations regarding family violence...
into account and be compatible with the legislation and policies in place across Canada in order to equitably meet the needs of Canadian families, particularly when their safety and protection are or may be in jeopardy. Accordingly, the Fédération des maisons d’hébergement pour femmes urges you to consider our recommendations in your study of Bill C-78.

If you require further information, please contact
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