



OVERVIEW

Close to a quarter of Canada's children and youth are affected by divorce. Bill C-78 will amend the *Divorce Act*, the *Family Orders and Agreements Enforcement Assistance Act*, and the *Garnishment, Attachment, and Pension Diversion Act*. It proposes to increase the ability of families, courts and others involved in making decisions about children in the context of family separation and divorce to be guided by children's best interests. By establishing the best interests of the child as the common "north star", better defining the criteria to understand the best interests of the child, creating systematic opportunity for children's views to be considered, expanding protections for children and supporting parents to fulfill their roles and duties, the changes will better support the rights and well-being of children and families in the context of divorce. UNICEF Canada welcomes these measures. They bring the legislation into greater alignment with Canada's human rights obligations and with the intention of the *Divorce Act* as stated in its preamble:

Recalling that, in accordance with Articles 3 and 27 of the United Nations Convention on the Rights of the Child of 20 November 1989,

- in all actions concerning children the best interests of the child shall be a primary consideration,
- every child has a right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development,
- the parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development, and
- States Parties should take all appropriate measures, including the conclusion of international agreements, to secure the recovery of maintenance for the child from the parent(s) or other responsible persons, in particular where such persons live in a State different from that of the child

UNICEF Canada outlines how the bill supports children's rights, and also has suggestions we hope the Minister will further consider to promote respect for children's rights and help secure good outcomes in the context of separation and divorce.

ABOUT UNICEF CANADA

UNICEF is mandated by the United Nations General Assembly to advocate for the protection of children's rights, to help meet their basic needs and to expand their opportunities to reach their full potential. UNICEF is guided by the United Nations Convention on the Rights of the Child and strives to establish children's rights as enduring ethical principles and international standards of behaviour towards children. UNICEF is active in 190 countries and we have saved more children's lives than any other humanitarian organization. UNICEF Canada is a Canadian nongovernmental organization (NGO) established 60 years ago and is the representative of UNICEF in Canada. We work tirelessly as part of the global UNICEF family to do whatever it takes to ensure that children and young people survive and thrive, and have every opportunity to reach their full potential. Our global reach, unparalleled influence with policymakers, and

diverse partnerships make us an instrumental force in shaping a world where the rights of all children are realized.

For more information about UNICEF, please visit www.unicef.ca.

SUMMARY OF RECOMMENDATIONS

1. Additional considerations should be added to the Best Interests Criteria (BIC) proposed in C-78 to include children's rights in addition to their well-being, adding an explicit criteria for Indigenous children and expanding the definition of violence.
2. The views of the child should be taken into consideration based on maturity, not by age and maturity.
3. Better define "parenting time", as parenting occurs outside and complementary to the direct time a child is in the supervisory care of one parent or guardian.

1. BEST INTERESTS OF THE CHILD

Bill C-78 establishes the best interests of the child as the primary consideration in decision-making in the context of children affected by family separation and divorce. This is consistent with the Government of Canada's duty to legislate in respect of the United Nations Convention on the Rights of the Child. The Convention, which was ratified by Canada in 1991, must, according to international treaty law and the precedence articulated by the Supreme Court of Canada, be explicitly considered by federal, provincial and territorial governments in the development, interpretation and application of legislation¹.

The Convention recognizes that the best interests of the child will be the basic concern of parents (article 18), and Bill C-78 improves the capacity for parents to ensure their children's best interests. A core guiding principle for states is that in all actions concerning children, including by courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. In the case of individual decision-making about children, the best interests of the child must be the priority - the paramount consideration.

While few will object to giving priority to a child's best interest, there are typically divergent views about what those best interests may be. The Convention on the Rights of the Child offers two tested and workable solutions:

- (1) the option(s) that best support the interdependent rights of the child in the Convention are most likely to be in their best interests, and;
- (2) the views of the child indicate what may be in her or his best interests.

The Best Interests Criteria (BIC) proposed in Bill C-78 establish that the court shall take into consideration only the best interests of the child in making a parenting order or contact order. This is consistent with the Convention on the Rights of the Child.

The BIC proposes "primary consideration" to be given to the child's physical, emotional and psychological safety, security and well-being. The superordinate consideration of BIC is consistent with the Convention. This provision also suggests an overall assessment and balancing of many factors consistent with the interdependent nature of children's rights, opposed to a hierarchy of needs.

The list of factors provided in Bill C-78 is a non-exhaustive list, leaving important space for the child's views and the individual circumstances of each case. The list of factors recognizes that children have different needs at different stages of development, though to be clear, all rights in the Convention apply to all children of all ages.

To address family violence, the Bill proposes:

- A broad definition of family violence, which would include conduct that is violent or threatening or causes a family member to fear for their safety, or a pattern of coercive and controlling behaviour;
- A list of factors to help courts assess the seriousness of the violence and how it could affect future parenting when deciding what parenting arrangements would be in the best interests of the child; and
- A requirement that, before making parenting, contact or support orders, courts would need to consider any other civil protection, child protection or criminal proceedings or orders that involve the parties.

These are welcome inclusions, given that any form of family violence poses a risk to children.

UNICEF Canada proposes the following changes to build on the proposed improvements to BIC:

Recommendations

- 1.1 BIC criteria (a) requires primary consideration, and that consideration must be given to a range of children's needs. UNICEF Canada recommends explicit consideration of children's rights as well as needs that may not be recognized as rights. Additionally, a strong focus of the proposed criteria is parenting responsibilities. The BIC should also ensure fulsome consideration of children's rights to education (article 28); health care (article 24); rest, leisure and play (article 31); nationality (article 7); preservation of identity (article 8); freedom of movement (article 10); protection from illicit transfer abroad (article 11); freedom of thought, conscience and religion (article 14); and the special needs of disabled children (article 23).
- 1.2 The rights of Indigenous children to culture, religion and language are recognized in BIC criteria (f). UNICEF Canada recommends that BIC (f) be amended to adhere more closely to children's right in article 30 of the Convention, recognizing that the rights of Indigenous children to enjoy their own culture, to profess and practice their own religion, and to use their own language are to be exercised in *community with other members of their group*. The importance of cultural continuity and preservation of identity are also recognized in articles of the Convention including 2, 7, 8 and 23.
- 1.3 The BIC elucidate factors relating to family violence defined in paragraph (3)(j) of the *Divorce Act*. UNICEF Canada recommends these factors include other forms of violence including child exploitation and involvement in hostilities defined in the Convention on the Rights of the Child.

2. THE VIEWS OF THE CHILD

Bill C-78 BIC (e) provides that the child's views and preferences are a factor to be considered to determine her or his best interests, giving due weight to the child's age and maturity, unless they cannot be ascertained. Hearing the views of the child, like the duty to give primary consideration to the child's best interests, is not only a right children have, it is another of the four core or guiding principles of the Convention on the Rights of the Child (article 12). Hearing children's views about what is in their best interests is a right that should be supported in any judicial or administrative proceedings. Importantly, the Bill does not qualify this right with an arbitrary minimum age, recognizing that every child should have the opportunity to express their views, with the views given increasing weight with age and maturity. The child's parent(s) also have the duty to provide guidance and make decisions in a manner consistent with the evolving capacities of the child (article 5). The views of the child are also recognized in article 9 of the Convention, which requires states to ensure that a child shall not be separated from his or her parents against their will unless necessary for the best interests of the child, including in situations where the parents are living separately and a decision must be made as to the child's place of residence. In any proceedings, all interested parties shall be given an opportunity to participate in the proceedings and make their views known. Children are interested parties.

The BIC provision also recognizes that some children may not wish to participate in expressing their views. The courts and other agencies will need explicit guidance to ensure that children's participation is informed, safe and voluntary, direct or indirect through an appropriate representative, and that there are no negative consequences to the child.

Recommendation

2.1 Children's right to express their views in decisions affecting them is a core principle to ensure their rights are respected. It is not limited to children of a specific age, but should be given increasing weight and influence as children mature. To be extremely clear, the terminology in Bill C-78 of "age and maturity" should be changed to "maturity". For older children, their views should not only be a factor among many factors in determining their best interests, but elevated as a primary consideration in BIC.

3. PARENTING RELATIONSHIPS AND RESPONSIBILITIES

The Convention on the Rights of the Child recognizes the roles, relationships and responsibilities of parents. In the context of separation and divorce, Bill C-76 makes improvements to support parents in their roles to guide, protect and nurture their children:

Access to and experience in the Canadian family justice system:

Bill C-78 promotes "family dispute resolution" such as mediation, collaborative law and other out-of-court processes to simplify and streamline family justice processes; and encourage less adversarial processes. Expanding the use of unified family courts should reduce delays and the intensity and length of disruptions for children.

The roles and relationships of parents:

Bill C-78 proposes new language to replace the inappropriate terms, “custody” and “access”. The changes support better recognition of the roles and dignity of parents and parent-child relationships described in the Convention on the Rights of the Child. This is consistent with the evolution of law in Canada including recent reforms to the *Ontario Child and Family Services Act*. While new legal terminology may not be universally found in related international law, the Convention on the Rights of the Child as a core human rights treaty that is better reflected in the proposed changes. UNICEF Canada supports the use of more respectful terminology. However, we encourage the Minister to continue to explore alternatives.

In Bill C-78, “Parenting Time” means the time that a child of the marriage spends in the care of a person referred to in subsection 16.1(1), whether or not the child is physically with that person during that entire time;

16.1 (1) A court of competent jurisdiction may make an order providing for the exercise of parenting time or decision-making responsibility in respect of any child of the marriage, on application by

- (a)** either or both spouses; or
- (b)** a person, other than a spouse, who is a parent of the child, stands in the place of a parent or intends to stand in the place of a parent.

Recommendation

3.1 The Convention recognizes that in principle, both parents have common responsibilities for the upbringing and development of the child (article 18). In the situation of separation or divorce, where a child spends separate time in the care of a parent/between parents, this is among the most momentous decisions affecting their best interests and well-being and is often highly contested. The proposal to describe this time as “parenting time” is an improvement over the existing terminology. However, other options might better recognize that parenting (and parenting “time”) occurs continuously outside and complementary to the direct time a child is in the supervisory, residential care and defined decision-making responsibilities of one parent or guardian. We encourage further consideration of appropriate terminology to recognize the ongoing, differentiated roles of parents, all of whom may be investing in parenting time and responsibilities.

The relocation of children:

As Canadian society continues to urbanize, the job market globalizes and immigration increases, the mobility of families and children will increase. The relocation of children should be considered in relation to their best interests, including their rights to maintain relationships with both parents, to education, health care, identity, cultural community, the rights of children with disabilities, and their other rights, needs and children’s preferences. Many of these considerations are those parents would have whether or not in situations where they are divorced or separated. UNICEF Canada welcomes the modernized approach Bill C-78 takes, and the intent to advance Canada’s implementation of the 1996 Convention on the Protection of Children. The Convention on the Rights of the Child is a primary lens, setting out the following

duties of government, courts and administrative bodies in considering the best interests of the child in the context of relocation, particularly if it is outside Canada:

- The right to know and be cared for by his or her parents, as far as possible (article 7);
- The right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law (article 8);
- That a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or where the parents are living separately and a decision must be made as to the child's place of residence (article 9);
- Applications by a child or his or her parents to enter or leave the country for the purpose of family reunification shall be dealt with in a positive, humane and expeditious manner and entail no adverse consequences for the applicants and for the members of their family. A child whose parents reside in different States has the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents (article 10);
- Governments must take measures to combat the illicit transfer and non-return of children abroad. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements (article 12), and;
- No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation (article 16).

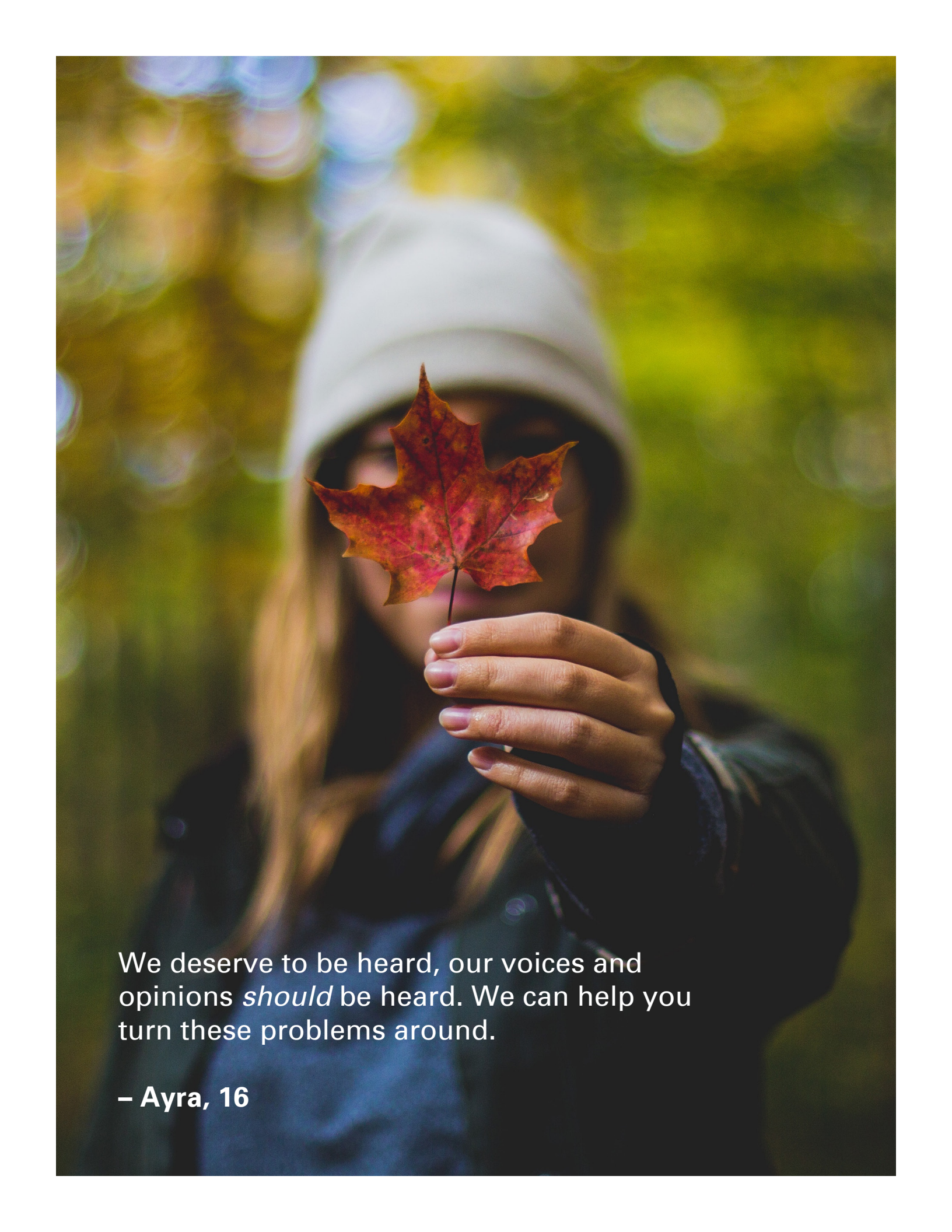
Reducing child poverty:

Bill C-78 proposes to strengthen child and spousal support enforcement to reduce the high rate of child poverty among children affected by divorce, with measures to:

- Allow families to determine and change child support without going to court; and
- Prepare for Canada's implementation of the 2007 Child Support Convention.

This is aligned with the right of children to an adequate standard of living in the Convention on the Rights of the Child. Governments have the duty to take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the state and from abroad. In particular, where the person having financial responsibility for the child lives in a state different from that of the child, the government should accede to international agreements or the conclusion of such agreements, as well as make other appropriate arrangements (article 27).

ⁱ See e.g., *Baker v. Canada (Ministry of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

A person with long blonde hair, wearing a white beanie and a dark jacket, holds a single red maple leaf in front of their face. The background is a soft-focus bokeh of green and yellow foliage, suggesting an autumn setting. The lighting is warm and natural.

We deserve to be heard, our voices and
opinions *should* be heard. We can help you
turn these problems around.

– Ayra, 16