

**Recommendations on Regulation, Policy, and Training  
Developed Pursuant to the British Columbia *Family Law Act***

Oct 2012

On November 24, 2011, the British Columbia Legislature passed new family law legislation that will come into effect as the *Family Law Act* on March 18, 2013. During this period, the Ministry of Justice will develop regulations, and new policy and training for family justice professionals will be developed to implement the new family law system in British Columbia.

The following is a set of joint recommendations from the organizations and individuals signed below for government ministries and professional bodies who are creating regulation, policy, or professional training pursuant to the *Family Law Act*.

The organizations and individuals who developed these recommendations are engaged in legal practice, research, education, or advocacy in family law, as well as front-line work with women escaping violence. We have expertise in issues of women's equality, particularly issues of violence against women. We met to identify areas in the legislative framework still to be developed that would benefit from a women's equality perspective.

Our goal when developing these recommendations was to ensure that the application of the *Family Law Act* through regulations, policies, and professional training requirements is informed by the lived conditions of women who have experienced violence. We make these recommendations in the hope of furthering women's substantive equality, with our primary focus on ensuring women's safety during and after separation from a violent man.

We hope that relevant government ministries and professional bodies will respond to these recommendations, and will remain open to receiving future recommendations from women's groups and anti-violence organizations.

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### Recommendations Pertaining to Protection Orders

It is our experience that police officers and Crown prosecutors often do not treat the breach of “no-contact” or “no-go” orders as a condition of release following arrest, as a part of sentencing, or in civil restraining orders ordered under the *Family Relations Act* as serious. When women call the police for help when men breach their orders, police officers often tell them that there’s nothing they can do or that the breach is a civil matter with no criminal repercussions. It falls on women and front-line workers to advocate to criminal justice system personnel to enforce these orders.

It is also our experience that the period of time during and after separation is a time of increased danger for women. Research on post-separation spousal violence and spousal homicide supports this.<sup>1</sup> The failure of the criminal justice system to treat breach of no-contact or restraining orders seriously reinforces men’s belief that they can act with impunity, and is associated with increased risk for violence.<sup>2</sup>

We are pleased to see that the legislative intention behind the new protection order is to address these systemic problems and ensure appropriate enforcement.<sup>3</sup> For this intention to be properly implemented, we recommend that adequate resources be allocated to train all municipal police officers, RCMP officers, and Crown prosecutors on the introduction of protection orders. This training should include information on the vital link between enforcing protection orders and ensuring women and children’s safety and the range of possible responses to a contravention of the order. Criminal justice system personnel responding to a breach should strongly consider arrest and the recommendation and laying of charges for a violation of section 127 of the *Criminal Code*.

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<sup>1</sup> Statistics Canada, Juristat: Spousal Violence After Marital Separation, by T Hatton, Vol 21 No 7 (Ottawa: StatCan 2001); Statistics Canada, Family Violence in Canada: A Statistical Profile, 2006 (Ottawa: StatCan 2006).

<sup>2</sup> Jacquelyn C Campbell, Daniel W Webster & Nancy Glass, “The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide” (2009) 24:4 *Journal of Interpersonal Violence* 653.

<sup>3</sup> As indicated by the Ministry of Justice document, “The Family Law Act Explained” in “Section 188 Enforcing orders respecting protection”, last updated Aug 8, 2012.

## Recommendations Pertaining to the Interpretation of “Family Violence” and Training of Family Justice Professionals

While the definition of family violence in section 1 of the *Family Law Act* (FLA) is gender neutral, violence committed in the family is a gendered phenomenon. Violence is overwhelmingly committed by men against women and children, which is both a result of, and a reinforcer of, women’s inequality.

Front-line anti-violence workers have recently seen an increasing trend in the criminal justice system of arresting women or arresting both men and women in circumstances where men are clearly the primary aggressor and women responded in self-defence, if they responded at all.<sup>4</sup> We are concerned that this trend should not be replicated by the family justice system.

Further, it is our experience that when women reveal to justice system professionals that they or their children have endured violence, they are often met with skepticism, minimization, and outright disbelief.

While it appears that training in family violence will be required for some family law professionals,<sup>5</sup> the content of that training will be essential to ensuring that the legislative objectives are carried out. Given the context of the problems referred to above, we recommend that any regulation, policy, or training of family justice professionals, such as lawyers, mediators, arbitrators, parenting coordinators, and professionals engaged in assessing the views of children or evaluating parenting capacities,<sup>6</sup> include the following content:

- The interpretation of the definition of “family violence” must reflect the reality that violence is a gendered phenomenon, in which men are usually perpetrators of an ongoing series of violence and control.<sup>7</sup> Women’s attempts to defend themselves from, or cope with, ongoing abuse should not be characterized as family violence.<sup>8</sup>

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<sup>4</sup> A practice that contradicts the “Violence Against Women in Relationships Policy” of the Ministry of Public Safety and Solicitor General, Ministry of Attorney General and Ministry of Children and Family Development, Dec 2010.

<sup>5</sup> For instance, as indicated by the Law Society of British Columbia’s “Qualifications for Lawyers Acting As Arbitrators, Mediators, And/Or Parenting Coordinators In Family Law Matters” Sept 7, 2012. It is not clear what training on family violence will be required of family justice professionals who are not subject to the Law Society requirements, but training requirements for those professionals will be of equal importance.

<sup>6</sup> Pursuant to FLA, s. 211.

<sup>7</sup> We commend approaches to training such as that used by the Honourable Justice Donna Martinson in her Continuing Legal Education training, “Family Violence And The New B.C. *Family Law Act*: Implications for: Best Interests of Children; Professional Responsibility; and the Interpretation of the *Divorce Act*” Sept 2012, or as found in the Legal Services Society pamphlet, “Is your client safe?”, Feb 2012, that instruct professionals that violence in relationships is primarily committed by men against women, and that women endure more severe forms of violence than men.

<sup>8</sup> Subsection 184(2) of the FLA takes this approach by instructing a Court that mutual protection orders are not necessarily appropriate.

- While it is important to recognize the impact of men's violence against women on the children exposed to such violence, we would condemn any attempt to characterize a woman who has suffered abuse from her partner as being responsible for exposing her child to family violence. The only person responsible for exposing children to violence is the perpetrator of that violence.
- False allegations of abuse are extraordinarily rare; it is much more common for women to hide or minimize abuse they have suffered. The systemic bias against believing women's claims of violence must be corrected. The expectation that professionals screen for violence can only be effective if women know that they will be believed when they reveal violence.

Finally, as experts on violence against women, women's groups and front-line anti-violence organizations are well positioned to provide useful feedback on the training provided to dispute resolution professionals. We recommend that a copy of any such training program be made available on request to women's groups and front-line organizations, and the Ministry and other professional bodies should remain open to feedback from these groups.

## Recommendations Pertaining to Dispute Resolution

### *Screening*

The promotion of dispute resolution processes in the new family law system makes screening for violence critical. We see the duty legislated by section 8 of the FLA to screen for family violence as creating a serious obligation that requires a meaningful and careful inquiry, and we recommend that this be reflected in any regulation, policy, or training of family justice professionals.

Women's equality seeking organizations and front-line anti-violence organizations are experts on the various forms of control, intimidation, and harassment tactics used by abusive men. We recommend that any tools used for family justice professionals to screen for family violence be made available for review by women's groups and front-line organizations, and that the Ministry and other professional bodies remain open to receiving feedback on the screening tools to better enhance their efficacy.

### *When violence is discovered*

We are pleased to see that dispute resolution professionals have a legislated obligation to provide potential parties with other facilities or resources that may assist with resolving the dispute resolution.<sup>9</sup> We recommend that regulation, policy, or training instruct dispute resolution professionals that when a woman reveals that she or her children have experienced violence she should be given referrals to a front-line anti-violence organization, such as a rape crisis line, women's support services, or a transition house, and that any movement toward dispute resolution should stop until women have had an opportunity to avail herself of these services.

It is our experience that dispute resolution between a woman and a man who has been violent to her is unlikely to result in a fair and voluntary agreement and that it has the potential to increase the amount of danger women are in. We would condemn any attempt to make dispute resolution mandatory, or a preliminary requirement to access justice through the courts. Women should always maintain the right to refuse to participate in dispute resolution.

If a woman chooses to participate in dispute resolution with a man who has been violent to her, we recommend that it should not take place with them in the same room, but should take place with shuttle mediation. Separation is a dangerous time for women leaving a violent man and attending meetings together creates opportunity for more threats, intimidation, harassment, and violence on the way to and from the meeting. It also makes it much more likely that a woman will enter an unfair agreement.<sup>10</sup>

In addition, we recommend that any regulation, policy, or training should ensure that women have the right to have a support person of her choosing present with her during the mediation, such as her lawyer, an advocate, or a trusted friend or family member.

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<sup>9</sup> FLA, s. 8(2)(b).

<sup>10</sup> For instance, a man may engage in subtle body language that carry threats in the context of their relationship that dispute resolution professionals may not be aware of.

### Recommendations Specific to Parenting Coordinators

Given that parents may now be ordered to attend a parenting coordinator contrary to their wishes, and that parenting coordinators will be able to make binding determinations on parents, determinations should be made with transparency and accountability, according to the principles of procedural fairness.

We therefore recommend that the policy, guidelines, or framework that guides parenting coordinators and the determinations they make should be made available to the public.

Furthermore, given that appeal of parenting coordinators' determinations to the courts will be costly and difficult to access for many women, we recommend that any regulations, policy, or training require parenting coordinators to write down their reasons for determination to facilitate appeal.

### Recommendations Pertaining to Funding

On average, women occupy a lower socio-economic status than men,<sup>11</sup> and are more likely than men to suffer a loss in this status following a relationship breakdown.<sup>12</sup> This may be particularly true for women who have been abused.<sup>13</sup> Women's financial status has direct implications for their ability to access just outcomes in family law disputes.

We therefore recommend that any regulation, policy, or training should direct courts not to order parties use professional services, such as parenting coordination, mediation, counselling, or assessments pursuant to section 211, when the parties do not have adequate funds to pay for these services or when paying for them will create financial hardship. In addition, courts should be attentive to the differences in financial status between women and men and when ordering parties use professional services, should assign costs according to that status.

Finally, we would like to conclude by noting that although the FLA has introduced new mechanisms intended to improve the conditions that women face, these improvement will remain merely promises without adequate funding for legal aid. Women will not be able to access justice while funding for legal aid for family law matters remains as low as it is.<sup>14</sup> We recommend that the Ministry provide adequate legal aid funding for family law legal services through lawyers, legal clinics, community-based partnerships, or other appropriate initiatives.

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<sup>11</sup> For instance, according to Statistics Canada, *Women in Canada, Economic Well-Being* by Cara Williams (Ottawa: StatCan 2010), Canadian women earned an average total income of \$30,100, while Canadian men earned an average total income of \$47,000.

<sup>12</sup> For instance, according to Statistics Canada, *The Daily*, (Ottawa: StatCan, 9 April 1997), one year after separation women experienced a 23% loss in family income, while men experienced a 10% gain in family income.

<sup>13</sup> For instance, if their partner has been controlling the family finances or did not allow women to work outside the family home.

<sup>14</sup> As documented by the Canadian Centre for Policy Alternatives and West Coast Women's Legal Education and Action Fund in "Legal Aid Denied", Sep 2004, while men have always outnumbered women in receiving legal aid, the cuts to legal aid announced in 2002 resulted in women comprising only 30% of those who receive legal aid in the following years.