



Women's Legal Education and Action Fund
Fonds d'action et d'éducation juridiques pour les femmes

***BILL C-78: An Act to amend the Divorce Act, the Family Orders and Agreements
Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act
and to make consequential amendments to another Act***

Brief by

LEAF (Women's Legal Education and Action Fund)

To the Standing Senate Committee on Legal and Constitutional Affairs

June 5, 2019

A Note on LEAF (Women’s Legal Education and Action Fund):

Founded in 1985, and with branches across the country, LEAF is a leading national organization dedicated to strengthening equality rights in Canada. LEAF has extensive expertise and experience in promoting and protecting women’s substantive equality. LEAF uses litigation, law reform work and public education to advance the rights of women and girls in Canada, particularly those who experience multiple and distinct forms of discrimination arising from the intersection of several grounds of discrimination, such as sex, gender, marital or family status, race, sexual orientation, disability, Indigenous ancestry, and socio-economic status. LEAF engages a substantive approach to equality, which recognizes historically and socially-based disadvantages and challenges systemic discrimination. LEAF also has unique expertise in law reform informed by a gender equality analysis, and has been at the forefront of advocating for and defending legislation designed to advance and protect women’s substantive equality. In addition to challenging discriminatory law and policy, LEAF has regularly advocated for the implementation of legislative changes that would advance women’s equality, and has intervened in cases to defend laws that improves women’s material lives. Relevant to Bill C-78, LEAF has intervened on legal issues related to spousal support, relocation, enforcement of family court orders, separation agreements, family status discrimination, sex discrimination in the *Indian Act*, violence against women, women’s socio-economic rights, and reproductive freedom.

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INTRODUCTION:

In fall 2018, LEAF (Women’s Legal Education and Action Fund) submitted a [brief](#) on Bill C-78 to the House of Commons Standing Committee on Justice and Human Rights. LEAF’s detailed comments on the Bill’s positive features as well as aspects that would improve the interpretation and impact of the Bill can be found in that earlier brief. LEAF’s Executive Director and General Counsel Shaun O’Brien also [appeared as a witness](#) before the House of Commons Standing Committee.

We stand by the concerns outlined in that brief, most of which were not dealt with by amendments to Bill C-78. Although LEAF supports Bill C-78, this brief for the Senate highlights three ongoing key concerns about the impact of the Bill on women’s substantive equality and children’s well-being.

OVERVIEW:

LEAF strongly supports many features of the Bill, including the fact that Bill C-78 directs courts to take into consideration only the best interests of the child in making parenting or contact orders (s. 16(1)). We also strongly support s. 16(2), which directs courts to give primary consideration to the child’s physical, emotional and psychological safety, security and well-being when considering the best interests factors in s. 16(3).

The addition of mandatory consideration of both “family violence” and “history of care” in the list of best interests of the child factors that judges must consider, as well as the identification of child safety, security and well-being as the primary consideration, are very positive, research-informed improvements that take into account issues related to women’s substantive equality and the prevention of harm to children. The definition of family violence rightly includes reference to “coercive and controlling behaviour”. The wording on family violence in s. 16 should, however, be improved if possible.

We remain very concerned about the “maximum parenting time” provision in s. 16(6), along with its misleading marginal note, which may in practice “trump” the appropriate focus on the safety, security and well-being of children that s. 16 otherwise provides. **We would prefer that this subsection be removed.** We are somewhat reassured that this provision is qualified by “as is consistent with the best interests of the child”,¹ and by the fact that there is no presumption in favour of shared parenting time or shared parental responsibilities. Such presumptions would compromise determination of the best interests of a given child, and would be especially problematic from the point of view of the safety and security of women and children who have experienced abusive behaviour at the hands of a spouse or parent.

The requirement in s. 16(3)(e) to consider the child’s views and preferences recognizes that the perspectives of children must be considered when determining their best interests. The provision also places the *Divorce Act* in line with Canada’s obligations pursuant to the United Nations *Convention on the Rights of the Child*, Article 12, which obligates Canada, in all matters affecting the child, to ensure that the views of all children, without discrimination, are heard and given due weight – taken seriously – in accordance with age and maturity. The new provision should help to prevent the current practice of ignoring the views of children when claims of alienation are made and where family violence is at issue.² We do suggest, however, that in order to be consistent with the United Nations Convention, s. 16(3)(e) be slightly amended to read: **giving due weight to the child’s views and preferences, in accordance with age and maturity.**

THREE REVISIONS THAT WOULD IMPROVE IMPACT AND EFFECTIVENESS OF BILL C-78:

Bill C-78 has numerous laudable goals, notably to promote the best interests of the child, address family violence, reduce child poverty, and improve the efficiencies and accessibility of the family

¹ But note that the current version of this principle in the *Divorce Act*, s. 16(10), is qualified in the same way, and this has not prevented very problematic interpretations of it.

² The Honourable Donna Martinson & Caterina Tempesta, “Young People as Humans in Family Court Processes, A Child Rights Approach to Legal Representation” (2018) 31 Can J Fam L 151 at 162-168; Linda C Neilson, “Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?” (2018), online (pdf): *Muriel McQueen Fergusson Centre of Family Violence Research and The FREDACentre for Research on Violence Against Women and Children* <www.fredacentre.com/wp-content/uploads/2018/02/Parental-Alienation-Linda-Neilson.pdf>

justice system.³ LEAF supports these goals. These goals will fall short unless certain provisions are revised. In particular, research demonstrates that women targeted by family violence and related abusive behaviour confront major hurdles when they try to protect themselves and their children in the face of statutes and/or judicial decisions that include maximum contact or time, *even when statutory provisions emphasize the best interests of the child*.⁴ If women cannot show that there are risks of harm in the future, the assumption is that maximum time with each parent, as well as full cooperation and communication, and mediation are all appropriate. This assumption is highly problematic in many scenarios, especially when family violence is at issue. A heavy onus is placed on mothers, especially those who are leaving abusive relationships.

Determining the best interests of the child:

We strongly support inclusion of “family violence” and “history of care” in s. 16(3). Family violence in a home where children reside is an empirically verified form of child abuse. Perpetrating family violence against intimate and former intimate partners is associated both with direct forms of abuse directed at children and with negative post-separation parenting practices that can harm children and prevent healing.⁵ All children who live in an environment where there is domestic violence against a caregiver or other family member are harmed, whether the behavior is witnessed or not.⁶

³ *House of Commons Debates*, “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,” 2nd reading, 42-1, No 328, (September 26, 2018) at 1625-1635 (Hon Jody Wilson-Raybould).

⁴ See e.g. Susan Boyd, *Child Custody, Law and Women’s Work* (Toronto: Oxford University Press, 2003); Rosanna Langer, “Male Domestic Abuse: The Continuing Contrast Between Women’s Experiences and Juridical Responses” (1995) 10:1 CJLS 65; Regina Graycar, Margaret Harrison and Helen Rhoades, “The Family Law Reform Act 1995: The First Three Years” (2000), online (pdf): *University of Sydney and Family Court of Australia* <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/reports/2000/FCOA_pr_FLRA_95_First_Three_Years> ; Daniel Saunders, “Child Custody and Visitation Decision in Domestic Violence Cases: Legal Trends, Risk Factors, and Safety Concerns” (2007), online (pdf): *National Online Resource Centre on Violence Against Women* <https://vawnet.org/sites/default/files/materials/files/2016-09/AR_CustodyREVISED.pdf>

⁵ See generally research from medical and social science disciplines discussed and cited in Linda C Neilson, “Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases, Canadian Legal Information Institute” (2017) CanLIIDocs 2 at ch 6, 11, supplementary reference 2, supplementary reference bibliography <www.commentary.canlii.org/w/canlii/2017CanLIIDocs2#!fragment/zoupio-Toe508270327/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zgFYAGADgCYA7FwDMggJQAaZNIKEIARUSFcAT2gBydRIhxc2ADb6AwkjTQAhMm2EwuBIuVrN12wgDKeUgCE1AJQCiADL+AGoAggByRv4SpGAARtCk7GJiQA>; “Children Living with Domestic Violence Research Team”, online: *Canadian Domestic Homicide Prevention Initiative* <www.cdhpi.ca/children-living-domestic-violence-research-team>

⁶ See generally research from medical and social science disciplines discussed and cited in Sibylle Artz et al, “A Comprehensive Review of the Literature on the Impact of Exposure to Intimate Partner Violence for Children and Youth” (2014) 5:4 Intl J Child, Youth & Family Studies 493.

The language on family violence in Bill C-78 is entirely gender neutral, which accommodates some realities, such as divorces between two persons of the same sex. This gender neutrality, however, flies in the face of much testimony before the Standing Committee about the highly gendered nature of family violence, specifically as a form of violence against women. While there are exceptions of course, women are overwhelmingly the victims/survivors of violence perpetrated by a spouse, and men are generally their abusers. This gender imbalance directly affects the interests of children and needs to be considered in the application of the norms in Bill C-78.

In the face of the gender neutral approach to family violence that is taken in Bill C-78, some provisions particularly require revision in order to be effective and to avoid the difficulties that arise especially in cases involving family violence against women and children.

1. Remove or revise s. 16(3)(c): “each spouse’s willingness to support the development and maintenance of the child’s relationship with the other spouse”:

We are especially concerned that s. 16(3)(c) re-inscribes the “friendly parent” rule currently in s. 16(10) of the current *Divorce Act*. Clearly it is inappropriate for any parent to undermine a child’s positive relationship with the other parent. But in emphasizing each spouse’s willingness to support the *development* and *maintenance* of the child’s relationship with the other spouse, the rule can operate unfairly and dangerously in the context of family violence.⁷ For example, a mother may fear abuse by the other spouse or be hesitant about the safety of the child should the other spouse be awarded unsupervised parenting time. She may nevertheless remain silent in the face of a provision such as s. 16(3)(c) for fear of jeopardizing her own chance of obtaining parenting time and decision-making responsibility and, thereby potentially, protecting her child. Such a mother may be worried, or be advised by a lawyer that she should be worried, about being viewed as an “unfriendly parent”, especially in the face of the mandatory maximum parenting time provision in s. 16(6). She may therefore compromise her own legal claims.⁸ The consequences of a parent feeling unable to raise legitimate concerns can lead to risks to the child and, in the very worst cases, death of the child.⁹

⁷ See generally Daniel Saunders, “State Laws Related to Family Judges’ and Custody Evaluators’ Recommendations in Cases of Intimate Partner Violence” (2017) online (pdf): *Office of Justice Programs’ National Criminal Justice Reference Service* <<https://deepblue.lib.umich.edu/handle/2027.42/136636>>; see discussion of parental alienation in Lori Shereen Winstock, *Safe Havens of Dangerous Waters? A Phenomenological Study of Abused Women’s Experiences in the Family Courts of Ontario* (PhD dissertation, Osgoode Hall Law School of York University, 2014) at 219-223, [unpublished], online: <<https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1044&context=phd>>; Joan Meier, “Mapping Gender: Shedding Empirical Light on Family Courts’ Treatment of Cases Involving Abuse and Alienation” (2017) 35 *Law & Ineq* 311.

⁸ In Australia, mothers who are tarred with this brush have been called “no contact mothers.” See especially Helen Rhoades, “The ‘No Contact Mother’: Reconstructions of Motherhood in the Era of the ‘New Father’” (2002) 16:1 *Intl JL Pol’y & Fam* 71.

⁹ See especially the tragic story of Sarah Cotton’s daughters being killed on Christmas Day 2017 by their father during his (unsupervised) parenting time: Lori Chambers, Deb Zweep and Nadia Verrelli, “Paternal Filicide and Coercive Control: Reviewing The Evidence in *Cotton v. Berry*” (2008) 51:3 *UBC L Rev* 671.

For these reasons, we recommend that subsection 16(3)(c) be removed.

Failing that, the subsection should be reworded as follows to emphasize the key principle:

(c) each spouse’s willingness to support the *child’s relationship with the other spouse to the extent that the relationship is in the best interests of the child*;

2. Revise Section 16(3)(j) “any family violence and its impact on, among things, (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child”:

Section 16(3)(j) is one of the most important sections in Bill C-67 for anyone who cares about the safety and security of children and their caregivers in the post-divorce context, and therefore needs to be worded with care.

In the current version of the Bill, s. 16(3)(j) requires consideration of “any family violence and its impact on, among other things, (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child”. This wording incorrectly frames the issue. The central concern should be what the patterns of behaviour associated with the family violence tell us about the perpetrator’s capacity to parent. Patterns of behaviour associated with perpetrating family violence are, unfortunately, commonly replicated in parenting practices.¹⁰ It is therefore crucial to avoid making false assumptions about the benefits of time with both parents. Instead, careful assessment of the risks to the child as well as the parenting practices of perpetrators must be done in each case. There should be a duty to consider (as there is in child protection cases) the impact of family violence on children and on children’s needs for safety, security and stability. This duty to consider parenting in family violence cases should be framed as a question of the child’s best interests and needs.

¹⁰ See e.g. Lundy Bancroft, Daniel Ritchie & Jay Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Families*, 2nd ed (US: SAGE Publications Inc, 2012); research cited in Linda C Neilson, “Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases, Canadian Legal Information Institute” (2017) CanLIIDocs 2 at 11.1.10, online: <www.commentary.canlii.org/w/canlii/2017CanLIIDocs2#!fragment/zoupio-Toc508270327/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zgFYAGADgCYA7FwDMggJQAaZNIKEIARUSFcAT2gBydRIhxc2ADb6AwkjTQAhMm2EwuBIuVrN12wgDKeUgCE1AJQCiADL+AGoAggByRv4SpGAARtCk7GJiQA>; Austl, Commonwealth, *Fathers Who Use Violence Options For Safe Practice Where There Is Ongoing Contact With Children*, CFCA Paper No 43, by Cathy Humphries and Monica Campo (Canberra: Child Family Community Australia, 2017), online: <www.minerva-access.unimelb.edu.au/bitstream/handle/11343/214065/fatherswho_useviolence-final-v2_0.pdf?sequence=1&isAllowed=y>; Rae Kaspiew et al, “Horizons: Domestic And Family Violence And Parenting: Mixed Method Insights Into Impact And Support Needs: Final Report” (2017) online (pdf: *Australia’s National Research Organisation for Women’s Safety Limited*) <www.anrows.org.au/wp-content/uploads/2019/02/Parenting_Horizons_FINAL-1.pdf>; Juan Arean et al, “Fathering After Violence Working with Abusive Fathers in Supervised Visitation” (2008) online (pdf: *Family Violence Prevention Fund*): <www.futureswithoutviolence.org/userfiles/file/Children_and_Families/fathering_after_violence.pdf>.

We therefore recommend that subsections 16(3)(j) be amended as follows:

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

3. Revise s. 2(1) “family violence” to clarify that family violence is a form of child abuse:

The definition of “family violence” is very good, even though it fails to highlight the gendered nature of most family violence. We are, however, concerned that the definition does not highlight the fact that that domestic violence is not only a phenomenon that exists between adults, but also a phenomenon that causes direct parent-child harm. Inserting a clause in the definition of family violence to identify family violence as a form of child abuse (such as *family violence ‘is a recognized form of child abuse’ that includes any conduct...*) would help to correct erroneous assumptions in the legal system that domestic violence is an adult relationship only. Our proposed addition would assist in ensuring a focus on the needs of children in family violence cases.

CONCLUSION:

The Divorce Act and related legislation plays an important role in protecting the interests of the most vulnerable women, families, and children at a time that can be very risky for them, in terms of emotional, physical and financial security. The current version of Bill C-78 goes a considerable way towards fulfilling this function and LEAF supports it. Given what we know about how similar legislation plays out in other jurisdictions, it would be optimal if the Bill were amended to ensure it properly protects women, families, and children, in particular those who are the most vulnerable at the time of separation and divorce, due to factors such as immigration status, poverty, indigenous ancestry, race or disability.

We conclude by adding that it is also of the utmost importance that all efforts be made by governmental bodies to **educate** all of those involved in the family justice system and family dispute resolution about the complexities and multifaceted nature of both family law and family violence, and the effects of both on women and children. The interpretation of Bill C-78 in a manner that supports those who are most vulnerable rests upon this education and will promote gender equality at the time of separation and divorce.