Understanding and Taking into Account the Realities of Women Victimized by Family Violence in Divorce Proceedings to Keep Them and Their Children Safe

Executive Summary of the Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs Concerning Bill C-78

June 2019
Summary of Our Recommendations

1. Amend section 16 to clarify that ensuring the safety of mothers will protect and benefit their children as well.
2. Delete paragraphs 16(3)(c) and (i) or add an exception where there is a risk of family violence.
3. Amend section 7.3 and subsection 16.1(6) to ensure that family dispute resolution processes are not mandatory or advisable where there is a risk of family violence.
4. Amend subsection 16(5) to ensure that courts take all past conduct of spouses into consideration in their decisions and that they must always consider family violence to be relevant.
5. Amend paragraph 16(4)(g) to state that the abusive spouse must clearly and unequivocally demonstrate behavioural change to the satisfaction of the court and the other spouse.
6. Add a section to the Act providing that in cases of family violence, the court should rule out the possibility of shared custody.
7. Expand the definition of decision-making responsibility set out in the introduction to the bill.
8. Amend subsection 16.2(3) to provide that the individual to whom parenting time is allocated may make, during that time, day-to-day decisions affecting the child, provided that they do not conflict with decisions made by the parent who has decision-making responsibility.
9. Delete subsection 16.2(1), which provides that the court is to give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.
10. Amend section 16.4 on the right to information to include an exception where there is a risk of family violence.
11. Amend section 16.1 and subsection 16.5(1) to ensure that courts give first priority to the best interests of the child before making a parenting or contact order, including to an applicant other than the spouses or the child’s parents.
12. Include mandatory training about family violence for the justice system in the Act.
Understanding and Taking into Account the Realities of WomenVictimized by Family Violence in Divorce Proceedings to Keep Them and Their Children Safe

Brief Submitted to the Standing Senate Committee on Legal and Constitutional Affairs Concerning Bill C-78

June 2019
CONTENTS

The organization ........................................................................................................................................ 3
1. Introduction ...................................................................................................................................... 4
2. General comments .......................................................................................................................... 4
3. Interest of the child and protection of the mother ........................................................................ 5
4. Communication and cooperation between spouses .................................................................... 5
5. Family dispute resolution ............................................................................................................... 6
6. Take all forms of past and present family violence into account .............................................. 6
7. The danger of shared custody in cases of family violence ......................................................... 7
8. Clarify the concepts of parenting time and decision-making responsibility ............................... 8
9. Parenting time and day-to-day decisions ...................................................................................... 9
10. Right to information ..................................................................................................................... 9
11. Applicant other than the spouses ................................................................................................. 10
12. Educate the justice system about family violence ..................................................................... 10
13. Conclusion ................................................................................................................................ 11
Summary of Our Recommendations ................................................................................................. 12
The organization

The Regroupement des maisons pour femmes victimes de violence conjugale is an extensive network that has been firmly dedicated since 1979 to protecting the right of women to physical and psychological integrity.

As part of its education activities and activism, the organization:

• helps influence legislation and policies to ensure that woman and children victims of family violence are more adequately protected;
• uses a range of prevention strategies to help the public, social workers and governments more clearly understand, identify and respond to family violence;
• designs, develops and delivers several training courses and publications;
• provides its members with a forum to discuss, access continuous learning and take action; and
• engages with public and government organizations on behalf of transitions houses / shelters.

The Regroupement currently represents 43 transition houses / shelters in 15 administrative regions in Quebec. Their specific mission is to work with and for battered women to stop this violence. The houses work individually and in groups to end family violence.

According to 2017-2018 statistics, member houses accommodated close to 2,800 women and more than 2,200 children. This does not include the women and children who received more than 16,000 services other than accommodation (outside consultations, support, post-stay follow-up, etc.). In total, member houses responded to more than 49,000 requests, mostly from women, but also from relatives, professionals and other resources.

Through the collaboration and expertise of its members, the Regroupement intervenes at the federal and provincial levels on any issue that may have an impact on women’s “right to life, liberty and security of the person,” as recognized in section 7 of the Canadian Charter of Rights and Freedoms and section 1 of the Quebec Charter of Human Rights and Freedoms. It takes action on any conditions that may hinder or facilitate the exercise of this right, i.e. in areas as varied as health and social services, housing, income security, justice, youth protection, public safety, assistance, victim compensation and education.
1. Introduction

At the invitation of the Senate Committee on Legal and Constitutional Affairs, we have prepared this brief setting out our position, opinions and recommendations 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. This bill is vitally important because some of its provisions have a direct impact on the safety of women and children victimized by family violence.

A Statistics Canada study\(^1\) shows that in 2017-2018, more than 41,000 women and more than 26,000 children in Canada were housed in a residential facility providing services to victims of violence. These significant numbers show that family violence is not an isolated phenomenon and therefore must be given consideration by Parliament. With respect to Bill C-78, the requirements to be imposed on parents going through a conflict-free separation must be different from those for a woman victimized by family violence going through divorce proceedings.

Violence does not actually stop once a relationship is over. In fact, it is frequently when the relationship ends, or even just after, that women and children are killed by ex-partners. For men who sought to dominate their partners during their relationships, the need for control and power does not end when the relationship is over, far from it. That is why we have looked closely at this bill to ensure that the safety of women victimized by family violence going through divorce proceedings and their children is not threatened.

This brief is based largely on the analyses and recommendations presented by Lukeʼs Place Support and Resource Centre and the National Association of Women and the Law/Association nationale Femmes et Droit (NAWL/ANFD) in their brief submitted to the House of Commons.\(^2\)

2. General comments

First, we welcome several additions and changes made by the government. The first, and the main addition, is the codification of the best interests of the child in section 16. The fact that this section includes a list of factors that courts must consider in determining the best interests of the child, including a sub-item on family violence and its impact, is extremely positive.

Along those same lines, it is very satisfying to see that the bill includes a comprehensive and inclusive definition of family violence, which takes into account spousal violence and the fact that children are also its direct and indirect victims. We were pleased to read that in addition to the definition, family violence is cited repeatedly as an exceptional factor for certain requirements (change of residence or relocation).

---

While we welcome these positive changes, we have noted some points and measures that should be amended, deleted or further clarified.

3. Interest of the child and protection of the mother

We are pleased to see that the best interests of the child remain the focus of the bill and that their well-being, health and safety are key factors that the courts must take into account before making any decision. These factors are all the more important in cases of family violence, even if the child is not a direct victim. Numerous studies have shown that family violence experienced by mothers has major impacts on children. It is becoming increasingly clear that there is a fine line between witnessing violence and being a victim. The expression “child witness of family violence” is being abandoned in favour of less restrictive terms such as “child exposed to family violence” or “child victim of family violence.”

In terms of experience, several studies show that children who witness violence against their mothers are often also abused by their fathers. Côté, Dallaire and Vézina report that according to the Groupe d’aide aux personnes impulsives (GAPI), “73% of men who have engaged in family violence report that their children also suffered one or other of the forms of violence they inflicted.” This confirms an American study (Ross) stating that the more frequent spousal violence is, the greater the likelihood of child abuse. According to Ross, when a spouse has been assaulted more than 50 times, it is almost certain that there has been child abuse.

While Bill C-78 provides greater protection for children, it is vitally important for the bill to focus on the safety of mothers as well. If a child knows that their mother will no longer have to live with family violence, their well-being will only improve. In addition, better protection for mothers would protect children from this harmful exposure to violence and the risk of suffering it as well.

**Recommendation 1:** Amend section 16 to clarify that ensuring the safety of mothers will protect and benefit their children as well.

4. Communication and cooperation between spouses

In situations of family violence, encouraging communication and cooperation between spouses can either be dangerous for the woman and child or simply end up penalizing abused mothers who try to minimize contact with their ex-spouse in order to protect themselves or their children. Therefore, we recommend that paragraphs 16(3)(c) and (i) relating to the spouses’ willingness to maintain the child’s relationship with the other spouse and to communicate and cooperate with each other be deleted or amended.

---


5 Ibid, p. 7.
Recommendation 2: delete or add an exception to paragraphs 16 (3)(c) and (i) as follows:

- Delete paragraph 16(3)(c): “each spouse’s willingness to support the development and maintenance of the child’s relationship with the other spouse,” or add an exception for family violence as follows: “except in cases of family violence or where it is otherwise contrary to the best interests of the child to develop or maintain a relationship with the other spouse.”

- Delete paragraph 16(3)(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,” or add the above exception.

5. Family dispute resolution

Section 7.3 calls on the parties to “try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process.” The Regroupement fears that this wording would end up making the family dispute resolution process the default. It is generally recognized that mediation is not an appropriate process for resolving separation or divorce where there is family violence, since there is no balance of power or the ability to negotiate on an equal footing, two things needed for such an approach to be successful.

Women must be free to choose dispute resolution process that best meet their needs and do not require them to confront their ex-spouses.

Recommendation 3: Amend section 7.3 as follows:
7.3 To the extent that it is appropriate to do so, the parties to a proceeding shall try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process. When there is a risk of family violence, the parties are free to turn to other, more appropriate processes.

6 Ibid, p. 7

6. Take all forms of past and present family violence into account

Any case of family violence, regardless of when it occurred, its form, frequency or severity, must be taken into account by the court in determining the best interests of the child and protecting the mother.
Recommendation 4: Amend subsection 16(5) and add paragraph (a) as follows:

(5) In determining what is in the best interests of the child, the court shall not take into consideration all past conduct of any person unless the conduct is relevant to the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order.7

(a) "In applying subsection 16(5), courts shall always consider family violence relevant, regardless of when it occurred, its form, frequency, and pattern."8

In cases of family violence, paragraph 16(4)(g) states that the court shall take into account “any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child.” The reality on the ground shows us that it is common for abusive men to join abusive partner support groups in order to prove their good faith to judges or to seek shared custody to justify a change in their behaviour. However, the Department of Justice Canada states that “program attrition is a significant factor in considering the efficacy of abusive partner intervention programs. Typically, more than half of all participants assigned to treatment do not finish the program.”9

Therefore, we recommend that the person engaging in family violence must clearly and unequivocally demonstrate behavioural change to the satisfaction of the court and the other spouse.

Recommendation 5: Clarify paragraph 16(4)(g) as follows:

(g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child as well as a clear and unequivocal demonstration of behavioural change to the satisfaction of the court and the other spouse.

8 Ibid., p. 6.

7. The danger of shared custody in cases of family violence

Under no circumstances should the courts assume that it is in the best interests of the child to award shared custody. According to Joan Zorza (1995),10 abusive men do not stop being abusive when there is separation; on the contrary, the intensity of violence and the level of danger increase. If violence before separation was directed only at mothers, abusive fathers may change their targets to control their children and continue to terrorize and abuse their mothers.
Jaffe, Poisson and Cunningham\textsuperscript{11} report that some abusive men threaten to seek custody or shared custody as a way to maintain control over their ex-spouse. Abusive spouses make several court applications and, according to Bowermaster and Johnson\textsuperscript{12} and to Zorza,\textsuperscript{13} abusive men are twice as likely to seek custody and have the same chance of obtaining it as non-abusive fathers.

Shared custody allows the abuse of power dynamic to continue during legal proceedings. As mentioned above, family violence does not stop at separation. The concept of post-separation violence is often ignored or misunderstood by judges, which results in too many decisions in favour of shared custody.

\textbf{Recommendation 6:} Add a section to the Act providing that in cases of family violence, the court should rule out the possibility of shared custody.

\section*{8. Clarify the concepts of parenting time and decision-making responsibility}

We recommend that the concept of “decision-making responsibility” be clarified in detail.

\textbf{Recommendation 7:} The Regroupement recommends expanding the definition of \textit{decision-making responsibility} (in the introduction to the bill) as follows:

\textbf{Custody/decision-making responsibility} means the responsibility for making all significant decisions about a child’s wellbeing, including:

(a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child, including;

(b) making decisions respecting where the child will reside;

(c) making decisions respecting with whom the child will live and associate;

(d) making decisions respecting the child’s education and participation in extracurricular activities, including the nature, extent and location;

(e) making decisions respecting the child’s cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child’s aboriginal identity;

(f) giving, refusing or withdrawing consent to medical, dental and other health-related treatments, including mental health treatments, such as counselling or therapy, for the child;

(g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;

(h) giving, refusing or withdrawing consent for the child, if consent is required;

(i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;


\textsuperscript{12} Bowermaster, J. and D. Johnson (1998), \textit{The Role of Domestic Violence in Family Court Child Custody Determinations: An interdisciplinary investigation}. Presented at the Fourth International Conference on Children Exposed to Conjugal Violence, San Diego, CA.

\textsuperscript{13} Zorza, Joan. Op cit., 1995.
(j) requesting and receiving from third parties health, education or other information respecting the child;
(k) starting, defending, compromising or settling any proceeding relating to the child, and
(l) identifying, advancing and protecting the child’s legal and financial interests; and
(m) exercising any other responsibilities reasonably necessary to nurture the child’s development.”

9. Parenting time and day-to-day decisions

It seems important to us to have the Act specify that the parent who has parenting time cannot, during this period of time with the child, reverse or go against the decisions made by the parent who has decision-making responsibility. Subsection 16.2(3) is unclear in this respect. The abusive partner must not be able to make day-to-day decisions that conflict with the decisions made by the parent with decision-making responsibility. A clarification of this subsection would prevent the abusive partner from using all possible biases to reinforce control over the child or the mother.

Recommendation 8: The Regroupement recommends amending subsection 16.2(3) as follows:

Unless the court orders otherwise, a person to whom parenting time is allocated under paragraph 16.1(4)(a) has exclusive authority to make, during that time, day-to-day decisions affecting the child, provided that they do not conflict with decisions made by the parent who has decision-making responsibility.

The Regroupement also wishes to draw Parliament’s attention to subsection 16.2(1) governing the maximum amount of parenting time. When reading this subsection, the court should not assume that it is always in the child’s best interests to spend time with both parents, especially in cases of family violence. We therefore recommend that this subsection be deleted to ensure that no presumption in favour of maximum contact is applied.

Recommendation 9: The Regroupement recommends deleting subsection 16.2(1).

10. Right to information

In order to ensure that information relating to the child’s well-being, including information about their health and education, is not used against the best interests of the child or the mother, the Regroupement recommends adding an exception to section 16.4.

Recommendation 10: Amend section 16.4 as follows:
16.4 Unless the court orders otherwise, particularly where there is a risk of family violence, any person to whom parenting time or decision-making responsibility has been allocated is entitled to request from another person to whom parenting time or decision-making responsibility has been allocated information about the child’s well-being, including in respect of their health and education, or from any other person who is likely to have such information, and to be given such information by those persons subject to any applicable laws.

11. Applicant other than the spouses

Section 16.1(1) states that the court “may make an order providing for the exercise of parenting time or decision-making responsibility in respect of any child of the marriage, on application by … a person, other than a spouse, who is a parent of the child, stands in the place of a parent or intends to stand in the place of a parent.” This final point (“who…intends to stand in the place of a parent”) warrants clarification by Parliament because it seems very vague to us, especially since this person may have parenting time or decision-making responsibility. In cases of family violence, an abusive ex-spouse could apply for a parenting order and then obtain parenting time or make decisions against the best interests of the child. The same applies to contact orders.

Recommendation 11: Amend section 16.1 and subsection 16.5(1) as follows:
Add that “the court must give priority to the best interests of the child before making a parenting or contact order, including to an applicant other than the spouses or the child’s parents.”

12. Educate the justice system about family violence

The Regroupement and its member houses have noted that a majority of lawyers and judges lack awareness about family violence and its mechanisms, which can put women and their children in danger. We have occasionally heard lawyers advising women victims against disclosing that there is violence, probably to avoid implying that they are not a “friendly parent.” As well, many judges do not take family violence into account, even when it is proven, in their decisions. Lastly, still too many women are accused of parental alienation as they try to protect themselves and their children.

To prevent these situations from recurring, we recommend mandatory training for all justice system professionals on family violence, the resources available to them and the use of existing checklists to screen for family violence.

Recommendation 12: Include mandatory training about family violence for the justice system in the Act. The section shall include:
• Recognition of spousal and family violence situations by members of the justice system should be encouraged by:
• having the justice system develop specific tools to screen for spousal and family violence; and
• having the authorities responsible for the administration of justice better educate and train legal professionals about the reality of family violence so that they can identify situations of family violence and intervene appropriately.

13. Conclusion

As stated in the introduction, we welcome some of the progress that Parliament has made in this bill, particularly the fact that family violence is recognized as a reality and that steps are being included to take it into account and to reduce its consequences. However, and surely because of a lack of awareness of this issue, there is a lot missing from the bill that could provide women and children with additional safeguards. The balance of power that still exists today in many relationships means that the current proceedings for granting a divorce must not be the same for a woman victimized by spousal and family violence. Their safety and that of their children is at stake. We therefore sincerely hope that Parliament will expand the bill to include these points.
Summary of Our Recommendations

1. Amend section 16 to clarify that ensuring the safety of mothers will protect and benefit their children as well.
2. Delete paragraphs 16(3)(c) and (i) or add an exception where there is a risk of family violence.
3. Amend section 7.3 and subsection 16.1(6) to ensure that family dispute resolution processes are not mandatory or advisable where there is a risk of family violence.
4. Amend subsection 16(5) to ensure that courts take all past conduct of spouses into consideration in their decisions and that they must always consider family violence to be relevant.
5. Amend paragraph 16(4)(g) to state that the abusive spouse must clearly and unequivocally demonstrate behavioural change to the satisfaction of the court and the other spouse.
6. Add a section to the Act providing that in cases of family violence, the court should rule out the possibility of shared custody.
7. Expand the definition of decision-making responsibility set out in the introduction to the bill.
8. Amend subsection 16.2(3) to provide that the individual to whom parenting time is allocated may make, during that time, day-to-day decisions affecting the child, provided that they do not conflict with decisions made by the parent who has decision-making responsibility.
9. Delete subsection 16.2(1), which provides that the court is to give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.
10. Amend section 16.4 on the right to information to include an exception where there is a risk of family violence.
11. Amend section 16.1 and subsection 16.5(1) to ensure that courts give top priority to the best interests of the child before making a parenting or contact order, including to an applicant other than the spouses or the child’s parents.
12. Include mandatory training about family violence for the justice system in the Act.