BRIEFING NOTE

BILL C-78

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I. PURPOSE

West Coast Legal Education and Action Fund (West Coast LEAF) is a BC-based legal advocacy organization. Our mandate is to use the law to create an equal and just society for all women and people who experience gender based discrimination.

In collaboration with community, we use litigation, law reform, and public legal education to make change. In particular, we aim to transform society by achieving: access to healthcare; access to justice; economic security; freedom from gender based violence; justice for those who are criminalized; and the right to parent. We have particular expertise in gender equality and human rights and have done in-depth research and analysis of the impacts of federal and provincial laws and policies on women.

West Coast LEAF has drafted this briefing note to provide feedback on the amendments proposed in Bill C-78. We support the intended purpose of these amendments: "to promote faster, more cost-effective and lasting solutions to family law disputes, reducing the burden on courts and leading to better outcomes for families."[1] We agree with the four stated goals: "promoting the best interests of the child, addressing family violence, reducing child poverty, and making Canada's justice system more accessible and efficient."[2] We provide this feedback to ensure that the proposed amendments are meeting the intended purpose and goals, and to flag unintended and harmful consequences of the proposed.

II. BACKGROUND

The enactment and reform of the *Divorce Act* has had a complex history. The *Constitution Act, 1867* empowers the federal government to legislate in relation to matters of marriage and divorce, while the provincial governments have jurisdiction over the solemnization of marriage and property and civil rights in the province.[3] The federal government's jurisdiction over marriage and divorce remained largely unused until the 1968 *Divorce Act*. Under this act, the grounds most frequently relied upon were cruelty, adultery, and separation for three years.[4] The decree could only issue after a judge alone trial, the divorce would take effect 90 days after it was granted, and variation had to be sought before the same court that granted the original order.[5] The 1985 *Divorce Act* brought some significant changes to the scheme, notably: establishing

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[1] Department of Justice, "Charter Statement – 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*" (2018), online: <http://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c78.html> ["Charter Statement"].
[2] *Ibid*.
[3] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, ss 91(26), 92(12), 92(13).
[4] Bruce Ziff, "Recent Developments in Canadian Law: Marriage and Divorce" (1986) 18 *Ottawa L Review* 121 at 141.
[5] *Ibid*. at 145, 176, 166.

marriage breakdown as the sole ground, provable on separation for one year, adultery, or cruelty; introducing a new lawyer duty to inform spouses of mediation services; removing any reference to the need for a trial; changing the date the divorce takes effect to 31 days after it is granted; and allowing variation to be sought from any competent court.[6]

Although federal legislation regarding marriage and divorce was extremely limited during the first century of Confederation, there were countless attempts to enact such legislation.[7] The failure of such attempts can be attributed to the contentious nature of the scope of their jurisdiction. The meaning of 'divorce' was questioned in its relation to corollary relief such as support, parenting, and property division, with divergent views on what was considered ancillary or necessarily incidental to divorce proceedings.[8] While it was ultimately decided that support and parenting are incidental and property division is not, the appropriate jurisdictional scope remains a live issue.

The access to justice crisis is exacerbated by these complex jurisdictional issues. Not only must litigants navigate both federal and provincial legislative schemes, they may also have to navigate different levels of courts. Proceedings under the *Divorce Act* must be adjudicated upon in superior courts, while proceedings under provincial legislation are heard in lower courts as well, unless there is a provincially created unified family court in which all proceedings may be heard. Due to inadequate family law legal aid, many litigants must navigate these confusing processes unrepresented.

Divorce disproportionately impacts women. After a divorce, women, particularly those with dependent children, experience a more significant income drop than men.[9] Female lone-parent families have lower incomes than male lone-parent families and rely more heavily on child benefits and other government transfers.[10] In addition to economic impact, there continues to be a lack of recognition of women's role in the family, particularly their unpaid and undervalued work in the private sphere.[11] There is also a greater risk of intimate partner violence when relationships are ending, heightening danger for women and their children.[12]

III. KEY CONSIDERATIONS

If the federal government is going to continue to exercise jurisdiction with regards to corollary relief, it is important that the legislation is comprehensive and fulfills its intended purpose and goals. While we appreciate many of the proposed amendments,

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[6] *Ibid*. at 141, 144-146, 176.
[7] F. J. E. Jordan, "The Federal Divorce Act (1968) and the Constitution" (1968) 14:2 *McGill LJ* 209 at 217.
[8] *Ibid*. at 247.
[9] Research and Statistics Division, Department of Justice, "JustFacts – Economic Consequences of Divorce and Separation" (2016), online: <http://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/jf-pf/ecds-cfds.html>.
[10] *Ibid*.
[11] Marie L. Gordon, "'What, Me Biased?' Women and Gender Bias in Family Law" (2001) 19 *CFLQ* 53.
[12] Ontario Women's Justice Network, "Introduction to Divorce and Separation in Canada" (2016), online: http://owjn.org/2016/07/introduction-to-divorce-and-separation-in-canada/.

some areas of concern include: the need for additional definitions and terms; the definition of family violence; adequate safeguards for family dispute resolution processes; the past conduct provision; the maximum parenting time and friendly parent principles; the day-to-day decisions provision; the relocation notice provisions; and release of information under the *Family Orders and Agreements Enforcement Assistance Act* (*FOAEAA*).

The terms 'contact' and 'parent' are used in the proposed amendments, however they are not defined; these terms should be defined to ensure clarity. The legislation also must clarify when it is referring to a parent or to a spouse (currently these terms are sometimes used interchangeably in the proposed amendments) in order to avoid the confusion which will inevitably result from such ambiguity. An example is found in the proposed amendments to s 16.5(1), which states that 'a person other than a spouse' may apply for a contact order, instead of 'a person other than a parent'.[13] The drafting of this provision creates uncertainty for the role of step-parents. Additionally, if the language of custody is being removed, guardianship should be included in the amendments and defined to make this legislation comprehensive and to bring it in line with provincial legislation, such as the BC *Family Law Act*.

It is positive step that the proposed amendments have included a definition of family violence.[14] However, it is crucial that the definition is broad, and contains a non-exhaustive list. Which is the not the case in the current form of the amendments. Family violence manifests itself in myriad ways, which all deserve recognition by the courts. The use of the term 'means'at the start of the proposed amendment limits the definition in a problematic way. The definition of family violence in the BC *Family Law Act* is an excellent example of how family violence should be defined.

While family dispute resolution processes can be a useful tool, they can lack the checks and balances of formal litigation, and may create pressure on the parties to reach an agreement.[15] Family dispute resolution processes can be even more insidious in the context of family violence. It is essential that this legislation contains adequate safeguards for cases of family violence. Mandatory screening and education for all professionals involved are particularly important safeguards.

The past conduct provision may be problematic for the recognition of family violence.[16] Family violence is always relevant to the exercise of a person's parenting time, decision-making responsibility, or contact. Past conduct must be taken into consideration in establishing family violence. It is recommended that this provision make the recognition of family violence more explicit, perhaps by adding 'relevant to establishing a pattern of

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[13] 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*, 1st Sess, 42nd Parl, 2018, cl 12, s 16.5(1).
[14] *Ibid*., cl 7, s 2(1).
[15] Neilson & Boyd Draft Discussion Paper 12
[16] Bill C-78, *supra* note 13, cl 12, s 16(5).

coercive and controlling behaviour', which is a factor relating to family violence under s 16(4).[17]

The proposed amendments retain the maximum parenting time and friendly parent principles.[18] These two principles have been the subject of much criticism. Not only do these principles seem to prioritize contact with a parent over safety of a child, they also have the effect of discouraging parents from disclosing family violence.[19] Maximum contact is the only specific factor, when considering best interests of the child, that is singled out in the current *Divorce Act*. It remains a separate provision outside of the listed best interests factors in the proposed amendments. Due to this singling out, the maximum contact principle has come to play a particularly influential role in custody and access determinations, and has been interpreted as supporting access in all but the most extreme cases.[20] The maximum contact principle competes with and undermines the best interests of the child and sidelines issues of family violence, placing women and children at greater risk.[21] The friendly parent principle also works to silence women experiencing family violence, as they do not want to appear uncooperative to the courts. Both the maximum parenting time and friendly parent principles should be removed from the legislation and the proposed amendments.

The provision regarding day-to-day decisions is also problematic.[22] The language of 'exclusive authority' is not reflective of actual experiences of parenting and may result in unnecessary conflict. There should be a more fulsome discussion of parental responsibilities beyond day-to-day decisions, emphasizing significant decisions. The parental responsibilities provision in BC's *Family Law Act* is a useful guide for crafting a more comprehensive provision.[23]

It is important that the relocation notice provisions address the issue of family violence. While the proposed amendments do provide an exception to the notice provisions where there is a risk of family violence, this exception is obtained upon application to court.[24] In situations of severe family violence, it may not be possible to wait to obtain a court order prior to fleeing. Not complying with notice provisions is a factor which may negatively impact the parent later when the court is determining whether to authorize the relocation.[25] The relocation provisions should not be used against parents fleeing family violence. While the relocation notice provision in BC's *Family Law Act* still has an application requirement, the application may be made in the absence of any other

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[17] *Ibid.*, cl 12, s 16(4)(b).
[18] *Ibid.*, cl 12, ss 16(4), 16.2(1).
[19] Helen Rhoades & Susan B. Boyd, "Reforming Custody Laws: A Comparative Study" (2004) 18 *International Journal of Law, Policy and the Family* 119 at 124.
[20] Fiona Kelly, "Enforcing a Parent/Child Relationship at All Cost?: Supervised Access Orders in the Canadian Courts" (2011) 49 *Osgoode Hall LJ* 277 at 296-297.
[21] Jonathan Cohen & Nikki Gershbain, "For the Sake of the Fathers? Child Custody Reform and the Perils of Maximum Contact" (2001) 19 *CFLQ* 121 at 5, 27.
[22] Bill C-78, *supra* note 13, cl 12, s 16.2(3).
[23] *Family Law Act*, SBC 2011, c 25, s 41.
[24] Bill C-78, *supra* note 13, cl 12, s 16.9(3).
[25] *Ibid.,* cl 12, s 16.92(1)(d).

party.[26] A without notice application is a much preferable process for a parent fleeing family violence. If it is not feasible to provide an exception to these relocation notice provisions in family violence cases, there should at least be an allowance for without notice applications.

As explained in the Charter Statement which accompanies this bill, the proposed amendments to *FOAEAA* are aimed at "reducing poverty by ensuring that accurate financial information is available for the purpose of determining family support, and by promoting compliance with family support obligations."[27] The release of information under *FOAEAA* is a useful tool. However, this tool is only useful if litigants are aware of it and know how to make an application to court. Due to the high proportion of unrepresented litigants in family cases, judges should be able to order release of information under *FOAEAA* on their own motion.

IV. RECOMMENDATIONS

With the foregoing in mind, we make the following recommendations:

- Include definitions for 'contact' and 'parent', clarify when parent or spouse is being referred to, and define guardianship;
- Ensure that the definition of family violence is broad, with a non-exhaustive list;
- Provide adequate safeguards for family violence in family dispute resolution processes, including mandatory screening and training for all professionals involved;
- Ensure past conduct , including pattern of coercive and controlling behaviour are considered when assessing family violence;
- Remove the provisions related to maximum parenting time and friendly parent principles;
- Replace the day-to-day decisions provision with a more fulsome explanation of parental responsibilities, emphasizing the sharing of only significant decisions;
- Provide an exception to the relocation notice provisions in family violence cases, rather than requiring an application to court, or allow a without notice application; and
- Empower judges to order release of financial information under *FOAEAA* on their own motion.

[26] *Family Law Act*, *supra* note 23, s 66(3).
[27] "Charter Statement", *supra* note 1.