

# The Special Joint Committee

## *A Threat to Women's*

BY BONNIE DIAMOND

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*Dans cet article l'auteure souligne que le Comité conjoint spécial sur les droits de garde et d'accès pour les enfants vont saper les droits à l'égalité des femmes pourtant gagnés de haute lutte, dans la Loi sur le divorce.*

As the twenty-first century gasps its last breath, women's equality rights are under serious siege. A brief look at the parliamentary Special Joint Committee on Custody and Access provides one clear example of modern, political assault on women's hard-won gains, this time through the *Divorce Act*. To fully understand the extent

of the threat it is useful to look at the origins and process of the Special Joint Committee on Custody and Access and at its subsequent report, filed in December 1998, entitled *For the Sake of the Children*.

The Special Joint Committee was a political concession made by the 1997 Justice Minister, Allan Rock, to the father's rights movement. Rock, at the urging of women who were suffering financial hardships after separation and divorce, had introduced a bill<sup>1</sup> to establish Guidelines on Child Support. The proposed guidelines standardized child support based on the income of the non-custodial parent, usually fathers, and on the number of children to be supported. Equally important, the Bill removed the necessity for custodial parents, usually mothers, to pay income tax on child support, and eliminated the automatic tax deduction for payers of child support. The new guidelines came about as a result of Suzanne Thibaudeau's court challenge in the early '90s (*Thibaudeau v. Canada*). Thibaudeau argued that forcing custodial parents to pay income tax on child support was a form of sex discrimination because it had an unfair impact on custodial parents, the majority of whom are women. Although the Supreme Court did not agree with her, the federal government proposed the tax change, and parents, lawyers, and judges were given a formula for determining the amount of child support. Fathers' rights advocates charged that the new guidelines were an unfair intrusion of government into their lives. They argued that if government

was going to enforce child support, it should also enforce father's rights to have access to their children (Mitchell). Just weeks before the Child Support Guidelines were to come into effect, a group of Senators, Ann Cools among them, threatened to reject the Bill. Rock reluctantly appointed the parliamentary Special Joint Committee on Custody and Access and included Ann Cools in its membership. The Committee was jointly chaired by two Liberals, Senator Landon Pearson and M.P. Roger Galway.

Fathers' rights groups or individual fathers dominated the witness list with their personal stories of "parental alienation" and personal loss. It seemed that non-custodial fathers were given precedence at the hearings and their tales of "vindictive" ex-wives illegally denying their rights to see their children went unchallenged. Committee Chair Landon Pearson did not stop fathers' rights advocates from heckling women during their presentations (Landsberg 1998b).

On the other hand, women's groups were repeatedly denied access to the hearings and when they were invited to appear they were jeered, mocked, and their well-researched presentations were derided (Landsberg 1998a). Some women's groups said that they were laughed at when they testified about wife battering and abuse (Landsberg 1998b). Research and documentation brought forward by women and women's groups was dismissed by some Committee members as "propaganda" (Shaughnessy) although much of that data was derived from Statistics Canada's *National Survey on Violence Against Women*. Women's organizations and other spokeswomen from wife abuse shelters pointing out that some of the non-custodial fathers who appeared had been charged with assaulting their spouses were threatened by Cools with lie-detector tests (Mitchell). Committee members asked shelter spokeswomen how many women who showed up on their doorsteps were lying about abuse (Mitchell). Cools publicly declared that mothers pose a greater abuse threat to children than fathers (Cools) despite her being acquainted with the findings of a 1996 study by Statistics Canada indicating that fathers were responsible for 73 per cent of physical assaults and 98 per cent of sexual assaults committed on children by parents (Statistics Canada).

The fact that mothers are most often appointed the custodial parent after divorce was cited as evidence that courts are biased against fathers, even though approximately

# on Custody and Access

## *Equality Rights*

70 to 80 per cent of divorcing mothers and fathers come to a mutual agreement that the mother will continue to be the primary caregiver following divorce without resorting to the courts. In most cases this continues the parenting arrangement that was in place prior to the separation.

A week before the Committee filed its report, Ann Cools called for the resignation of the Honourable Hedy Fry, Secretary of State for the Status of Women, following the publication of a *Globe and Mail* article in which Fry expressed her reservations about the tactics of some Committee members ("Face-Off Over Child Access"). One *Ottawa Citizen* headline read that Fry had been accused of "sabotage" for publicly speaking out to set straight the record on women (Cobb). Countless letters to the editor and opinion pieces, written by the National Association of Women and the Law (NAWL) and other women's organizations, were repeatedly refused publication by editors of the major Canadian newspaper.<sup>2</sup> When Michele Landsberg, a femi-nist columnist for *The Toronto Star*, exposed the bias of the Committee in her column, Ann Cools threatened her with a charge of contempt of Parliament ("Face-Off Over Child Access"). It was no surprise, given the poisoned process of the Committee, that its report is toxic to women's rights.

The hearings and media coverage of the Special Joint Committee on Custody and Access painted a frightening and false picture of the state of custody and access in this country and of women's behaviour towards men. The public was led to believe by both the Committee and the mainstream media that most divorced and separated families in Canada are tangled in a web of endless wrangling over the children with hoards of distraught fathers weeping on their "callous ex's" doorsteps. The fact that most divorcing couples work out custody and access issues without going to court and after the first year or so of sorting out the details, settle into a workable arrangement is not mentioned in the *Report*. This is remarkable considering that easily-accessible Department of Justice statistics reveal that only 3.8 per cent of all custody and access cases are resolved through the courts and only about five per cent of those cases ever proceed to the trial stage (Department of Justice).

At the time of the *Report's* release, Penni Mitchell, in a column for *The Winnipeg Free Press*, summed up the implications of this report for women and their children very well. "The Joint Committee on Child Custody and

Access' final report will turn Canada's *Divorce Act* into a tool for chaos for women and children in high-conflict families" (Mitchell).

The *Report* proposes eliminating the terms "custody" and "access" and replacing them with a form of mandatory joint custody called "shared parenting." This concept is not well-defined in the *Report* but it implies that parents "share" equal authority over children without necessarily "sharing" equal day-to-day responsibility for children. The terms of shared parenting would be outlined in "parenting plans" which parents would be required to present as the basis of "parenting orders," a replacement for custody orders. These "parenting plans" would be developed after educational classes that would teach the benefits of shared parenting. Those who could not easily work out "good parenting" plans would be sent to mandatory mediation.

The fulcrum of the *Report* is a list of criteria that would be used to determine "the best interests of the child." Preference would be given to parents who favour shared parenting; to those who are most willing to encourage a close and continuous relationship between the child and the other parent; to those most willing to attend mediation and educational sessions; and to those best able to provide the necessities of life to the child. Any notion that mothers are superior caregivers would be against the best interests of the child (Mitchell).

In an analysis prepared for NAWL, family law practitioner Carole Curtis points out that the language used to describe post-separation child-care arrangements (from "custody and access" to "shared parenting") will not result in a shift of long-ingrained historical and social patterns of caregiving. Worse, it will encourage court disputes in those high-conflict families where parents look for every opportunity to do battle. Curtis points out that the existence of the Joint Committee report is already creating confusion, in that some lawyers and clients think the suggestions in the *Report* are already the law (Curtis).

The area of custody and access is a complicated one, and the consequence of changes to the law profound. Policy-

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making in the area of custody and access law must be evidence-based, following a careful analysis of existing data, not merely the anecdotal summaries of "town-hall" meetings. The bibliography in the *Report* refers only to the material that was presented to the Committee by witnesses and other presenters. There is a very large, constantly growing, and sophisticated body of literature regarding custody and access which was entirely ignored by the Committee. Custody and access is the subject of scholarship by experts, both academics and practitioners, from many different and highly skilled disciplines: mental health professionals (both clinicians and academics, including social workers, psychologists, psychiatrists) and professionals in the family law system (judges, lawyers). There are many new articles published every month about custody and access. This Committee made no effort to examine even the available research. Nor did the Committee commission any research on the area, which should also be used to inform any policy-making with consequences of this magnitude. This, sadly, is an opportunity missed.

The most disturbing aspect of the Committee workings and its report is the abject failure to address the issue of violence against women. Wife assault and sexual abuse of children in families is a disturbing and widespread occurrence in Canada (Rodgers).<sup>3</sup> The demand for services for assaulted women and their children leaving abusive relationships continues to grow. The number of children disclosing sexual abuse is also increasing. Yet the *Report* on custody and access is almost entirely silent on the two most detrimental and significant issues facing Canadian children. Only inferentially does the *Report* deal with either of these very serious issues, by referring to the incidence of "false reporting." By doing so, the *Report* seemingly denies the existence of wife assault and sexual abuse of children.

Women's groups have worked tirelessly for years to ensure that the occurrence of violence against women in relationships, and the incidence of sexual abuse of children in the homes by their father or their mother's partner is brought to the attention of and, acted upon, by all governments in Canada. Courts simply cannot assume that women and children are safe after separation. In fact, the data is overwhelming that violence in the home escalates when a man fears that he will lose his wife or partner. Tragically, this is the point at which women are most often killed by their spouses and partners (Crawford and Gartner).

The *Report* also completely ignores contemporary evidence that processes such as mediation are not suited to parties where violence is present (Goundry *et al.*) and recommends mandatory mediation as a first step in working out parenting plans. The *Report* recommends that the *Divorce Act* be amended to state that divorced parents and their children "are entitled to a close and continuous relationship with one another," a clause that could force children who have been abused into regular contact with their abusers. A woman could face the impossible choice

of handing over children to an abusive parent or having to face criminal sanctions for defying a court order. There is no recognition that violence witnessed or experienced by children should be a factor in determining custody. Women reporting abuse could be jailed for making "false allegations" and could be deemed "unfriendly" parents for not wanting to maximize contact with the other parent. Women who flee the family home "without suitable arrangements for contact between the child and the other parent" could be seen as acting contrary to the best interests of the child. There is no recognition that in cases of wife or child abuse, including sexual abuse, no access by an offending parent would sometimes be in the child's best interests.

The recommendations in the *Report* call for a review of the Child Support Guidelines to reflect the thrust of the Committee's new approach and language brings the process full circle and perhaps reveals the real motivation behind the fathers' rights groups. Would the new concept of "shared parenting" completely exempt either parent from paying child support? That could be one implication of adopting the "shared parenting" scheme that is suggested. The report certainly hints that non-custodial parents who have children in subsequent relationships might be able to opt out of the new support guidelines. It is also clear that any expenses related to facilitating contact between a parent and child would be deducted from support payments. Which brings us right back to why the Committee was struck in the first place—an attempt by some non-custodial fathers to resist the newly-proposed Child Support Guidelines.

In May 1999, Justice Minister Anne McLellan formally responded to the *Report of the Joint Committee on Custody and Access*. While she did not commit to acting on its recommendations neither did she condemn them. She instead called for a three-year period of consultation before proceeding with reforms of the *Divorce Act*. Women and women's groups will have to fight hard during this period to resist the changes put forward by the Joint Committee which have garnered some significant public support. The Committee's workings, the media support for anti-woman sentiments expressed by members of the Committee, and the failure of other Committee members to stand up for women's rights, all signal the danger presented by the increasingly organized father's rights movement. These men are feeling strengthened by the support they received by the members of the Special Joint Committee on Custody and Access and they will escalate their political challenges. Some fathers' rights groups are threatening to launch a *Charter* challenge against the Women's Program at Status of Women Canada which funds equality-seeking projects. Recently they have also laid a complaint against Madame Justice Claire L'Heureux-Dubé for her Supreme Court judgment in *R. v. Ewanhuck* where she clearly articulated that when it comes to sexual assault "no means no." In other times these challenges might be laughable. However, given the inroads made by

fathers' rights groups on custody and access who knows where these threats will go. One point is made very clear by this political exercise: women's equality rights cannot be taken for granted as we enter the next millennium.

*The author wishes to acknowledge the work of many women who have worked hard with NAWL on the issue of women's rights in the Divorce Act, particularly, Carole Curtis, Penni Mitchell, Michele Landsberg, and Louise Shaughnessy, whose work forms the basis of this article.*

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<sup>1</sup>Bill C-41, passed May 1997.

<sup>2</sup>This is firsthand experience. NAWL wrote several letters to the *Ottawa Citizen* and to the *National Post* and to the *Globe and Mail* that were not published. Other women's groups reported to NAWL that they had also written but had not been published.

<sup>3</sup>See also the website of the Clearinghouse on Family Violence at Health Canada which provides statistics on both women and children which substantiate this claim: <http://www.hc-sc.gc.ca/hppb/familyviolence/index.html>

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## CLARE BRAUX

### Levitation

A headlong wind swerves broadside,  
tumbles the fronds and shivers  
the bug screen.

I hear the refrigerator's agonizing hum, and  
him  
who rustles his paper, turning the pages one  
by one.  
I hear his smoke-filled breath.

I sit eyes glued to a page in a book  
about Anaïs, who speaks: "Poetry is a way  
to learn levitation."

The rain follows, twists the palm tree  
disheveled. Tears succumb,  
glancing off its cut-up bark.

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