

## INTERPRETING THE NEW *DIVORCE ACT*, RULES OF STATUTORY INTERPRETATION & SENATE OBSERVATIONS

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### Introduction

Canada's federal *Divorce Act* will soon change in significant ways.<sup>2</sup> For example:

- References to “custody” and “access” orders will be removed and replaced by “parenting orders”. Parenting orders will allocate parenting time and decision-making responsibilities
- A definition of “family violence” will be added: s. 2(1)
- Courts will be required to give primary consideration to the child’s “physical, emotional and psychological safety, security and well-being” when determining the best interests of the child: s. 16(2)
- A detailed, albeit non-exhaustive, list of factors that must be considered when determining a child’s best interests will be introduced: s. 16(3)
- Family violence will become a mandatory consideration when determining the best interests of the child: ss.16(3)(j) and 16(4).

Other positive changes include: inclusion of the terms “coercive and controlling” in the definition of family violence; retention of the best interests of the child as the only consideration when making parenting and non-spousal contact orders; the duty to consider the child’s views and preferences when determining the best interests of the child; a new legislated duty requiring persons allocated parenting time or decision making responsibility to act in accordance with the best interests of the child (s. 7.1); a new obligation on the part of courts, pursuant to s. 7.8(2), to consider any civil protection, child protection and criminal orders and other proceedings pending or affecting a party; and new provisions governing changes in residence or relocation enabling waiver or modification of notice provisions when there is a risk of family violence (ss. 16.8(3)(4) and 16.9(3)(4)).

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2 [\*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\*](#), SC 2019, c 16 (Royal Assent June 21, 2019), formerly referred to as Bill C-78, are to come into force on a day to be fixed by order of the Governor in Council. The Department of Justice website indicates the date to be July 1, 2020.

Nonetheless during the House of Commons and Senate proceedings many witnesses proposed changes to enhance the clarity of some of the forthcoming provisions, particularly in connection with children, gender and family violence. In response, the Senate Standing Senate Committee on Legal and Constitutional Affairs (Senate Committee) commented that while, as a result of the imminent dissolution of Parliament, the Senate was faced with “insufficient time to make the amendments to the Bill that would clarify its interpretation”,<sup>3</sup> it could publish observations that could be referenced when interpreting the new provisions.<sup>4</sup> Subsequently, in [Observations to the thirty-fourth report of the Standing Senate Committee on Legal and Constitutional Affairs](#) (hereafter referred to as *Observations*) the Committee documented additional information from the Minister of Justice and commented on statutory interpretation.

We have written this brief in order to highlight the value of well known principles of statutory interpretation, including taking into account Parliamentary intentions and Senate [Observations](#) when interpreting forthcoming changes to the *Divorce Act*.

## Rules of Statutory Interpretation

We begin with an abbreviated discussion of well-known rules of statutory interpretation:

- **The words of an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.**<sup>5</sup>
- **Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.**
- **In the case of federal legislation, the modern approach to statutory interpretation is confirmed by section 12 of the *Interpretation Act*, RSC 1985, c I-21.**

For example, at paragraph 20 of *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 29 (CanLII), [2003] 1 SCR 476, Gonthier J. stated on behalf of the majority of the Supreme Court of Canada:

*The starting point for statutory interpretation in Canada is E.A. Driedger’s definitive formulation in his Construction of Statutes (2<sup>nd</sup> ed. 1983), at p. 87:*

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3 Standing Senate Committee on Legal and Constitutional Affairs (2019) [Observations to the thirty-fourth report of the Standing Senate Committee on Legal and Constitutional Affairs](#) (Bill C-78) page 2.

4 Oral communication, Senate Law and Constitutional Affairs Committee to Linda C Neilson in Ottawa via video link with Fredericton, New Brunswick, on June 5, 2019, during Senate Committee hearings on Bill C-78.

5 E.A. Driedger, *Construction of Statutes* (2<sup>nd</sup> ed. 1983), at p. 87; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 29 (CanLII), [2003] 1 SCR 476, at para. 20; *Rizo & Rizo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27.

*Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.*

*In the case of federal legislation such as the Act in Question, this modern approach to statutory interpretation is confirmed by s. 12 of the Interpretation Act, RSC 1985, c. I-21, which provides that every enactment “is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects” (see *Bell Express Vu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, per Iacobucci J.).*

- **It is a presumption of statutory interpretation that provisions of a statute are meant to work together, as parts of a functioning whole and forming an internally consistent framework. Each provision should therefore be considered in relation to other provisions, as parts of a whole.<sup>6</sup>**
- **The legislature does not intend to produce absurd consequences. An interpretation can be considered absurd if it is incompatible with other provisions or with the object of the legislative enactment.**

For example, Supreme Court of Canada Justice Iacobucci, as he then was, wrote on behalf of the Court at paragraph 27 of *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27:

*It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, supra, an interpretation can be considered absurd if it is .... incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80).*

And, on behalf of the Supreme Court of Canada, Gascon and Côté JJ. held at paragraph 28 of *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19 (CanLII), [2016] 1 SCR 306:

*There is a presumption of statutory interpretation that provisions of a statute are meant to work together “as parts of a functioning whole” (Sullivan at p. 337) and form an internally consistent framework. In other words, “the whole gives meaning to its parts” and “each provision should be considered in relation to other provisions, as parts of a whole” (P.A. Côté in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4<sup>th</sup> ed. 2011), at p.326).*

Forthcoming s.16(2) of the *Divorce Act* states:

*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.*

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<sup>6</sup> *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19 (CanLII), [2016] 1 SCR 306, at para. 28, Gascon and Côté JJ. on behalf of the Court.

New subsection (3) of section 16 offers a non-exhaustive list of factors to be considered when assessing the best interests of the child, among them, pursuant to s. 16(3)(j), family violence. The rules of statutory interpretation and s. 12 of the *Interpretation Act* outlined earlier, tell us that the best interest of the child factors set out in forthcoming s. 16(3) of the *Divorce Act* are to be interpreted in accordance with remedial intentions and in a manner that is consistent and harmonious with the other best interest of the child sections, particularly s. 16(1) and s. 16(2). Section 16(1) states that courts are to take into consideration “only the best interests of the child of the marriage in making a parenting order or a contact order”. Section 16(2) directs courts to “give primary consideration to the child’s physical, emotional and psychological safety, security and well-being” as well as with the scheme of the *Act* as a whole. In other words, none of the best interests of the child factors listed in s. 16(3) are to be considered or interpreted in isolation.

### **Interpreting the New Family Violence Provisions: Gender**

One of the important remedial changes introduced by the new legislation is that family violence becomes a mandatory best interests of the child consideration. Section 2(1) of the *Divorce Act* will define family violence as:

*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 or coercive and controlling behavior 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*

*(a) physical abuse, including forced confinement but excluding the use of reasonable force to protect themselves or another person;*

*(b) sexual abuse;*

*(c) threats to kill or cause bodily harm to any person;*

*(d) harassment, including stalking;*

*(e) the failure to provide necessities of life;*

*(f) psychological abuse;*

*(g) financial abuse;*

*(h) threats to kill or harm an animal or damage property; and*

*(i) the killing or harming of an animal or the damaging of property*

Presumably, Parliament intended the definition to be interpreted in a manner consistent with the realities of children's lives. Those realities include the well documented social reality that family violence is a gendered phenomenon, primarily affecting women and children.

In connection specifically with gender and interpreting the *Divorce Act*, Justice L'Heureux-Dubé asserted on behalf of herself, La Forest, Gonthier, Corey and Iacobucci JJ in *Moge v Moge*, 1992 CanLII 25 (SCC), [1992] 3 SCR 813 that the *Divorce Act* must be interpreted in the social context of women and children being disproportionately disadvantaged. She stated:

*It is also axiomatic of statutory interpretation that Parliament must be taken as being aware of the social and historic context in which it makes its intentions known: P.A. Côté, The Interpretation of Legislation in Canada (2<sup>nd</sup> ed. 1992) at p. 346.*

Several years later Justice L'Heureux-Dubé stated in *Willick v Willick*, 1994 CanLII 28 (SCC), [1994] 3 SCR 670 on behalf of herself, Gonthier and McLachlin JJ.:

*The task of statutory interpretation requires that courts discover the intention of Parliament. In Moge v Moge, 1992 CanLII 25 (SCC), [1992] 3 SCR 813, this court underlined the fact that an integral aspect of discovering Parliamentary intention is the precept that Parliament must be taken to be aware of the social and historical context in which it makes its intention known (p. 857). Interpretation and application of family law, especially the law of support, in a manner consistent with Parliamentary intention therefore implicitly require sensitivity to the social realities experienced by those most affected: Moge, supra, at p. 874.*

In the same way, we can assume that Parliament intended the new family violence provisions in the *Divorce Act* to be interpreted with sensitivity to the well documented social reality that women and children are those most harmed and affected by family violence. The Standing Senate Committee on Legal and Constitutional Affairs made clear in its [Observations](#) the disproportionate impact of family violence on women and children:

*The Committee is cognisant of the gendered nature of family violence and notes that the majority of victims of spousal violence – both during the marriage and at the point of separation – are women. (p. 2)*

In support of the assertion, the Committee documented, at pages 2 to 3, the Minister of Justice's acknowledgement to the Senate Committee that the Department of Justice's Gender-Based Analysis associated with developing the *Act* had found that "in comparison to men, women are more likely to suffer from more serious types of violence and more serious injuries" and that "women are substantially more likely to report fearing for their lives as a result of post-separation violence and are more likely to be killed by a former partner." In connection with interpreting the definition of family violence in social context, the Committee observed:

*The committee observes that the gender-neutral drafting used in Bill C-78 does not obviate the need to take into account the gendered nature of family violence. The committee further observes that the bill requires family law practitioners and those*

*applying the Divorce Act to take into consideration the potential consequences of awarding parental responsibilities to a perpetrator of family violence. (p. 3)*

Accordingly, interpreting the definition of family violence in s. 2(1) and the factors relating to family violence when deciding child best interests set out in ss. 16(3)(j) and 16(4) requires sensitivity to gender and recognition of the unequal impact of family violence on women and children.

The Committee also noted concerns that the French and English definitions of family violence in the Act might not have the same meaning (pp. 3-4). As a result, the Committee approached the Minister of Justice for clarification. In response the Minister clarified that the reference to “pattern” in English or “aspect cumulatif” in French applies only to “coercive and controlling.” The Minister made clear to the Senate Committee that Parliament did not intend to require a pattern of conduct in order to make a finding of family violence:

*It is clear that a single act can constitute family violence if the conduct is violent or threatening or causes fear.*

### **Interpreting the new Family Violence Provisions: Child Abuse**

During the legislative process family violence experts also expressed disappointment that the Department of Justice had not taken the opportunity to clarify, in the definition of “family violence” at s. 2(1), that “family violence”, including family violence against a parent in a child’s home, is a form of child abuse.<sup>7</sup>

In response, the Standing Senate Committee took additional parliamentary steps to question the Minister in order to ascertain legislative intentions. The Committee clarified Parliamentary intentions in connection with family violence and child abuse as follows:

*The committee notes, as several witnesses have stated, that direct or indirect exposure to family violence is child abuse, causing emotional stress and developmental harm to the child. Spousal Violence is not only a matter between spouses; it is a form of family violence. This was acknowledged by the Minister of Justice in his letter to the chair in the following terms: “In the case of a child, any exposure to family violence is family violence in and of itself; that is exposure to family violence is a form of child abuse.” (p. 3)*

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7 For example: L. C. Neilson [\*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 other Acts.\*](#) Prepared for the SENATE OF CANADA. Background Reading for March 20, 2019 at page 2; LEAF (Women’s Legal Education and Action Fund 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*, prepared for the House of Commons Standing Committee on Justice and Human Rights, at page 2.

In other words, both the Minister of Justice and the Standing Senate Committee on Legal and Constitutional Affairs make clear the Parliamentary intention to recognize family violence, including direct or indirect exposure of a child to violence against a parent, as a form of child abuse when interpreting and applying the *Act*.

## Applying Principles of Statutory Interpretation to Specific Sections

### Section 16(3)(c)

Section 16(3) identifies a non-exclusive, albeit mandatory, list of factors that courts are to consider when determining the best interests of a child. Among them is s. 16(3)(c) which lists as a best interest of the child factor:

*each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse.*

The Senate Committee documents in its [Observations](#) expert witness concerns that subsection 16(3)(c) could be misinterpreted and applied in a manner not consistent with the best interests of the child. Witnesses and briefs<sup>8</sup> pointed to research documenting how similar reasoning has led to children and protective parents being penalized in family law cases when children fear a parent and the protective parent has attempted to protect the children from that parent's harmful parenting practices.<sup>9</sup> The concern is not merely speculative. Family lawyers, mediators, evaluators and judges who do not understand that family violence is a child abuse issue,<sup>10</sup> are

8 E.g. Neilson note 7; [Brief by LEAF \(Women's Legal Education and Action Fund\)](#) to the Standing Senate Committee on Legal and Constitutional Affairs June 5, 2019 at pages 5 to 6.

9 The provision replicates reasoning that is causing problems for women and children, as documented in Linda C Neilson (2018) [Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?](#) (Vancouver: The FREDA Centre for Research on Violence Against Women and Children, 2018). Refer as well to the special issue of the *Journal of Social Welfare and Family Law* (2020) Vol. 42 <https://www.tandfonline.com/toc/rjsf20/42/1?nav=toCList>.

10 Researchers report that many custody evaluators do not have sufficient understanding of domestic violence to assess child best interests in a domestic violence context: Hon. Donna Martinson and Professor Emerita Margaret Jackson (2019) [Family Violence and Parenting Assessments: Law, Skills and Social Context](#) (Vancouver: FREDA Centre); Neilson (2018) note 9; Daniel Saunders et al. (2012) [Child Custody Evaluators' Beliefs About Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, Domestic Violence Knowledge and Custody-Visitation Recommendations](#); Daniel Saunders (2017) [State Laws Related to Family Judge's and Custody Evaluators' Recommendations in Cases of Intimate Partner Violence: Final Summary Overview](#); Michael Davis et al. (2011) [Custody Evaluations When There are Allegations of Domestic Violence: Practices, Beliefs, and Recommendations of Professional Evaluators](#); Jason Hans et al. (2014) "The Effects of Domestic Violence Allegations on Custody Evaluators' Recommendations" in *Journal of Family Psychology*, 28(6), 957-966; Jennifer Hardesty et al. *Divorcing Mothers' Demeanour in Custody Evaluations* (National Council of Juvenile and Family Court Judges); Samantha Jeffries, Rachael Field, Helena Menih, Zoe Rathus (2016) "[Good Evidence, Safe Outcomes in Parenting Matters Involving Domestic Violence? Understanding Family Report Writing Practice from the Perspective of Professional Working in the Family Law System](#)" [2016] *UNSW LawJI* 50, (2016) 39(4) *UNSW Law Journal* 1355.

currently failing to investigate concerns about parenting and child safety in favour of punishing parents – primarily mothers (and children) – when children resist contact with the other parent.<sup>11</sup> Yet, presumably, child well being and safety are the very social and family law conditions that the new family violence provisions are designed to promote.

In response to concerns about s. 16(3)(c) the Senate Committee stated in its [Observations](#) that there are many reasons why a post-divorce relationship with a parent might not be in a child’s best interests. The Committee also highlighted concerns that the section could discourage the presentation of evidence of family violence and of parenting practices harmful to a child:

*The Committee heard concerns that subsection 16(3)(c), which references each spouse’s “willingness” to support the child’s relationship with the other spouse, could be interpreted as placing more value on assertions of parental willingness than on whether the child in fact has a positive relationship with a parent and on the views of the child. There are many reasons why having a post-divorce relationship with a child may not be in the best interests of the child. Witnesses also expressed concern that the provision may have a silencing effect, because women and children who allege parental behaviour that is not beneficial to the child, are, in turn, met with allegations that mothers are poisoning children against fathers, or not facilitating contact with fathers.*

...

*While the committee appreciates that, when read in its entirety, section 16 establishes that the court is to take into consideration only the best interests of the child in making a parenting order or a contact order, the committee is nonetheless sensitive to witnesses’ concerns.*

The rules of statutory interpretation outlined earlier serve as a reminder that s. 16(3)(c) is to be interpreted in a manner that is consistent with other best interests of the child provisions, including, for example, new s. 16(3)(d) “the history of care of the child” and s. 16(3)(e) “the child’s view and preferences, giving due weight to the child’s age and maturity.” Section 16(3)(e) represents a major step toward incorporating into Canadian federal law Article 12 (1) of the United Nations [Convention on the Rights of the Child](#) ratified by Canada on 13 December 1991. The importance to children of this provision is well supported by child centered empirical research as well as by Canadian law.<sup>12</sup> Considering the views of children is especially important

11 Neilson, (2018) note 9; Lois Shereen Winstock (2014) [Safe Havens or Dangerous Waters?](#) PhD dissertation. Law, York University (York University); Isabelle Côté and Simon Lapierre (2019) [L’Aliénation Parentale](#); *La Pesse*, March 9, 2019 citing parental alienation research conducted by University of Ottawa researcher, Simon Lapierre.

12 Honourable Donna J. Martinson and Caterina E. Tempesta, *Young People as Humans in Family Court Processes, A Child Rights Approach to Legal Representation*, (2018) 31 *Can. J. Fam. L.* 151 to 168 for a nuanced discussion of pertinent child rights issues; Justice Canada *Article 12 of the Convention on the Rights of the Child and Children’s Participatory Rights in Canada*. See also Canadian Bar Association Child and Youth Law Section, *Alternative Report to the UN Committee on the Rights of the Child*, February 2020, especially pages 17-19 on family law.

in family violence cases, given that parents are often unaware of the full extent and impact of family violence on children<sup>13</sup> and in light of new sections 16(4) and 16(3)(j), discussed below, which require courts to consider both the extent and impact of family violence. In addition, as previously mentioned, s. 16(3)(c) “willingness to support the development and maintenance of the child’s relationship with the other spouse” is to be read in harmony with other provisions, including the duty to consider, in family violence cases, pursuant to s. 16(3)(j)(ii), “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.”

This blended harmonious approach to interpretation is corroborated by the Department of Justice in its explanation of how forthcoming subsection 16(3)(c) should be interpreted and applied:

*In some situations, it may be inappropriate for one parent to support a child’s relationship with the other parent, such as in situations of family violence where there are safety concerns. In cases involving family violence, courts must consider the impact of the violence on all of the best interests of the child factors set out in section 16, including on the willingness of a spouse to support the child’s relationship with the other spouse. In every case, the court must give primary consideration to the child’s safety, security and well-being.*<sup>14</sup>

In other words, it was not the intention of Parliament for section 16(3)(c) to be considered or interpreted in isolation. Nor was it the intention of Parliament for the provision to be held against a parent acting protectively to shield a child from a harmful relationship with another spouse. Instead, and in accordance with rules of statutory interpretation, the provision is to be interpreted in a manner consistent with the other best interest of the child provisions, including the new family violence provisions and s. 16(2).

## **Section 16(6)**

Similar considerations apply with respect to s. 16(6), which was previously misleadingly entitled “Maximum Parenting Time” in the marginal note. The wording of the provision makes clear that courts are to allocate only as much parenting time with each spouse as “is consistent with the best interests of the child” in accordance with other best interests of the child provisions in the *Act*, including those associated with family violence. The section does not create a presumption in favour of shared or joint parenting time. Rather it is clear that the allocation of parenting time must be based on the best interests of each child, on a case by case basis. The Senate Committee on Legal and Constitutional Affairs clarifies this issue in its [Observations](#):

*Several witnesses raised concerns with respect to the marginal note for proposed subsection 16(6) of the Divorce Act that refers to “Maximum parenting time.”*

<sup>13</sup> Peter Jaffe et al. (2014) [Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce](#) page 18.

<sup>14</sup> [The Divorce Act Changes Explained](#) (accessed February 7, 2020)

*3. The committee takes note of the Minister of Justice’s commitment, in his letter to the chair, to make an administrative change to this marginal note to remove the words “Maximum parenting time” and instead use wording along the lines of “Parenting time consistent with the best interests of the child”. The committee believes this note would more closely reflect the language of the subsection and the guiding principle of section 16.*

*Update:* In keeping with the legislative scheme and legislative intentions, the new marginal note for s. 16(6) is being changed to “Parenting time consistent with best interests of the child/Temps parental compatible avec l’intérêt de l’enfant”. This language will be reflected in the version of the *Divorce Act* that is proclaimed into force.<sup>15</sup> As the Department of Justice makes clear:

*the optimal amount of time depends on an individual child’s circumstances and must be based on what is in the child’s best interests. Therefore, courts must take into account all factors relating to the best interests of the child in determining what division of time would be best.... As part of the best interests of the child analysis, the allocation of parenting time is subject to the overarching primary consideration of the child’s safety, security and well-being.*<sup>16</sup>

### **Sections 16(3)(j) and 16(4)**

Forthcoming s. 16(3)(j) will require courts to consider any family violence when deciding the best interests of the child. Section 16(3)(j) states that, in determining the best interests of the child, courts are to consider:

*(j) family violence and its impact on, among other things*

*(i) the ability and willingness of each person in respect of whom the order would apply to the care for and meet the needs of the child, and*

*(ii) 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;*

It is important to note the words “among other things” in s. 16(3)(j). The wording leaves open consideration of other factors affecting the impact of family violence, such as the gendered nature of family violence and the acknowledgement that family violence is a form of child abuse, as discussed earlier.

Section 16(4) sets out the family violence factors that must be considered in connection with 16(3)(j):

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<sup>15</sup> Justice Canada “Amendments Not in Force” document, 2019, c. 16, s. 12 accessed March 8, 2020. See also <https://www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/div72.html>, footnote 1: “The marginal note will be modified to use wording along the lines of Parenting time consistent with the best interests of the child’ which more closely reflects the legislative intent behind this provision.”.

<sup>16</sup> <https://www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/div72>.

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

*(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 in relation to a family member;*

*(c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;*

*(d) the physical, emotional and psychological harm or risk of harm to the child;*

*(e) any compromise to the safety of the child or other family member;*

*(f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;*

*(g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and*

*(h) any other relevant factor.*

Section 16(4) is of central important because s. 16(3)(j)(i) lacks clarity. Throughout the legislative process, numerous family violence experts commented on problems with the wording of s. 16(3)(j)(i). Experts explained that assertions of willingness to parent are characteristic of perpetrators of family violence because control of children during parenting time and control of parenting responsibilities enable perpetrators to continue coercive control over the whole family through the children. LEAF (Women’s Legal Education and Action Fund) summarized the concerns of experts:

*This wording incorrectly frames the issue. The central concern should be what the patterns of behavior tell us about the perpetrator’s capacity to parent. Patterns of behavior associated with perpetrating family violence are, unfortunately, commonly replicated in parenting practices.<sup>17</sup>*

Nonetheless, consideration of Parliamentary intentions and the remedial objectives of the new provisions make it apparent that the wording of s.16(3)(c) “*the ability and willingness of each person in respect of whom the order would apply to the care for and meet the needs of the child*” is intended to require assessment of *both* ability and willingness to care for and meet the needs of

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<sup>17</sup> [Brief by LEAF \(Women’s Legal Education and Action Fund\)](#) to the Standing Senate Committee on Legal and Constitutional Affairs June 5, 2019

the child. In other words, willingness to parent is not to be considered independently of a positive assessment of ability.

This interpretation is endorsed by the Department of Justice in “[The Divorce Act Changes Explained](#).”

*To assess the ability and willingness of a perpetrator of family violence to care for and meet the needs of the child, the court must consider what the history of family violence demonstrates about that person’s ability to parent in the child’s best interests. For example, the court would need to consider whether the person*

- *might be violent with the child*
- *might use their relationship with the child to be violent with or control another person*
- *has caused the child to be fearful of them*
- *can be an appropriate role model for, and provide guidance to, the child*

*In cases of family violence, particularly spousal violence, it is crucial that the court consider whether a co-operative parenting arrangement is appropriate. A victim of family violence might be unable to co-parent due to the trauma they have experienced or ongoing fear of the perpetrator. In addition, co-operative arrangements may lead to opportunities for further family violence.*

## **Additional Senate Committee Observations**

### **Family Dispute Resolution**

Forthcoming section 7.3 states:

*7.3 To the extent that it is appropriate to do so, the parties to a proceeding shall try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process.*

Moreover section 7.7 (2) imposes a duty on legal advisers:

*(a) to encourage the person to attempt to resolve the matters that may be the subject of an order under this Act 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;*

During the legislative process concerns were raised that the terms “appropriate to do so” and “clearly not appropriate” offer insufficient guidance in connection with professional obligations to encourage dispute resolution and in connection with party obligations to attempt to resolve matters using dispute resolution processes, particularly in family violence cases. Concerns were raised that section 7.7(2) might interfere with the professional obligations of lawyers to act in their clients’ best interests. Related concerns included the potential for reduced legal representation and delayed access to remedies in the legal system, particularly in connection with

parenting obligations to children. The other problem is that dispute resolution processes are often inappropriate in family violence cases. These processes require participants to be able to present interests and negotiate effectively; the processes are known to disadvantage women and children in family violence cases in the absence of specialized screening; expert assessments of harm from family violence and the capacity to participate effectively; specialized understandings of family violence and the effects on women and children; and specialized processes to ensure due process and effective participation.<sup>18</sup> In response to such concerns, the Senate Committee observed:

*4. The committee underscores that, as stated in the 1998 report of the Special Joint Committee on Child Custody and Access, where there has been violence by one parent toward the other or toward the children, alternative forms of dispute resolution should only be used to develop parenting plans if and when the safety of the person who has been the victim of violence is no longer threatened and the risk of violence has passed.*

In addition, keeping in mind the principle that provisions of the *Divorce Act* are to be interpreted in harmony with other provisions, ss. 7.3 and 7.7(2) should be interpreted in a manner consistent with the obligation in s. 16(3)(j)(ii) to consider, in family violence cases, the appropriateness of requiring a person subjected to family violence to cooperate on issues affecting the child.

## **Screening and Education**

The Committee emphasized in its [Observations](#) that “an awareness campaign aimed at parents and all actors involved in family law (including family law services, courts and legal advisors) is needed.” The Committee also commented on the importance of screening for family violence in all family law and child protection cases and reported on the Minister of Justice’s response to Senate inquiries on this issue:

*In a letter to the chair, the Minister underscored the importance of training being specifically for family law and child protection practitioners to screen for family violence in their work. He noted that the approach to be taken in this regard aligned with the recommendations made by Luke’s Place.*

The Committee concluded:

*6. The committee invites the federal government to collaborate with provincial and territorial governments to ensure awareness of the main changes introduced by Bill C-78, including the proper use of family violence screening tools for legal practitioners that the Department of Justice is currently developing in collaboration with key partners such as Luke’s place.*

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<sup>18</sup> Wanda Wiegers, Jennifer Koshan, Janet Mosher (2017) [Early Dispute Resolution in Family Law Disputes](#); Jennifer Koshan, Janet Mosher and Wanda Wiegers (2019) [Mandatory Dispute Resolution Coming back to Alberta, But What About Domestic Violence Cases?](#); Linda C Neilson (2014) “At Cliff’s Edge: Judicial Dispute Resolution in Domestic Violence Cases” *Family Court Review* 52(3).

7. *Recognizing the importance of dealing with family violence as a crucial factor in allocating parenting time and parental responsibilities and in making a contact order, the committee respectfully invites the Canadian Judicial Council to incorporate issues relating to intimate partner violence, gender-based violence, and the unique circumstances of Indigenous women in the design of judicial education seminars on family law.*

### **The need for amendment and continuing expert review**

As a result of concerns raised by expert witnesses throughout the Parliamentary process, the Senate Committee concluded:

8. *The committee invites the Minister of Justice to take measures to ensure the next review of the Divorce Act occurs within five years of the adoption of Bill C-78.*

9. *The committee proposes that an independent body of experts be established by the Government of Canada to assist with this proposed legislative review and to provide recommendations for the modernization and reform of the Divorce Act.*

10. *The Committee encourages the Minister of Justice to:*

- *immediately begin monitoring the application of section 16 to ensure that it is implemented as intended; and*
- *consider - introducing these particular amendments quickly to the law to ensure greater clarity, rather than waiting for the proposed review period of five years.*

### **Concluding Comments**

Canada, and specifically abused women, men and children, owe a debt of gratitude to the Canadian Senate, and particularly to the Standing Senate Committee on Legal and Constitutional Affairs, for listening carefully and knowledgeably to the concerns of experts and for taking additional steps to offer “a sober second thought”<sup>19</sup> in connection with the implementation and interpretation of forthcoming changes to *Divorce Act*. Although concerns about the gender imbalance remain,<sup>20</sup> the Senate’s Observations, along with Supreme Court of Canada rulings on

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19 Government of Canada “[About the Senate](#)” accessed February 6, 2020.

20 Although family violence is gendered (primarily directed against women), the new provisions in the *Divorce Act* do little *per se* to enhance the safety of women and their relationships with children. The *Act* continues to place the onus on abused parents to prove child harm rather than on abusive parents to prove child safety. In addition to the burden of proving family violence, the onus throughout this Bill – to prove the negative effects of family violence on the child, to prove negative parenting patterns known to be associated with engaging in family violence, to prove the need for protective measures, to prove an exception to notice in relocation cases, to prove an exception to the other parent's entitlement to demand information about the child, to prove an exception to the other parent's right to make day to day decisions during parenting time, to prove an exception to the appropriateness of dispute resolution – all fall on the parent subjected to family violence (usually the mother). Instead the onus should fall on the person who engaged in family violence to establish that a proposed parenting arrangement ensures the child’s physical, emotional and psychological safety, security and

statutory interpretation, should go a long way toward ensuring that the new provisions will be interpreted in accordance with Parliamentary intentions and the social realities of Canadian family life, especially in family violence cases.