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

Brief by

Luke’s Place Support and Resource Centre, Durham Region, Ontario
and
National Association of Women and the Law/Association Nationale Femmes et Droit (NAWL/ANFD)

and endorsed by the following organizations:

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

1 Funding for the NAWL Project; “Rebuilding Feminist Law Reform Capacity: Substantive Equality in the Law Making Process” was generously provided by Status of Women Canada.
Introduction
This is a joint brief on BILL C-78: An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act (hereinafter Bill C-78) by Luke’s Place and the National Association of Women and the Law (NAWL). It is informed by multiple consultations with feminist lawyers, academics, advocacy and frontline service organizations. Luke’s Place is a community organization in Durham Region, Ontario, that works to improve the family court experiences and outcomes of women leaving abusive relationships. This work includes both direct service delivery to women in Durham Region and systemic work such as research, resource development, training and education and law reform advocacy at the provincial and national levels. NAWL is an incorporated not-for-profit feminist organization that promotes the equality rights of women in Canada through legal education, research, and law reform advocacy. NAWL has a long history of work and advocacy on women’s rights in the context of the separation and on the Divorce Act in particular, and on violence against women. Both Luke’s Place and NAWL use an intersectional and gender-based analysis that focuses on the lived realities of women in all their diversity. Other factors such as race, Indigenous identity, ethnicity, religion, gender identity or gender expression, sexual orientation, citizenship, immigration and refugee status, geographic location, social condition, age, and disability influence women’s experiences. This is true in the context of violence against women, family violence, and divorce.

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

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

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

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

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2 This Brief was prepared by Suki Beavers and Anastasia Berwald (NAWL) and Pamela Cross (Luke’s Place). NAWL and Luke’s Place gratefully acknowledge the many contributions that informed the development of this brief, including those made by the following organizations: Action Ontarienne contre la violence fait aux femmes; the Barbra Schlifer Commemorative Clinic, the BC Society of Transition Houses, the Canadian Council of Muslim Women, the Canadian Women’s Foundation, the DisAbled Women’s Network of Canada, Femmes Autochtones du Québec, Harmony House, LEAF (Women’s Legal Education and Action Fund), Ontario Association of Interval Transition Houses, the Native Women’s Association of Canada, Ottawa Coalition to End Violence Against Women, RISE Women’s Legal Centre, the South Asian Legal Clinic, Vancouver Rape Relief and Women’s Shelter, West Coast Leaf, Women’s Shelters Canada. NAWL and Luke’s Place also gratefully acknowledge contributions made by the following law firms and individuals: Athena Law, Equitas Law Group, Jenkins Marzban Logan LLP, Suleman Family Law, Professor Emerita Susan Boyd, Rachel Law, Hilary Linton, Professor Linda Neilson and Glenda Perry. Finally, special thanks to Lisa Cirillo, Lorena Fontaine, Martha Jackman, Anne Levesque, Cheryl Milne and Zahra Taseer (NAWL), and Carol Barkwell (Luke’s Place) for their contributions.
consultation of Indigenous peoples, including indigenous women, during the law-making process, whenever new laws may affect them. To date, there is no evidence that the Department of Justice has engaged in meaningful consultation with Indigenous women’s groups on the potential impacts of C-78 on Indigenous women, their children, families and communities. We urge the Federal Government to do so prior to the finalization and enactment of C-78, in order to ensure the cultural heritage, safety, security, autonomy and rights of Indigenous women and their children are respected, protected and fulfilled, and not further endangered or violated by any impacts (direct or indirect) of any of the provisions of C-78.

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

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

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

We are in favour of maintaining rather than changing the habitual and clear terms of ‘custody’ and ‘access’ in the Divorce Act. In addition, we propose that the decisions that the parent with custody has the authority to make, and the types of decisions that can also be made by the parent with access, should both be further clarified in Bill C-78. We understand the sentiment behind the proposal to introduce new terms to replace ‘custody’ and ‘access.’ In principle, we agree that trying to shift the focus in divorce proceedings away from the perception that one parent wins a custody battle and the other loses it, to a focus on cooperation between parents so that the best interests of the child prevail, seems positive in cases where there has not been any violence. Unfortunately, the risks associated with the introduction of new language that will be subject to much interpretation and debate far outweigh the desired benefits, well-intentioned though they are. As we heard from lawyers and advocates who have been working with similar new language in some provincial family law regimes, there is no compelling evidence that the new language introduced has actually been effective in reducing conflict when the issues of custody, access and decision-making are in dispute. There is also legitimate reason to be concerned that this new language will cause interpretation conflicts in international matters, as it differs from the language used in the Hague Convention. This may prevent Canada from fulfilling its duties under the Convention. Moreover, the experiences of too many women who have been in abusive relationships reflect that abusive men exploit every angle of uncertainty and ambiguity they can find. Every ambiguity introduced into law can be turned into an opportunity for abuse, harassment and undermining of the mother. Therefore, it is safer for children and their mothers to have a clear, unambiguous allocation of custody, and clarity about who has the authority to make specific decisions about what is in the best interests of a child.
We have similar concerns about the proposed mandatory requirement that family dispute resolution processes be encouraged. Of course, some women find such processes empowering and/or better suited to their needs. However, family dispute resolution processes are not always better and particularly in cases involving family violence, they may not be appropriate at all. The flexibility of family dispute resolution processes serves some families extremely well, but in other circumstances, they can provide abusive partners with an opportunity to manipulate and continue being abusive. The Divorce Act should reflect and respect women’s autonomy and agency, and provide them with all the tools necessary to make free and informed decisions about which process is better and safer for them. Thus, rather than requiring legal advisers always ‘encourage’ dispute resolution, we recommend that Bill C-78 be revised to require all legal advisers to fully inform spouses about all processes available to them. This change will ensure that all women get information on the full range of processes available, so they can make a meaningful choice about which type of process is best suited to their circumstances and needs. We believe the current mention of “appropriateness” in the provision is not sufficient and will lead to family dispute resolution being the default process, including in cases of family violence in which it may be dangerous.

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

Recommendations:

VIOLENCE AGAINST WOMEN/FAMILY VIOLENCE

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

- Recommendation #1: Include a preamble in Bill C-78
  WHEREAS in Canada, women are more likely than men to be victims of gender-based violence, including sexual assault and intimate partner violence;
  WHEREAS Indigenous women, be they First Nation, Métis or Inuit, are disproportionately affected by gender-based violence and intimate partner violence;
  WHEREAS family violence has profound negative consequences on families, children and Canadian society;
  WHEREAS men continue to be the main perpetrators of family violence and women continue to be the victims/survivors of family violence;
  WHEREAS violence against women is a form of gender-based discrimination rooted in systemic inequalities between women and men;
  WHEREAS family violence is experienced by women in multiple ways shaped by other forms of discrimination and disadvantage, which intersect with race, Indigenous identity, ethnicity, religion, gender identity or gender expression, sexual orientation, citizenship immigration and refugee status, geographic location, social condition, age, and disability;

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3 We have used gender-specific language to refer to those who are harmed by violence within the family and those who cause that harm. We believe it is important to acknowledge that, in Canada, women in all their diversity, and transgender, queer and gender non-confirming people are overwhelmingly those who are subjected to abuse and men are primarily those who engage in abusive behaviour.
WHEREAS transgender, queer, and gender non-conforming people are also disproportionately victims of family violence;
WHEREAS divorce proceedings and the family law system should protect women from violence and not ignore or exacerbate family violence;
WHEREAS it is in the best interest of children to protect them and their mothers from family violence;
Whereas the Government of Canada is encouraged to continue to monitor the progress, across departments and agencies, of the status of women in Canada;
Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

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

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

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

Family violence
means any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another
family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or
that causes that other family member to fear for their own safety or for that of another person — and in the case of
a child, the direct or indirect exposure to such conduct — and includes any incident or pattern of;

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

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

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

o Recommendation #4.1: Remove section 16(3)(c), maintenance of relationship with other spouse or add
exception of family violence.

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

(c) each spouse’s willingness to support the development and maintenance of the child’s relationship with the other
spouse, except in cases of family violence, or when it is otherwise contrary to the child’s best interests to develop or
maintain a relationship with the other spouse;
(i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child, except when such communication and cooperation are contrary to the child’s best interests, including in cases of family violence involving either the other spouse and/or the child.

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

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

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

1. its impact on the child;
2. its impact on the child’s relationship with each spouse;
3. its impacts on the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child;
4. 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);
5. its association with negative parenting practices on the part of the person who engaged in a pattern of family violence;
6. the demonstrated capacity of any person who engaged in family violence to prioritize the best interests of the child and to meet the needs of the child.

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

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

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

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

**Factors relating to family violence**

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

1. family violence experienced by women is a form of violence against women;
2. society’s interest in ending all forms of violence against women;
3. systemic power imbalances between men and women and the actions that may constitute resistance or self-defence against patterns of coercion and control, and incidents of family violence;

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

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

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

Family violence always relevant

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

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

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

The court shall not infer

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

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

BEST INTERESTS OF THE CHILD/MAXIMUM PARENTING TIME

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

Finally, it should be made explicit that maximum contact is not always

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4 Child, Youth and Family Services Act, 2017, SO 2017, c 14, Sch 1
in the child’s best interests. On the contrary, the section should clarify that the best interests of the child should always be determined on a case-by-case basis.

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

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

**The court shall not presume**
(2.1) In determining the best interests of the child, the court shall not presume any particular arrangement to be in the best interests of the child and without limiting this:
  - (i) it must not be presumed that custody/decision-making responsibilities should be allocated equally between spouses;
  - (ii) it must not be presumed that custody and access/parenting time should be shared equally between spouses;
  - (iii) it must not be presumed that each spouse should be allocated as much parenting time as possible;
  - (iv) it must not be presumed that decisions regarding the child should be made either by one spouse or jointly
  - (v) it must not be presumed that there should be maximum contact between a child and parent

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

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

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

**CUSTODY AND ACCESS/DECISION-MAKING RESPONSIBILITY AND PARENTING TIME**
As mentioned, we believe removing the clear and familiar terms of ‘custody’ and ‘access’ will cause confusion and ambiguity, and that abusive fathers are likely to exploit that ambiguity. In addition, there is currently no evidence in other jurisdiction that a change in language reduces even non-violent conflict. We recommend maintaining and further defining the existing terms.

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

**Custody/decision-making responsibility** means the responsibility for making all significant decisions about a child’s well-being, including:
(a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child, including;
(b) making decisions respecting where the child will reside;
(c) making decisions respecting with whom the child will live and associate;
(d) making decisions respecting the child’s education and participation in extracurricular activities, including the nature, extent and location;
(e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;
(f) giving, refusing or withdrawing consent to medical, dental and other health-related treatments, including mental health treatments, such as counselling or therapy, for the child;
(g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
(h) giving, refusing or withdrawing consent for the child, if consent is required;
(i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
(j) requesting and receiving from third parties health, education or other information respecting the child;
(k) starting, defending, compromising or settling any proceeding relating to the child, and
(l) identifying, advancing and protecting the child's legal and financial interests;

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

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

Day-to-day decisions

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

Day-to-day decisions shall not conflict

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

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

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

Section 16.5
Factors in determining whether to make order

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

RELOCATION

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

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

Notice

Section 16.9 (1) A person who has parenting time or decision-making responsibility in respect of a child of the marriage and who intends to undertake a relocation shall notify any other person who has parenting time, decision-making responsibility or contact under a contact order in respect of that child of their intention.
(3) The court may grant an exemption from all or any part of the requirements to give notice under subsection (2) if it is satisfied that
   (a) notice cannot be given without incurring a risk of family violence by the other spouse or a person having contact with the child, or
   (b) there is no ongoing relationship between the child and the other spouse or the person having contact with the child.

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

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

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

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

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

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

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

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

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

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

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

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

**FAMILY DISPUTE RESOLUTION PROCESSES**

Though diversity in dispute resolution processes is positive, Bill C-78 must respect women’s freedom and agency by allowing them to make fully informed choices about what processes best suit their needs. Special attention needs to be paid to what processes should be recommended in family violence cases, where alternative dispute resolution processes can provide abusers with ongoing contact with and the opportunity to continue abusing the other spouse.
• **Recommendation #14**: Remove the duty for parties to resolve matters through family dispute resolution and include reference to family violence.

**Family dispute resolution process**

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

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

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

**Section 7.7**

**Duty to discuss and inform**

(2) It is also the duty of every legal adviser who undertakes to act on a person’s behalf in any proceeding under this Act

(a) to assess whether family violence may be present, using an accredited family violence screening tool, and the extent to which the family violence may adversely affect

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

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

**EDUCATION**

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

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

**Education**

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

**FUNDING**

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

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

Discussion Paper by

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INTRODUCTION

Purpose of the discussion paper
This joint NAWL (National Association of Women and the Law) and Luke’s Place paper is intended to form the basis for discussion and advocacy on Bill C-78: An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act (hereinafter Bill C-78) by women’s equality-seeking and violence against women organizations and advocates across the country.†

We hope this discussion paper will be a valuable feminist law reform resource that will be used by a range of organizations and individuals to prepare written and oral testimony on Bill C-78 for Parliamentary and/or Senate Committees and other advocacy, and that it will also be useful for decision-makers involved in the law making process.

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

SETTING THE CONTEXT

Why does the Divorce Act matter?
The Divorce Act, as its name indicates, applies only to married people who are seeking a divorce. This includes people of all genders, gender expressions and sexual orientations. As a result, people in a common-law relationship or who are married but not seeking a divorce, are not affected directly by this legislation.

†This discussion paper was prepared by Suki Beavers and Anastasia Berwald (NAWL) and Pamela Cross (Luke’s Place). NAWL and Luke’s Place gratefully acknowledge the many contributions that informed the development of this paper, including those made by the following organizations: Action Ontarienne contre la violence fait aux femmes; the Barbra Schlifer Commemorative Clinic, the BC Society of Transition Houses, the Canadian Council of Muslim Women, the Canadian Women’s Foundation, the DisAbled Women’s Network of Canada, Femmes Autochtones du Québec, Harmony House, Ontario Association of Interval Transition Houses, the Native Women’s Association of Canada, Ottawa Coalition to End Violence Against Women, RISE Women’s Legal Centre, the South Asian Legal Clinic, Vancouver Rape Relief and Women’s Shelter, West Coast Leaf, LEAF: Women’s Legal Education and Action Fund, Women’s Shelters Canada. NAWL and Luke’s Place also gratefully acknowledge contributions made by the following law firms and individuals: Athena Law, Equitas Law Group, Jenkins Marzban Logan LLP, Suleman Family Law, Professor Emerita Susan Boyd, Rachel Law, Hilary Linton, Professor Linda Neilson and Glenda Perry. Finally, special thanks to Lisa Cirillo, Lorena Fontaine, Martha Jackman, Anne Levesque, Cheryl Milne, and Zahra Taseer (NAWL), and Carol Barkwell (Luke’s Place) for their contributions.
However, it is the only federal law dealing with family law and, as a result, is important for all of us, even if many of the women we support or represent do not rely on it directly. As a federal law, it sets a tone for the country and may have an impact on the development of provincial and territorial legislation.

An intersectional gender-based analysis
Prime Minister Justin Trudeau has identified himself as a feminist and has spoken frequently about his commitment to women’s equality both domestically and internationally. This Federal Government is committed to using a gender-based analysis + (GBA+) to help “ensure that the development of policies, programs and legislation includes the consideration of differential impacts on diverse groups of women and men.”

NAWL and Luke’s Place are working with an intersectional, feminist framework in responding to Bill C-78. Our comments are rooted in an intersectional women’s equality analysis of the legislation and in the lived realities of women in Canada.

In doing so, we consider women as a heterogenous group, with varied lived-experiences and often multiple and intersecting axes of discrimination. We recognize the need to consider and take into account impacts on all groups of women for any legal analysis to be meaningful. In particular, we recognize from the onset the devastating effects settlers’ colonialism has had on Indigenous women and communities. Any discussion of violence against women must consider these ongoing impacts, and the actions and absence of actions by governments and individuals that continue to perpetuate them.

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, and transgender, queer and gender non-confirming people are overwhelmingly those who are subjected to abuse, and men are primarily those who engage in abusive behaviour. We also acknowledge the diversity of women and families in this country and the continued adverse impacts of homophobia, transphobia and heteronormative culture.

Disaggregated data will be used wherever it is available as it is critical that considerable attention be given to understanding the different impacts (good and bad) that the changes Bill C-78 introduces will have on diverse communities of women across Canada.

A brief history of Divorce Act law reform
The Divorce Act, in particular its provisions dealing with custody and access, have been of concern to feminists – frontline workers, advocates, lawyers and academics – for decades. Various attempts to revise the Act, many of them driven by so-called fathers’ rights activists, have failed. Bill C-78 proposes the first comprehensive amendments to this legislation since the 1980s.

NAWL, working with frontline violence against women organizations, has played a significant role in past Divorce Act law reform efforts. (For a history of activism and advocacy in this area,
Since at least 1997, when the *Child Support Guidelines* were introduced by the then federal Minister of Justice, “fathers’ rights” organizations have advocated for a presumption of equal-parenting. Couched in unsupported, gender-neutral, best interests of the child claims in favour of equal parenting, these organizations are, in fact, interested in saving their members money on child support as well as maintaining their power and control over their former partner after separation. Indeed, when time is split equally between both parents, child support, which normally falls on the father’s shoulders, is far less expensive for him.

For many years now, there has been a concerted and organized attempt by these organizations to paint a picture of hapless, loving fathers being discriminated against and victimized by vindictive women seeking to take all their money and deny them a relationship with their children. They claim the family law system in Canada is biased against men and in favour of women, going so far as to accuse women of lying about family violence to demonize fathers and “win” custody battles. They have engaged in vigorous lobbying at the provincial, territorial and federal levels to have family law set out a legal presumption in favour of shared parenting. Their activities have also included high-profile public relations stunts to gain attention for their point of view. In addition, judges’ misunderstanding of family violence coupled with these aggressive and effective strategies has led to worrisome results and cases of judges over-sympathizing with abusive fathers.

Despite the lack of any kind of meaningful evidence – their strategy has been called a “personal troubles discourse” – they have gained considerable public and political sympathy, and a number of private member’s bills in both the House of Commons and the Senate since 1997 have attempted to introduce the concept of shared parenting into the *Divorce Act*. There is every reason to believe they will once again be very vocal in their advocacy for this presumption.

In some measure due to ongoing advocacy by women’s equality and violence against women organizations and individuals, these attempts have been unsuccessful. However, fathers’ rights organizations have remained active on this issue, making submissions in December 2017 to the Senate Committee on Legal and Constitutional Affairs on Bill S-202, which proposed creating the equivalent of a presumption in favour of shared parenting.

Such a presumption would not be in the best interests of children. It is crucial to be prepared to respond to the fathers’ rights advocates and make it clear that a GBA+ analysis is better suited to protect mothers and children.

**Unintended negative consequences**

Even well-intentioned and carefully thought out public policy can lead to unintended negative consequences for women. Mandatory charging in cases of domestic violence, intended to respond to the fact that domestic violence was not being taken seriously by police forces,
provides one obvious example of this. While the policy to require charging had some initial benefit, in the long run it has proven detrimental to many women, especially those marginalized because of race, Indigeneity, class, disability, mental health and/or substance use.

As we consider our intersectional feminist response to Bill C-78, we need to reflect on possible unintended negative consequences of each provision – even those that appear to offer significant improvement – of the Bill. We recognize that the Bill introduces improvements to the current version and is well intended. However, we consider it our role, as active members of civil society and within the independent feminist movement to remain critical when necessary to continue the work towards all women’s substantive equality.

THE REALITIES OF WOMEN’S ONGOING INEQUALITY

Women in Canada have not yet achieved equality. This is apparent in the family, where, predominantly, women continue to be the primary caregivers to children and to carry a larger role in terms of household management and chores as well as care of family elders. In addition, time spent on unpaid family labour affects the time spent at work, which contributes to the persistent gender pay gap in Canada. In turn, the gender pay gap makes such unpaid labour even more onerous and exacerbates women’s difficulties when problematic intimate relationships end.

Indigenous Women

At the outset, we want to recall the international and domestic obligations of the federal government in relation to the rights of all Indigenous peoples in Canada, and to Indigenous women specifically. The Government of Canada has committed to reconciliation with Indigenous peoples. Reconciliation is only possible through the renewal of the relationship between Indigenous peoples and Canada, on a nation-to-nation basis. This undoubtedly includes the consultation of Indigenous peoples, including Indigenous women, during the law-making process, whenever new laws may affect them. To date, there is no evidence that the Department of Justice has engaged in meaningful consultation with Indigenous women’s groups on the potential impacts of C-78 on Indigenous women, their children, families and communities. We urge the federal government to do so prior to the finalization and enactment of C-78, in order to ensure the cultural heritage, safety, security, autonomy and rights of Indigenous women and their children are respected, protected and fulfilled, and not further endangered or violated by any impacts (direct or indirect) of any of the provisions of C-78.

Marriage as defined by the Divorce Act is a colonial and patriarchal institution. Such institutions have long contributed to the oppression of Indigenous women in Canada. Indeed, these women face a specific set of deeply rooted inequalities. Though they are more likely to become mothers than are non-Indigenous women, they are also vastly more likely to see their children removed from their care and placed in the care of the state. Indeed, in 2011, in Canada, approximately half of the children under 14 in foster care were Indigenous children, though they represented roughly only 7% of the total population of children under 14. In 2005, this was almost three times as many children as were ever in residential schools. The removal of children from Indigenous families is the result of anti-Indigenous racism, underfunding of welfare services on
reserves, and lack of reparation for the harms caused by residential schools, and other settler colonialism violence.\textsuperscript{6}

As the Canadian Human Rights Tribunal found in 2016, the high rate of intervention by child protection services on reserve is in part due to poverty, poor housing and substance abuse; all issues for which the State bears considerable responsibility.\textsuperscript{7} Indigenous populations have a great need for social services, yet these services are vastly underfunded.\textsuperscript{8} In addition, off-reserve Indigenous women are at higher risk of becoming homeless,\textsuperscript{9} while on reserve ownership of matrimonial property remains uncertain.\textsuperscript{10} The calls for action by the Truth and Reconciliation Commission address this situation and we thus note that these should be integrated into any meaningful law reform.\textsuperscript{11}

Lastly, “the profiles of Aboriginal families differ dramatically from the profile of non-Aboriginal families”\textsuperscript{12} and “less than one-half of Aboriginal children in foster care live with at least one adult with an Aboriginal identity.”\textsuperscript{13}

Though Indigenous mothers are less likely to be married,\textsuperscript{14} relationship breakdown always exacerbates risks for women. The ways in which family matters are dealt with when the \textit{Divorce Act} applies to Indigenous spouses may help set the bar and influence the protection of Indigenous mothers and children.

\textbf{Women as primary caregivers and unpaid labourers}

In 2010, women spent an average of 50.1 hours per week on child care, more than double the average time (24.4 hours) spent by men.\textsuperscript{15} However, the level of involvement of men with their children has seen a steady increase over the last 30 years. Despite this increase, women continue to spend more time than men providing help and care to children: 2.6 hours and 1.9 hours per day on average respectively.

Along with unpaid childcare labour, women spent an average of 3.6 hours per day doing unpaid household work in 2015. This gap was smallest in British Columbia, where women did 36\% more unpaid work than men, and highest on the Prairies, at 52\%.\textsuperscript{16}

In 2015 only 39\% of the total number of hours of housework done by parents could be attributed to men. For the same year, 33\% of men performed household responsibilities such as cleaning, laundry and other indoor household work. Despite a slight decrease, women remained responsible for close to three-quarters (72\%) of all the hours spent on laundry and cleaning in 2015.\textsuperscript{17}

Family caregivers were more likely to be women: 30\% of women reported that they provided care to a relative or friend with a chronic health problem in 2012, in comparison with 26\% of men.\textsuperscript{18}
Women tended to spend more time caring for seniors inside the household than men. Forty-nine percent (49%) of women providing some care to a senior spent more than 10 hours per week on this activity compared with 25% of men.¹⁹

**Women in the workforce and parental leave**
Based on the Labour Force Survey (LFS), 82% of women - six million - in the core working ages of 25 to 54 years participated in the labour market in 2015, in both full-time and part-time positions.

Women generally perform fewer paid hours than men, as they tend to spend more time on housework and child care.²⁰ However, the difference between the work hours of men and women has gotten smaller over the last 40 years, mostly as a result of declines in men’s work hours.

According to Statistics Canada’s 2013 findings, 30.8% of recent fathers claimed or intended to take parental leave, an increase from 25.4% in 2012.²¹

In 2015, fathers were the stay-at-home parent in 1 of 10 families with at least one parent remaining at home with children.²²

Access to affordable child care also affects women in the workforce. Currently, there are only enough regulated child care spaces for about 20% of children under five years of age. Spaces for infants and toddlers, children with disabilities, Indigenous, and rural children are even tougher to find.²³ Because women provide most of the labour in caring for children, this affects them the most: “When child care is unavailable or unaffordable, women are the ones that scale down or withdraw from their professional commitments to care for children. Almost a third of women in part-time jobs cited caring for children as the reason they were in part-time work.”²⁴

On average, women across Canada face a 32% gender pay gap. Women with disabilities face a 56% gender pay gap, immigrant women face a 55% gender pay gap; Indigenous women face a 45% gender pay gap, and racialized women face a 40% gender pay gap.²⁵ Divorce exacerbates these inequalities. Time spent on household labour, caregiving for children and other family members and lack of affordable child-care contribute to this gap in Canada. In addition, pay equity has yet to be achieved, adding to the disparity.²⁶

These realities need to be a central consideration in any family law reform. To fail to do so will exacerbate women’s subordination in the family as well as society and make women more vulnerable to coercive control, violence and abuse.

**THE REALITY OF FAMILY VIOLENCE IN CANADA**
In 2016, Canada’s Chief Public Officer of Health, Dr. Gregory Taylor, declared family violence to be a serious national public health issue. He also noted that the majority of victims of violence within the family are women. In addition, the perpetrators are more likely to be men.²⁷
Victimization of women by their partners varies in many ways: women are more likely to face family violence that is categorized as more severe; women with an activity limitation are almost twice as likely to be victims of family violence, and women who identify as lesbian or bisexual are three times more likely to report spousal violence.

Indigenous women are more likely to be victims of family violence and are more likely to report injury as a result (6 in 10 aboriginal women report injury vs 4 in 10 non-Indigenous women). This is consistent with research indicating that Indigenous women are victims of more “severe” types of family violence.

Spousal violence remains underreported and under prosecuted, making it hard for women to be adequately protected from dangerous partners. In 2009, “less than one-third (30%) of female victims of spousal violence stated that the incident came to the attention of police.” Women “who sustained physical injury, who feared for their lives and who suffered the greatest number of spousal violence incidents” were the likeliest to report spousal violence to the police. Of these women, “about one in seven female victims of spousal violence obtained a restraining order.” About a third of these women report that such orders were breached.

The seriousness of family violence is further illustrated by occupancy rates at women’s shelters. Indeed, most women seeking shelter are fleeing abuse (71-78%). Women also seek shelter to protect children from abuse. In April 2014, there were 12,058 shelters beds in Canada. A snapshot of April 16 2016, indicated that 70% of beds in women’s shelters were occupied. Admissions in Territories and Western provinces tended to be higher. On the same date, more than half the women turned away from shelters (56%) were turned away because the shelter was at capacity. The National Shelter Survey found that on an average night in 2014, 90% of beds in emergency shelters were being used.

Family law reform must reflect the gendered reality as well as the overall prevalence of violence within Canadian families. If it fails to do so, women and their children will continue to be exposed to ongoing abuse and violence, including lethal violence, when they leave abusive relationships.

Marriage and Divorce Statistics
According to Statistics Canada, in 2011, 46.4% of the population aged 15 and over was legally married, while 53.6% was unmarried (that is, never married, divorced or separated, or widowed).

According to the 2011 General Social Survey on Families, approximately five million Canadians had separated or divorced within the preceding 20 years. About half (49%) of these Canadians ended a common-law relationship, 44% a legal marriage and 7% both a common-law union and a legal marriage.

In 2011, about one in five people in their late 50s were divorced or separated (21.6% of women and 18.9% of men), the highest among all age groups.
Data from the 2011 Household Survey shows 11% of Canadian women lived with a common-law partner, up from 3.8 per cent in 1981. The survey was done among 14 million Canadian women aged 15 and older.

**Same-Sex Relationships**
Same-sex couples accounted for 0.9% of all couples in 2016. The number of same-sex married couples grew 60.7% between 2006 and 2016—the first full 10-year period in which same-sex marriage was legal across the country. In 2016, roughly 33% of same sex-partners were married (24,370 couples out of 72,880 couples).†

**THE REALITY OF WOMEN’S LIVES POST-SEPARATION**

It is well established that women’s standard of living falls considerably post-separation. Women who have been the primary caregiver during the relationship often cannot find full-time employment or cannot secure appropriate child care to enable them to return to the paid workforce. Child and spousal support seldom, if ever, allow women with children to maintain their pre-separation standard of living. Affordable housing is in short supply and usually only available to the worst off after a lengthy waiting period.

Women with children who flee abusive relationships face additional challenges. While the abuse almost always continues past separation, women are often not believed or are given the message that they should stop their complaining and move on with their lives. They are also criticized for legitimately not getting along with their abusive partners on matters concerning the children.

It is difficult for women to obtain protection/restraining orders despite the clear evidence that women are at greatest risk of being killed at and just after the point of separation.45

Many fathers draw the children into their abuse, using them to spy on their mother, telling them lies about her and encouraging them to be disrespectful or even abusive to her.

Abusive men also make untrue allegations that their former partners are alienating the children from them and, when they do so, they are believed more often than mothers who make the same claim about their former partners. Once a father makes a claim of parental alienation, the mother’s allegations of abuse against her drop out of sight because they are often disbelieved and ignored by judges.

Frontline services report that legal bullying post-separation is common and can exhaust a woman emotionally and financially as well as intimidate her into conceding on important legal issues or even to returning to the abuser.46

‡ To our knowledge, no data has yet been released on divorce rates of same-sex couples.
Some men continue their financial abuse post-separation by refusing to provide interim, informal support for the children or to assist with family expenses.

Post-separation abuse often enters the woman’s workplace, making it difficult for her to maintain employment and a measure of financial independence.

High shelter occupancy rates as well as lack of affordable housing are serious issues for women leaving abusive relationships. Some have no other choice but to return to the abusive partner. Abusive fathers may even be granted custody by judges who blame mothers for the inability to find safe, affordable housing which forces them to seek refuge in shelters. On the flip side, judges erroneously minimize abuse when women continue to live with their partners to avoid homelessness or shelters.

Relationship breakdown and divorce are particularly dangerous times for women leaving abusive partners. Stalking and harassment are frequently observed in custody conflicts. Six in ten spousal homicides against women had a history of family violence. Separation increases the risk of lethality: “women are six times more likely to be killed by an ex-spouse than a current legally married spouse.” Moreover, the months immediately following separation are the most dangerous: “approximately 50% of women killed by intimate partners were murdered in the first two months after separation and 87% were killed within the year.”

In 2011, there were 59 female victims of spousal homicides in Canada, in comparison to 7 male victims. From 2002 to 2009, 12% of domestic violence cases resulting in homicide had child victims.

It is important to understand that this increased risk of lethality at the time of separation puts women in the difficult position of risking their lives by leaving their partner. It is crucial that divorce procedures in no way increase this risk.

Despite the stark reality of family violence in Canada, courts and other actors in the family legal system still struggle with understanding its dynamics. There remains a tendency to focus on incidents rather than patterns, to minimize the impacts of the abuse and to consider mothers’ acts of resistance or self-defence as family violence. Myths and stereotypes continue to motivate legal decisions and endanger mothers. The Act should prevent and correct these errors as much as possible.

In 2014, lone-parent families accounted for 20% of families with children aged less than 16 and lone mothers accounted for 81% of lone-parent families. In addition, in 2007, the Native Women’s Association of Canada found that “27 percent of Aboriginal families are headed by single mothers, and 40 percent of Aboriginal mothers earn less than $12,000.00 a year.”

In 2011, seven in ten separated or divorced parents indicated that the child lived primarily with their mother. Another 15% indicated that the child mainly lived with the father, while 9% reported equal living time between the two parents’ homes.
In 1994-95, 79.3% of the time mothers were being granted custody through court orders.\textsuperscript{55}$

In 2011, 21% of separated or divorced parents who currently had children 18 years of younger were paying some form of financial support for their children, while 26% were receiving child support.\textsuperscript{56}

\textbf{WHAT BILL C-78 PROPOSES}

Bill C-78 proposes a number of positive changes to the \textit{Divorce Act} as well as some that are of concern. Many of the new provisions are inspired by provisions from the most recent reform of the British Columbia \textit{Family Law Act}\textsuperscript{57} and the Alberta \textit{Family Law Act}.\textsuperscript{58}

Below, we set out what we have identified as the most significant proposed changes in general themes, with a brief assessment from our perspective of the pros/cons of each, as well as some changes the legislation does not include that we think are important.

\textbf{Note:} We have paraphrased the language of the Bill in this discussion paper, so reading the section below in conjunction with the Bill itself is recommended (http://www.parl.ca/DocumentViewer/en/42-1/bill/C-78/first-reading). For specific language and proposed amendments, see the joint Luke’s Place and NAWL Brief on Bill C-78.

1. \textbf{Family violence}

Concerns about family violence, and the ways Bill C-78 may be improved to reduce risks and mitigate impacts of past family violence, frame much of our discussion. Certain aspects of the Bill are very positive in this regard, while others are concerning as they place women at greater risk of experiencing continued family violence.

Bill C-78 sets out both a definition of family violence and factors the court must consider as part of the best interests of the child test.

\textbf{Section 1(7)} defines family violence broadly to mean any conduct, whether or not it constitutes a criminal offence, that is violent or threatening, that constitutes a pattern of coercive and controlling behaviour or that causes fear. More specifically, family violence is defined as physical abuse, including forced confinement; sexual abuse; threats to kill or cause bodily harm; harassment, including stalking; failure to provide necessaries of life; psychological abuse; financial abuse; threats to kill or harm an animal or damage property, and, killing or harming an animal or damaging property.

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\textsuperscript{55} Statistics Canada stopped collecting data on divorce and custody after 1995. In addition, the information we were capable of gathering for this paper is based on their analyses of census data, which is done based on their needs and interests. In other words, while there may be more detailed information on marriage and separations in the raw census data, it has not been currently analyzed.
The use of reasonable force to protect oneself or another person is excluded from the definition of family violence.

Comments:
Positive: This is an extensive and inclusive definition. It is especially good to see the language of coercive and controlling behaviour as well as of fear. Inclusion of threats or actual harm to animals is very positive, as is the explicit inclusion of financial abuse.

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

While it is positive to see an exception for the use of reasonable force to protect oneself or another person, this could backfire on women who use force to keep themselves or their children safe. What will a family court judge consider to be “reasonable” force? Will this clause be interpreted narrowly as self-defence in the criminal law understanding of that phrase or will it be interpreted more broadly? How will abusive men be able to manipulate this clause to cover their own use of violence?

Section 16(3)(c) states that each spouse’s willingness to support the development and maintenance of the child’s relationship with the other spouse should be considered in determining the child best interests.

Comments:
Negative: This section continues to reinforce the “friendly parent” rule and is problematic in cases of family violence. On its surface, the friendly parent rule seeks to encourage parents to get along, for the sake of their children and to prevent one parent from interfering with the child’s relationship with the other parent. In practice however, this provision makes any parent who appears to not be fully collaborating, or refusing to be “friendly,” look like a bad parent who cares more about their spousal conflict that their child’s well-being. A mother in an abusive relationship will in most cases have legitimate reasons to oppose, or at least not support, the child’s relationship with the abusive parent, especially if she fears he may be violent towards them. The inclusion of this factor may prevent crucial protection of children and mothers. The other factors in the section adequately ensure that the child will continue to have a relationship
with both spouses when it is in their best interests. In other words, this factor is unnecessary and dangerous. If it is to be retained, there needs to be an exception for such cases in which it is not in the child’s best interests to maintain a relationship with an abusive spouse.

In addition, claims of parental alienation by an abusive parent are a real problem. Due in part to a lack of true understanding of family violence by judges, abusive fathers successfully claim parental alienation and in some cases are granted custody. In the most worrisome cases, this happens despite children’s testimony that they would prefer to remain with their mother. This section seems very well suited for parental alienation claims by abusive fathers.

**Section 16(3)(i)** further includes the ability and willingness of each person to communicate and cooperate on matters affecting the child.

Comments:
Negative: This factor also reinforces the “friendly parent” rule. Women leaving abusive relationships are often legitimately neither able nor willing to communicate with their former partner. It can place them at risk of both emotional/psychological, physical and even lethal harm. In some cases, communication may violate a criminal court no-contact order. Again, there is no real need for this section to protect the child’s best interests, and it is dangerous. Though the next section creates an exception to this provision in cases of family violence where cooperation is not appropriate, removing it would be ideal. Alternatively, an explicit reference to family violence as an exception would make this provision less cause for concern.

**Section 16(3)(j)** requires the court to consider 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

(ii) the appropriateness of requiring persons to cooperate on issues affecting the child.

Comments:
Positive: Placing an assessment of family violence directly in the test, unlike in some provincial family law legislation, is a positive move.

It is also positive that the consideration of family violence must include whether or not it is appropriate for people to cooperate on issues affecting the child.

Negative: The court should not be concerned with whether the person who engaged in the family violence is willing to care for the child. Most abusers will say they are willing; this does not mean parenting time/decision-making responsibility is appropriate or safe for the children or for the mother. The focus should be on the impacts of family violence on the mother and the child’s well-being, as well as on the abusive spouse’s ability to parent.

**Section 16(4)** sets out the factors related to family violence that the court is to consider as part of the best interests of the child test. These factors include:
(a) The nature, seriousness and frequency of the family violence and when it occurred
(b) Whether there is a pattern of coercive and controlling behaviour
(c) Whether the violence is directed toward a child or whether the child is directly or indirectly exposed to it
(d) The harm or risk of harm to the child
(e) Any compromise to the safety of the child or other family member
(f) Whether the violence causes the child or other family member to fear for their own safety or that of another person
(g) Any steps taken by the person engaging in the family violence to prevent future family violence and to improve their ability to care for the child
(h) Any other relevant factor.

Comments:
Positive: It is positive to have a list of factors for the court to consider when assessing family violence for the purpose of determining the best interest of the child. Including both direct and indirect exposure to the family violence rather than just direct involvement is important.

Negative: Clause (g) is problematic. The legislation should require objective evidence of changed behaviour and not simply evidence from the abuser that he has taken "steps" to prevent future violence and to improve his parenting ability. In many communities, especially smaller ones, men hold positions of power and influence. They may use this position to bolster evidence of steps taken to prevent family violence. On the other hand, if the mother is marginalized, be it due to her gender, race, disability or the family violence itself, she may not be in a position to find support in her community to refute these claims. The clause should be rewritten to require evidence that steps have rendered the abusive spouse capable of caring for the child.

This section would be a great place to include a reference to the gendered nature of family violence, to encourage judges to take its dynamics into account.

The Act should also prevent judges from interpreting exposure to family violence too narrowly. Indeed, research indicates that even when a child is aware of the abuse, without necessarily being present, their well-being can be seriously affected by the fact of their mother’s abuse. That being said, mothers should not be blamed for their children’s exposure to family violence. The focus should be on protecting mothers from violent situations, rather than removing children from their mothers entirely, as removal tends be more detrimental on children’s well-being.

Section 16(5) states that past conduct shall not be taken into account in determining the best interests of the child, unless the past conduct is relevant.

Comments:
Negative: This may create an obstacle to introducing family violence, especially its pattern, into evidence. The section would be stronger if it was positively worded and clearly stated that family violence is always relevant past conduct.
In addition, misunderstandings and common misconceptions about the dynamics of family violence lead to dangerous decisions. The Act would do a much better job of protecting mothers and children if it explicitly mentioned that courts should not presume:

1. that because the relationship has ended, or divorce proceedings have begun, that the family violence has ended.
2. that the absence of disclosure of family violence prior to separation, including reports to the police or child welfare authorities, means the family violence did not happen, or that the claims are exaggerated.
3. that the absence or recanting of criminal charges, or the absence of intervention of child welfare authorities means that the family violence did not happen, or that the claims are exaggerated.
4. that if claims of family violence are made late in the proceedings or were not made in prior proceedings, they are false or exaggerated.
5. that inconsistencies between evidence of family violence in the divorce proceedings and other proceedings, including criminal proceedings, mean the family violence did not happen, that the claims are exaggerated, or that the spouse making the claims is unreliable or dishonest.
6. that a spouse continued to reside or maintain a financial, sexual, business relationship or a relationship for immigration purposes, with a spouse, or has in the past left and returned to a spouse, that family violence did not happen, or that the claims are exaggerated.
7. that leaving a violent household to reside in a shelter or other temporary housing is contrary to the best interests of the child.
8. 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. that the absence of observable physical injuries or the absence of external expressions of fear means the abuse did not happen.

2. Best interests of the child/maximum parenting time

Presently, the Divorce Act states that the court is to consider only the best interests of the child, but does not provide factors for the court to take into account when determining the child’s best interests.

Bill C-78 provides a list of factors to be taken into account when determining the best interests of the child, some of which were addressed in the previous section.

Comments:
Positive: In general, it is very positive to see that the best interests of the child remains the only test to be used in determining arrangements for children post-separation. It is especially good to see that the government has retained a focus on the best interests of the child and resisted pressure from fathers’ rights organizations for the introduction of a presumption in favour of
shared parenting. Such a presumption would be a poor reflection of reality, create an unnecessary onus for parents seeking to reverse it and is especially worrisome in family violence cases. It is in the best interests of the child that arrangements be ordered on a case by case basis, to ensure their safety as well as continuity of care as it existed during the marriage.

The addition of a list of factors is also positive, inasmuch as the factors can provide guidance and support to courts.

**Negative:** As mentioned in the previous section, some of the factors seem to vacate the reality that the children being dealt with exist within the matrix of a complex relationship. In family violence cases, this must be recognized. Some of the factors, in particular the “friendly parent” requirements, seem to create a fiction wherein, once divorce proceedings begin, an abusive relationship, can somehow immediately become a cordial, healthy one, in which both parents can coparent without conflict, abuse, risk, or violence. However, we know that this not true in family violence cases. Indeed, separation tends to exacerbate violence and abuse, making cooperation with an abuser even more onerous. The full dynamics of the abusive relationship need to be understood by all actors and especially the deciders in such cases. When there is ongoing contact by former spouses, because there are children involved, the power and control exerted by one spouse during the marriage is not going to end simply because the marriage is legally ending.

**Section 16(2):** The court is to give primary consideration to the child’s physical, emotional and psychological safety, security and well-being.

**Comments:**
**Positive:** This provision makes it clear that child safety and well-being are of paramount importance.

Negative: It would be made stronger if it included 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. Research also demonstrates that children’s well-being is improved when their mothers are safe from abuse. Therefore, the best interests of the child test should acknowledge that protecting the non-abusive spouse’s “physical, emotional and psychological safety, security and well-being” is also relevant to the child’s best interests.

**Section 16(3):** Below are additional factors to be considered the in the best interests of the child test about which we have some concerns.

**Section 16(3)(b) lists the nature and strength of the child’s relationship with each spouse, as well as other family members such as siblings and grandparents.**

**Comments:**
Positive: This section allows for other positive figures in the child’s life to be considered and may benefit the child inasmuch as it allows these people to remain in the child’s life.

Negative: The wording, particularly “nature and strength” 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. We believe the word ‘quality’ would better reflect the types of relationships worth preserving for the child’s best interests.

Section 16.2(1): requires to the court is to give effect to the principle that a child shall have as much time with each spouse as is consistent with the best interests of the child.

In addition, as mentioned, the third factor in the best interests of the child test stipulates that the court is to consider each spouse’s willingness to support the development and maintenance of the child’s relationship with the other spouse.

Comments:
Negative: Both of these clauses continue to entrench the notion from the current Divorce Act that it is generally in children’s best interests to spend maximum time with both parents. This is obviously not the case in family violence situations, and is at odds with the stated goals of Bill C-78 with respect to the best interests of the child. While Section 16.2(1) requires that maximum contact is to be consistent with the best interest of the child, this is not strong enough language, especially because of Section 16(3)(c), which makes supporting the development and maintenance of the child’s relationship with the other spouse a mandatory consideration in the best interest of the child test. While not called a presumption, given current societal and judicial attitudes about the family, there is every reason to be concerned that courts will focus on the maximum contact without truly considering the best interests of the child.

Maximum contact requirements are also especially onerous for rural women attempting to leave abusive relationships. Doing so can require moving to another community, which could give the impression that she is refusing to cooperate and follow the maximum contact principle. This may force women to continue to live in close proximity to their abusive ex-spouse, putting them at great risk, especially in the months following the separation.

Both these sections should be removed entirely. This would be consistent with the Bill’s goal of protecting children’s best interests. The British-Columbia Family Law Act provides that no parenting arrangement is presumed to be in the child’s best interest and that there is to be no assumption that maximum time with each parent is ideal. A provision to the same effect in the federal Bill would make the best interests of the child test more effective and credible.

3. Language of custody and access
Bill C-78 proposes to eliminate the language of custody and access, replacing it with new terms: parenting time, parenting orders, decision-making responsibility and contact orders.
Section 7 defines decision making responsibility in broad terms, as the responsibility to make significant decisions regarding health, education, culture and extra-curricular activities. Parenting time refers to the time allocated as such by the court, in a parenting order.

Section 16.1: Parenting orders will provide for the exercise of parenting time and/or decision-making responsibility. These orders will allocate parenting time and decision-making responsibility. They can include requirements that parenting time and/or exchanges of children be supervised as well as requirements for how communication between a child and whichever parent the child is not with at the time will happen. Through a parenting order, parents can be directed to attend a family dispute resolution process. Relocation can be authorized or prohibited.

Comments:
Positive intentions: Eliminating the terms custody and access is meant to reduce conflict by getting rid of the idea of one person winning and the other losing. The goal is to avoid children being caught in the middle of their parents’ conflict. In addition, there is a feeling within the profession that the use of the expression “custody” is not appropriate when referring to the care of children and some lawyers have already stopped using these terms outside litigation.

Negative: Though the intention of reducing conflict to shield children is a commendable one, there is currently no evidence that similar changes of language that have been made in other jurisdictions (domestically and internationally) have actually resulted in the reduction of conflict that was hoped for. In addition, losing the clear and habitual terms of custody and access will have serious negative consequences in cases involving family violence. Tensions and conflictual situations that arise during relationship breakdown differ qualitatively from family violence. In family violence cases, abusive spouses attempt to make use of any means available, in this specific case the custody battle/arrangement, to sustain/maintain coercive domination and control. Absence of clear identification of ultimate authority inflames and strengthens efforts from the abusive spouse to maintain/gain coercive control in family violence cases. Any weakening of clarity around a mother's parenting authority will be used by perpetrators in family violence cases to coerce, intimidate and control.

Conflating family violence and conflict is dangerous. The Act should reflect the differences between conflict surrounding non-violent relationship breakdown, which the language and custody and access may exacerbate, and family violence, which requires clear authority and little room for abuse. Reducing conflict in non-violent situations is a good objective, but it should not be the focus of family violence cases. It is safer for children and their mothers to have a clear, unambiguous allocation of custody, and clarity about who has the authority to make specific decisions about what is in the best interests of a child.

Losing the familiar terms of custody and access will, at least in the short term, lead to some uncertainty and confusion in the interpretation of the new language. There is no evidence that other jurisdictions that have replaced custody and access language with other terms have seen a reduction in the level of disputes over where children should live and who should have
authority over them. There is also a risk that mother’s may face complications or obstacles at the international level, notably regarding Canada’s obligations under the Hague Convention. In at least one case, a British Columbian mother seeking to apply for a passport for her children has faced barriers due to the lack of clear authority over such matters. In any case, there is no way of being certain the change in terminology will not create undue and onerous consequences.

It would be preferable to maintain the habitual terms of custody and access. We would also recommend clarifying the proposed definition of custody/decision-making responsibility, by listing in more detail the decisions the parent with custody has the authority to make. The broadness of the proposed definition leaves too much opportunity for abusive fathers to undermine mothers by claiming decision fall outside their authority. The British Columbia Family Law Act currently contains an extensive detailed list.60

Section 16.2(3) states that during their parenting time, that parent has the exclusive authority to make day to day decisions affecting the child.

Comments:
Neutral/negative: In families where there is no history of family violence and where both parents are able to place the interests of their children ahead of their desire to coerce and control the other, this clause does not raise concerns.

However, in the context of family violence, an abuser may well use this clause to justify making decisions that are clearly not in the best interests of the child or just because he knows they are not decisions the mother would support, as a tactic in his ongoing abuse and intimidation of his ex/spouse.

It is also challenging in many cases to separate “day-to-day decisions affecting a child” from some “decision-making responsibilities.” If a parent has the child six days a week and signs the child up for swimming lessons, is that day to day care or a significant extra-curricular activity? This can work for parents who are cooperative, but does little to resolve disputes for parents who are not. Moreover, this provision invites a controlling parent to insist on having input into relatively minor decisions. It also creates the opportunity for him to ignore activities that are important to the child that fall during his time, claiming that not sending the child to swimming lessons for instance, is a day-to-day decision.

The language should be changed to make clear that any day to day decision making cannot conflict with the decisions made by a parent with custody, or decision-making authority and that day to day decisions must be made in the best interests of the child. The term “exclusive” should also be removed to make it clear that decisions of the parent with decision making authority supersede all day to day decisions at all times, if there is any conflict. As mentioned, we recommend adding a clear list of decisions that the parent with custody/decision making responsibility retains the right to make.
Section 16.5: Contact orders will set out the time that a person other than the spouses (e.g., a grandparent) can spend with a child. Any such person must have leave of the court to make an application. In making a contact order, the court must consider all relevant factors including whether contact could happen otherwise, such as during parenting time of one of the spouses.

Comments:
Positive: This provides statutory authority for people other than parents to apply for an order giving them contact with a child, which could be positive where family members, in particular grandparents, have played an important and positive role with their grandchildren. This could be beneficial for Indigenous or newcomers families in which relatives and grandparents are often positive figures. However, this potential positive impact must be weighed against the possibility that some immigrant women may be in Canada without extended family.

Negative: Abusive men may turn to their parents to seek a contact order as a means of gaining time with their children that they may have been denied in a parenting order. Additionally, paternal grandparents may seek a contact order in situations where their relationship with their grandchildren’s mother is toxic and use such contact time to undermine the children’s relationship with their mother.

Contact orders should be made only if they are in the best interest of the child, but there is no reference to these criteria in the provision. It would be made stronger with an explicit reference to the best interests of the child as the only relevant factor and an explicit requirement to apply the best interests of the child test when determining contact orders.

As mentioned, this provision can have an increased adverse impact on immigrant women, who are often in Canada without the extended family members that their abuser has, leaving the mother alone against the father and his family members with contact orders.

4. Relocation
Bill C-78 sets out detailed provisions for the relocation of children, beginning at section 16.9.

Comments:
Positive: There is value in having a statute-based approach to relocation to bring consistency across jurisdictions.

Negative: All provisions dealing with relocation need to provide a clear exception for cases of family violence.

Women who need to flee for reasons of safety or to reconnect with family for support should not have to notify the other parent or apply to the court before moving with the children (Section 16.9(2)), nor should they have to provide their new address to the other parent (Section 16.9(2)(b)).
While **subsection 16.9(3)** allows these requirements to be waived or modified where there is a risk of family violence, there should be an absolute exemption in cases of family violence to both the notice period and providing the new address. It should also be made clear that application for the waiver can be made without notifying anyone else.

**Section 16.5(8):** permits orders providing that a child shall not be removed from a specified geographic area without the written consent of any specified person or without a court order authorizing the removal.

This section is problematic, as it could be used by an abuser against the mother to prevent her from fleeing to a safe place.

**Section 16.92(1)** sets out factors the court is to consider, in addition to those set out in section 16(3), when deciding whether or not the relocation of a child is in the child’s best interests. Those factors include:

(a) Reasons for the relocation
(b) Impact on the child
(c) Amount of time spent with the child by each person with parenting time or a pending application for a parenting order and the level of involvement in the child’s life of each of those persons
(d) Whether the person intending to relocate has complied with the notice requirements and other legislation
(e) The existence of an order specifying the geographic area in which the child is to live
(f) The reasonableness of the proposal of the person intending to move to vary the exercise of parenting time, decision-making responsibility or contact, taking into account, among other things, the proposed new location and travel expenses
(g) Whether each person with parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award or agreement and the likelihood of future compliance.

Comments:
**Positive:** These are useful factors for a court to consider when making a decision about the relocation of children.

**Negative:** While family violence should be read in as part of the best interests of the child test, there is no reason to think it will be, so it should be set out as an explicit factor in this list. Ensuring that a mother is safe from an abusive ex-partner is generally going to be in the child’s best interests as well. Therefore the court should also be required to consider if the relocation would serve to protect the mother, which would weigh in favour of relocation.

The section should also explicitly mention that if the party opposing the relocation is doing so to maintain coercive control over the party requesting the relocation, the opposition should be dismissed.
Section 16.92(2) provides that the court must not take into account whether the party seeking to relocate would do so if the child’s relocation is not granted.

Comments:
Positive: This section is a positive inclusion which will help women who find themselves in a “double-bind” situation. Indeed, if the mother claims she will not move without her children, courts may believe the relocation is not important and therefore deny the request. If however, the mother claims she will move without her children, this is seen as a failure in motherhood on her part and custody may be awarded to the father.

Section 16.93(1) states that if the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child of the marriage spend substantially equal time in the care of each party, the party wishing to relocate with the child has the burden of proving that the move would be in the best interests of the child.

Section 16.93(2) states that if the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child of the marriage spends the vast majority of their time in the care of the party who intends to relocate the child, the party opposing the relocation has the burden of proving that the relocation would not be in the best interests of the child.

Comments:
Positive: In theory, the burden of proof provisions appear reasonable.

Negative: However, it is currently not the trend in Canada for one parent to receive the “vast majority” of parenting time. Mothers, who will be doing most of the childcare duties despite shared parenting orders, will be put in a position where they need to prove that relocation is in the best interests of the child which will likely be difficult to do. This is especially problematic in family violence cases where women need to be able to flee quickly for their safety and that of the child. Upon separation, some women finally freeing themselves from coercive control need to return to their communities for support (financial and other). These provisions create a barrier to this positive move.

In addition, the expressions “substantially comply” as well as “vast majority” are unclear and highly problematic. They will likely cause confusion, which may lead to additional litigation, both of which are dangerous and undesirable for abused, poor, or women who are otherwise disadvantaged in the legal system.

Lastly, it should be noted that changing the burdens for specific percentages of time would be problematic and should be avoided. Such percentage tend to increase and exacerbate litigation.

5. Family dispute resolution processes
Section 7.3 requires that parties try to resolve matters through a family dispute resolution process, when appropriate.

Section 7.7(2) creates a duty for legal advisors to encourage their client to attempt to resolve matters through a family dispute resolution process, “unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.”

Comments:
Negative and positive: Dispute resolution processes can have many benefits. They may indeed be less adversarial and more empowering to some women than family court litigation. However, it would be wrong to assume they are best suited to all cases. They may be dangerous to women in abusive relationship who will find themselves forced to cooperate with an abusive spouse and pressured to agree to dangerous resolutions. Certain women, including Indigenous women, immigrant and refugee women, women with disabilities, women in LGBTQ+ relationships, and women living in isolated or rural communities where there are access to justice issues and a lack of resources, may be less able to resist pressure to mediate and may be disadvantaged by that process.

In any case, the system should ensure that women are free and capable of making a meaningful choice between available processes. The language of 7.3 should be softened and not require parties to use alternative dispute resolution processes. The language should also acknowledge specific risks that exist in cases of family violence. Legal advisors should have the duty to provide women with all the relevant information on the various processes to allow them to make a free and educated decision, free from any pressure.

The risks of family dispute resolution processes in family violence cases, should be taken into account when a legal advisor is advising a client. To ensure this, legal advisors should have an ongoing duty to screen for coercive control, fear and power imbalances.”

6. Education
Bill C-78 makes no mention of either education or accountability for lawyers and judges as well as others involved in the family court system, including mediators. Both of these are critical. Without mandatory education on family violence, provided by community-based as well as legal experts, and on evidence- and research-based principles of child development, that is supported by strong accountability measures, changes to the law will not result in changes to outcomes in family court.

Provisions should be added to the Bill specifying requirements for training on family violence and family violence screening, as well as the use of recognized screening tools. Here again, there is a need for the federal government to work with provincial and territorial governments as

** In British Columbia, the ADR requirement has proven problematic, especially in case of power imbalances and family violence. Women and abused women without representation do not know how to object to ADR, and it is unclear whether the screening is effective.
well as law societies to ensure all actors in the family law system are adequately trained and regulated.

There must also be a commitment from the federal government to work with provincial and territorial governments as well as law societies to ensure all actors in the family law system are adequately educated on family violence.

7. Funding

The Bill does not address the gendered inequities that result from the lack of proper resourcing for legal aid programs and services in the provinces and territories, nor the high number of unrepresented litigants in family law cases. The Bill should provide requirements for legal aid funding in family law cases. The Bill should allow for a regulatory scheme to be set out, under which federal transfer to the provinces would necessarily be attributed to legal funding in the family law system.

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