Family Law Act Modernization Project:

Care of and Time with Children & Protection from Family Violence

Discussion Paper – Chapter 3: Child-Centred Decision Making

January 2024

This paper addresses issues that arise under Part 4 – *Care of and Time with Children* as well as protection from family violence under the *Family Law Act* (FLA) and was created by the BC Ministry of Attorney General's Family Policy, Legislation, and Transformation Division as part of an on-going project to review and modernize the FLA. The FLA modernization project is not an overhaul of the Act but rather is intended to respond to issues that have emerged since the Act was introduced and respond to case law.

The ministry invites you to participate in the project by reviewing this paper and providing feedback. Your feedback will be used in the development of recommendations for changes. The ministry will assume that comments received are not confidential and that respondents consent to the ministry attributing their comments to them and to the release or publication of their submissions. Any requests for confidentiality or anonymity, must be clearly marked and will be respected to the extent permitted by freedom of information legislation. Please note that there will not be a reply to submissions.

This paper is organized in chapters, with each chapter addressing a different family law topic. You may respond to questions throughout the paper or provide feedback only on those topics you choose.

You can submit your comments by regular mail or email to the following addresses below until **March 31st, 2024**.

By regular mail:

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Chapter 3 : Child-Centred Decision Making

Introduction

Phase 2 of the *Family Law Act* (FLA) Modernization Project includes a review of child-centred decision making. This review considers the best interests of the child provisions in Part 4, and the various mechanisms by which the views of a child can be obtained in family law disputes that relate to them. For example, current mechanisms used in BC include children providing evidence through letters, affidavits, and judicial interviews, as well as appointing legal representation for a child in family law court proceedings that relate to them.

Reports prepared under sections 202 and 211 of the FLA are also commonly used to obtain and present a child's views in family law matters. For more information and to respond to discussion questions related to these reports, including "Full" Section 211 reports, Views of the Child reports, and Hear the Child reports, please see Chapter 4 – *Children's Views & Parenting Assessments and Reports*.

Early engagement with people with lived experiences, lawyers, and advocates identified the following should be reviewed in the FLA Modernization Project:

- The best interests of the child factors
- The ways in which a child's evidence can be obtained in a family law dispute
- When a children's lawyer is appointed in a family law dispute.

Best Interests of the Child

When making agreements and orders under Part 4 related to guardianship, parenting arrangements or contact with a child, section 37(1) of the FLA requires the parties and the court to consider the best interests of the child only. This was a change from the language in the former *Family Relations Act*, which required the court to only give "paramount consideration" to the best interests of a child in making those types of decisions.

Under the FLA, in order to determine the best interests of the child, the court must consider all of the child's needs and circumstances, including the factors listed in section 37(2):

> **37 (2)** To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
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> (a) the child's health and emotional well-being;
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> (b) the child's views, unless it would be inappropriate to consider them;
>
> (c) the nature and strength of the relationships between the child and significant persons in the child's life;
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> (d) the history of the child's care;
>
> (e) the child's need for stability, given the child's age and stage of development;
>
> (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise the person's responsibilities;

(g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;

(h) whether the actions of a person responsible for family violence indicate that the person may be impaired in the person's ability to care for the child and meet the child's needs;

(i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;

(j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

In addition, section 37(3) clarifies that:

> an agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

And, section 37(4) restricts the court's ability to consider a person's conduct to only situations where the conduct substantially affects one of the listed factors in section 37(2), and only to the extent that it affects the factor.

Section 38 requires a court to consider a number of factors when assessing section 37(g) and (h) related to the impact of any family violence.[1]

The concept of determining the best interests of a child is common in legislation pertaining to decisions about children. Recently, the federal *Divorce Act*[2] inserted a list of best interests of the child factors. Those factors differ slightly from those in the FLA.

In addition to factors similar to those in the FLA, section 16(4) of *Divorce Act* has the following additional factors:

(c) Each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse

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[1] **Assessing family violence**

38 For the purposes of section 37 (2) (g) and (h) [best interests of child], a court must consider all of the following:

(a) the nature and seriousness of the family violence;
(b) how recently the family violence occurred;
(c) the frequency of the family violence;
(d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
(e) whether the family violence was directed toward the child;
(f) whether the child was exposed to family violence that was not directed toward the child;
(g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;
(h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
(i) any other relevant matter.

[2] *Divorce Act*, RSC 1985, c 3 (2nd Supp.) [DA].

…

(f) The child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage

(g) Any plans for the child's care.

Furthermore, section 16(2) of the *Divorce Act* states that primary consideration shall be given to the child's physical, emotional and psychological safety, security and well-being when considering the best interests of the child factors. Whereas the FLA does not have any primary considerations or factors that are to be given more weight than others. Section 37(2)(a) of the FLA does list "the child's health and emotional well-being" as one of the factors that must be considered in determining the best interests of the child. Section 37(3) of the FLA also states that an agreement or order is not in a child's best interests "unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being." The wording of the FLA provision may have a similar effect as section 16(2) of the *Divorce Act*, as an agreement or order cannot be considered in the best interests of a child, unless section 37(2) is satisfied.

Although the *Divorce Act* does provide more factors than the FLA, consideration should be given to whether additional factors are needed in the FLA. For example, whether a spouse is willing to support the development and maintenance of the child's relationship with the other spouse[3] and plans for a child's care[4] may already be taken into account by the court when making parenting arrangement and relocation decisions under the FLA. Similarly, Section 41 of the FLA provides a list of parental responsibilities a guardian has with respect to a child, which includes making decisions respecting the child's "cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an Indigenous child, the child's Indigenous identity."[5]

The *Divorce Act* factors are also not as comprehensive as other legislation that provides additional factors related to a child's culture, community, disability, and gender identity or expression as outlined below.

Another federal act, *An Act respecting First Nations, Inuit and Métis children, youth and families* (the "*Federal Act*"), has factors that must be considered to determine the best interests of an Indigenous child for purposes of that Act related to setting out principles applicable to the provision of child and family services in relation to Indigenous children on a national level.[6] Unsurprisingly those factors refer explicitly to the issue of preserving a child's Indigenous (First Nations, Inuit, and Métis) culture and heritage, including the following from section 10(1) of the *Federal Act*:

(a) the child's cultural, linguistic, religious and spiritual upbringing and heritage;

…

(d) the importance to the child of preserving the child's cultural identity and connections to the language and territory of the Indigenous group, community or people to which the child belongs;

…

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[3] *Ibid*, s 16(3)(c).

[4] *Ibid*, s 16(3)(g).

[5] *Family Law Act*, SBC 2011, c 25, s 41(e) [FLA].

[6] *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, s 8(b).

> **(f)** any plans for the child's care, including care in accordance with the customs or traditions of the Indigenous group, community or people to which the child belongs.

Similar to the *Federal Act*, BC's *Child, Family and Community Service Act*[7] ("CFCSA") and the *Adoption Act*[8] both have specific factors that must be considered in determining the best interests of an Indigenous child in addition to general best interests of the child factors. It is noted that the *Federal Act*, the CFCSA and the *Adoption Act* provide best interests of the child factors in the child protection context, rather than in the family law context. Appendix D contains a chart comparing the best interests factors in each of the statutes mentioned.

Notably, compared to these pieces of child protection legislation, the FLA best interests of the child factors do not explicitly include considerations related to the following:

- a child's Indigenous and other cultural, linguistic, religious and spiritual upbringing and heritage,
- the importance of preserving cultural connections and relationships with groups and communities,
- the needs of a child with disabilities, and
- a child's ability to exercise their rights or a child's family member's ability to exercise the family member's rights without discrimination, including discrimination based on sex or gender identity or expression.

In the recent case of *JW v British Columbia (Director of Child, Family and Community Service)*[9] the BC Supreme Court heard an application by the former non-Indigenous foster parents of Indigenous children to have contact with them under section 59 of the FLA. At the time of the application, the children were in the care of the Director who is their sole guardian. The Indigenous Nation of which the children were members had also reaffirmed their jurisdiction over child and family services under the *Federal Act*. Although the application was made under the FLA, the Court held that when there is overlapping legislation on the best interests of the child factors, the CFCSA and the *Federal Act* are paramount.

> [91] In *British Columbia (Superintendent of Family & Child Service) v. D.S.,* 63 B.C.L.R. 104, 1985 CanLII 452 (C.A.), it was clarified that access should be considered solely through the lens of the best interests of the child, rather than of the person seeking access. This case also discusses how issues of conflicting legislation should be dealt with in child and family services matters, finding that where there is overlap or conflict, the *CFCSA* is paramount. This was also the finding of Justice Smith in *J.P. v. British Columbia (Children and Family Development),* 2017 BCCA 308 at paras. 75-76.
>
> [92] Although this application is brought under the *FLA*, as the Children are Indigenous children in the care of the Director, the BIOC analysis must follow the criteria set out in the *CFCSA* and the *Federal Act*.[10]

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[7] *Child, Family and Community Service Act*, RSBC 1996, c 46, s 4(1)—(2).
[8] *Adoption Act*, RSBC 1996, c 5, ss 3, 3.1.
[9] *JW v British Columbia (Director of Child, Family and Community Service)*, 2023 BCSC 512 [*JW v BC*].
[10] *Ibid* at paras 91—92.

Applications were also made for a section 211 report and to appoint a lawyer for one of the children in this case, both of which were denied for not being in the best interests of the Indigenous children. If the CFCSA and the *Federal Act* are paramount to the FLA's best interests of the child factors when Indigenous children are in the care of the Director, it could be reasonable to ensure the FLA's best interests of the child factors align with the CFCSA and the *Federal Act* in family law matters related to all Indigenous children.

Discussion Questions:

3-1. Should the best interests of the child provisions in the FLA be updated? If so, how?

3-2. Should any factors be added to, removed from, or clarified in the current FLA best interests of the child provisions? If so, should any best interests of the child factors be added to the FLA related to the following:

- **(a) Each guardian's willingness to support the development and maintenance of the child's relationship with the other guardian**
- **(b) The child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage**
- **(c) Any plans for the child's care**
- **(d) The importance of preserving cultural connections and relationships with groups and communities,**
- **(e) The needs of a child with disabilities**
- **(f) A child's ability to exercise their rights or a child's family member's ability to exercise the family member's rights without discrimination, including discrimination based on sex or gender identity or expression**

3-3. Should any best interests of the child factors be given more weight than other factors when making decisions about guardianship, parenting arrangements or contact with a child?

Indigenous Considerations on Best Interests of a Child – What We Heard

In speaking with Indigenous peoples with lived experience, one of the themes the Ministry heard is that it is vital for every Indigenous child to grow up with their culture.[11] For an Indigenous child, culture is something that begins at birth, is nurtured through their lifetime, and is passed down from generation to generation. It was therefore suggested that the FLA should emphasize the need for Indigenous children to stay connected with their culture, including maintaining connections to the culture of all sides of their family, when making family law decisions that relate to the child.

There were, however, mixed views on whether maintaining an Indigenous child's connection to their culture is more important than other best interests of the child factors, such as the child's health and emotional well-being, the child's views, and the impact of any family violence on the child. There were also different opinions on whether, in the case of a child connected to both Indigenous and non-

[11] Mahihkan Management on behalf of the B.C. Ministry of Attorney General, *What We Heard: Family Law Act Modernization Dialogue Sessions*, (Coming Soon).

Indigenous cultures, the importance of building connections to their Indigenous culture, traditions and community is greater given the historic oppression of Indigenous peoples.

Although there was no consensus on whether maintaining connection to Indigenous culture should be a "priority factor," people did agree that an Indigenous child's cultural background is more important than a guardian's income or the quality of their house and furnishings.

3-4. Should the FLA provide specific factors that must be considered when determining the best interests of an Indigenous child? If so, what should those factors be?

3-5. Should any best interests of the child factors be given greater weight when making decisions about an Indigenous child under the FLA?

Children's Evidence

Section 37(2)(b) of the FLA states that a child's views must be considered unless it is inappropriate to do so, but the Act does not provide any mandated or preferred method for obtaining the child's views. Instead, section 202 gives the court the broad authority to admit a child's hearsay evidence as well as make any other order related to receiving a child's evidence:

> **Court may decide how child's evidence is received**
>
> **202** In a proceeding under this Act, a court, having regard to the best interests of a child, may do one or both of the following:
>
> (a) admit hearsay evidence it considers reliable of a child who is absent;
>
> (b) give any other direction that it considers appropriate concerning the receipt of a child's evidence.

Section 202(a) of the FLA would seem to expand possibilities beyond formal report writers to include evidence introduced by parents, teachers or any other person who may have information to share about a child's opinions and wishes. Section 202(b) of the FLA provides additional flexibility which the courts have used when it would be potentially harmful for children to testify in an acrimonious proceeding.[12]

In the recent case of *DS v TN*,[13] the BC Provincial Court concisely summarized the various methods that a child's views may be received by the court under the FLA, including through hearsay evidence and the appointment of a children's lawyer. The court referred to recent research stating that the court should consider various factors when determining which method to use to obtain the views of a child:

> [86] A child's views and preferences can be communicated to the Court directly through oral testimony at trial or through a judicial interview or through child-inclusive mediation. In their treatise, *Hearing the Voices of Children in Family Disputes* (Canada, Themis 2021), Professors Nicholas Bala and Rachel Birnbaum, state (at p. 28):

[12] *TAO v DJM*, 2021 BCSC 1704 at para 109 [*TAO*]; *NJ v SJ*, 2018 BCSC 2352 at para 10.
[13] *DS v TN*, 2023 BCPC 26.

> There is no single “best way" to hear from children during the family justice process, as each approach has its own strengths and limitations. The method chosen will depend on a number of factors including:
>
> - the issues in dispute;
> - the resources available;
> - getting the best information possible before the decision-maker
> - the efficiency of the justice process;
> - the child's age and capacity;
> - the attitude of child;
> - the stage of the process (e.g. case conference, interim proceeding, trial or variation of prior order or agreement);
> - the nature of dispute resolution process (e.g. mediation/ negotiation/ litigation);
> - concerns about fairness to parties;
> - concerns about fairness to the child; and,
> - legal framework and attitude of decision-maker.
>
> There is great variability across Canada in judicial practice and in the extent to which professional services are available, especially for parents who lack the financial resources to hire lawyers and mental health professionals. Arguably, the needs and views of the child involved should always be the dominant factors in deciding how to involve them. In practice, however the resources available and the attitudes of various adults involved, including those of the parents and professionals, often play the most significant role.

The court explained that section 202 is protective of children, as it allows a child to participate in a family law proceeding related to them but does not require them to be a witness in litigation or to testify at trial.[14]

The BC Supreme Court has also established factors the court should consider when assessing the reliability of a child’s hearsay evidence:

> [111] In *N.J.* at para. 14, Justice Brundrett helpfully summarized the factors established in *P.V. v. D.B.*, 2007 BCSC 237 for assessing the reliability of hearsay evidence of children. Those factors include: “timing of the statement; demeanour of the child; personality of the child; intelligence and understanding of the child; absence of motive of child to fabricate; absence of motive or bias of the person who reports the child's statement; spontaneity; statement in response to non-leading questions; absence of suggestion, manipulation, coaching, undue influence or improper influence; corroboration by real evidence; consistency over time; and statement not equally consistent with another hypothesis or alternative explanation.”[15]

Under the federal *Divorce Act*, the court is similarly required to consider the child’s views and preferences when making a parenting or contact order. Section 16(3)(e) states that when considering

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[14] *Ibid* at para 89.
[15] *TAO*, *supra* note 12 at para 111.

views and preferences of a child, the court must give "due weight to the child's age and maturity, unless they cannot be ascertained." However, the *Divorce Act* does not specify any mechanisms for the court to obtain the views or preferences of a child.

Discussion Questions:

3-6. Should the FLA provide specific factors for a court to consider when deciding how to obtain the views of a child in a family law proceeding? Is so, what should those factors be?

3-7. Should the FLA provide factors for a court to consider when determining the reliability of a child's hearsay evidence? If so, what should those factors be?

Affidavits & Letters to the Court

A letter to the court is not sworn evidence, and it is up to the judge to decide whether to permit the letter to be filed and reviewed by the court. One of the problems with introducing a letter to the court from a child, in the absence of other evidence, is that it can be hard to ascertain whether the letter reflects the child's actual views or whether the child was influenced by the parties or someone else. It can also be a negative experience for a child to write a letter to the court, anticipating this will be a chance to voice their opinions, and then have the court decline to accept the letter.

Unlike a letter, an affidavit is a sworn statement. While it is another legitimate way to put a child's evidence before the court without having the child testify, it may put a child in a position where they have to take sides in a dispute, and possibly damage the relationship the child has with the other parent. As well, courts may decline to accept a child's affidavit: for example, in a 2021 BCSC decision the court excluded a child's affidavit on the grounds that it was unreliable.[16] The court considered the timing of the affidavit in the course of the family law proceedings, that it was prepared by one party's lawyer, that it contained a factual error, and that the child's evidence was already captured in two separate police statements.

Judicial Interviews

Judicial interviews are another method by which children's views have been obtained within court processes under section 202. Judges have been talking to children in family law cases for decades, however the practice is not widespread and there are a number of arguments both for and against.[17] Proponents of judicial interviews with children see them as a way for judges to get a better sense of who the child is and what matters to them. The background information that the child provides can help the judge to make a more nuanced decision, and the opportunity to speak directly to the decision-maker can be considered respectful of the child. The meeting may make the child feel involved and is an opportunity to explain the process and answer questions they may have. The meeting respects the right of the child to understand and have a voice in the proceedings and provides the judge an opportunity to better understand the case and the child whom the decision will impact.

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[16] *Ibid* at paras 107—117.

[17] John Magyar, "Judicial Interview of Children in Custody and Access Disputes: Emerging Perspectives and Unresolved Tensions" (2011) [available at SSRN].

On the other side, opponents of the process argue a judge has no special training to speak with a child, and insufficient time to vet the integrity of what the child says. There are concerns that meeting a judge may cause undue stress to a child and make the child feel responsible for a decision that they may not want to or should make. There is the potential for harm to the parent-child relationship if the parent blames the child for a decision the parent dislikes. Also, a child whose wishes are not followed may feel they were not heard. Further, because judicial meetings are often confidential to encourage the child to speak freely, they raise issues of fairness and transparency regarding the parties to the proceeding.
It has been suggested that judicial interviews can be a valuable method of hearing the wishes and views of a child in their own words, but generally not intended to be determinative or an evidence-gathering exercise under section 202:

> [38] … Interviews of children have been described by the Court of Appeal in *Rupertus v. Rupertus*, 2012 BCCA 426, in these terms at para. 13:
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> > It is not uncommon for a judge attempting to resolve difficult issues of custody and access to speak alone with the children who are involved. Generally, what they have to say is not determinative, but it may provide the judge with context in which to understand . . . the whole of the evidence that must be weighed . . . (See generally, *L.E.G. v. A.G.*, 2002 BCSC 1455)
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> [39] The judicial interview is not intended to be an evidence-gathering exercise or to give the child an opportunity to provide factual information about the dispute between his or her parents. Rather, it allows the court to hear from children directly in their own words about their wishes and views. As observed by the Court of Appeal in *Rupertus*, the children's views are not determinative, but provide useful context for considering the evidence as a whole.[18]

Since the FLA came into force in 2013, there have been some reported decisions indicating that judges conduct private interviews with children in family law disputes.[19] However, despite the apparent flexibility given to the court under section 202 to support judges meeting with children in family law disputes, there does not appear to have been a considerable increase in the number of judicial interviews with children in BC since before 2013.

The Age 12 Cut-Off

In discussions with family law practitioners and advocates, it was indicated that there is a common misconception that children are not permitted to provide their views on any family law dispute until they are 12 years old. This perception likely comes from section 51(4) of the FLA which directs a court to not appoint a non-parent guardian for a child without obtaining the child's written approval. It was suggested that the FLA could clarify that there is no age requirement associated with providing evidence to a court, and that the court should consider the maturity, ability, and willingness of each child to provide their views in a family law dispute, rather than simply their age.

Indigenous Considerations on the Views of the Child – What We Heard

During dialogue sessions with Indigenous peoples with lived experience in family law matters, the Ministry heard that the voices of Indigenous children must be heard in family law disputes that relate to them. In

[18] *KMH v PSW*, 2018 BCSC 1318 at paras 38—39 [*KMH*].
[19] For example, *Rashtian v. Baraghoush*, 2013 BCSC 2023; *Richards-Rewt v. Richards-Rewt*, 2015 BCSC 1391; *JSR v PKR*, 2017 BCSC 928; *LGP v CFB*, 2018 BCSC 1168; *KMH*, *supra* note 18.

particular, it was noted that Indigenous children should have a say in the community where they will live and how they will maintain connections to their culture and their family.[20]

It was noted that questions about a child's views should be asked by an objective third party to ensure the child is not being influenced. The third party could include individuals from the child's Indigenous community, including Elders, Matriarchs, and knowledge keepers. However, if a person from outside the Indigenous community interviews an Indigenous child, the person needs to have knowledge of the child's community, culture, and traditions before the interview begins.

Priority must also be given to processes that make the child feel safe and allow the child to share their views without negative outcomes. Rather than interviewing an Indigenous child alone in a room, the process should be more wholistic and incorporate Indigenous values. For example, trust could first be built with the child over multiple meetings, or a format other than a formal interview could be used such as art therapy, play therapy, or speaking through stories.

In the child protection context, the BC Supreme Court has also acknowledged that Indigenous Nations may engage in "mechanisms within their own tradition to ensure that the voices of the Children are heard and reflected in their care."[21]

3-8. Should the FLA provide specific or alternative processes for obtaining the views of an Indigenous child? For example, should the FLA require that an Indigenous child have a support person from their Indigenous community present during a judicial interview? Or should the FLA allow Indigenous children to provide evidence through other processes, such as through art or storytelling?

3-9. Should the FLA establish specific factors to be considered when determining how to obtain the views of an Indigenous child as opposed to a non-Indigenous child?

Discussion Questions:

3-10. Should the FLA provide specific direction on various methods for obtaining the views of children in family law disputes, including children's letters to the court, affidavits, and judicial interviews?

(a) If so, should the FLA explicitly permit or prohibit affidavits, letters to the court, and judicial interviews with children?

3-11. If the FLA expressly permits affidavits, letters to the court, and judicial interviews with children, should the legislation establish parameters on the circumstances for when affidavits or letters may be accepted or when and how interviews may be conducted?

3-12. Should the FLA provide guidance on when a child is able to provide their views, such as their age, maturity or ability to provide their views in a family law matter?

[20] Mahihkan Management, *supra* note 11.
[21] *JW v BC*, *supra* note 9 at para 116.

Children's Lawyer

Section 203 of the FLA allows the court to appoint a lawyer to represent the interests of a child in a proceeding under the Act. Before appointing such a lawyer, the court must be satisfied that the degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the child's best interests, and that the appointment is necessary to protect the child's best interests. The court may also decide whether one or both parties will be responsible for paying the lawyer's fees and disbursements.

In a recent 2023 decision,[22] the BC Supreme Court also described section 203 as setting a high bar for appointing a child's lawyer:

> [29] Taken together, these conditions set a high bar. This can be seen by unpacking the statutory language. The first condition requires more than an ordinary level of conflict between the parents. The conflict must be severe. It must be so severe that it impairs the capacity – that is, the ability – of the parents to act in the best interests of the child. The impairment must be significant. The second condition requires that the appointment of a lawyer be necessary – not just helpful, useful, or convenient – to protect the best interests of the child. The requirement of necessity entails that nothing short of the appointment of a lawyer will do for the protection of the child's best interests.
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> [30] The Judge said that the appointment of a lawyer for the children would give them a voice. Consideration of the views of children is often important to an assessment of their best interests, though less so in the case of a young child; *FLA,* 37(2)(b); *J.E.S.D.* at para. 51. The appointment of a children's lawyer is one way to make children's views and perspective known to the court, but it is not the only way. Children's views are often made available through affidavits, judicial interviews, and reports prepared pursuant to s. 211 of the *FLA,* or by other means contemplated by s. 202; *J.E.S.D.* at paras. 36-37.
>
> [31] This Court has held that, where the requirements of s. 203 are not satisfied, a lawyer may be appointed under s. 202(b) for the specific purpose of obtaining a child's views on court applications that may affect their interests; *Goldsmith v. Holden,* 2020 BCSC 1501 at paras. 21-26. The object of a s. 202 appointment is communication, not representation and advocacy. ….
>
> [32] The appointment of a lawyer under s. 202 serves the limited purpose of obtaining for the court the child's views. An appointment under s. 203 serves the much broader purpose of introducing into the litigation an advocate for the child who may participate in the proceeding on the child's behalf. A lawyer cannot be appointed as an advocate and participant under s. 202, because such an appointment would avoid the strict requirements of s. 203 and make that section a dead letter.

In the same decision, the court cautions that appointing a lawyer for a child risks pitting the child against their parents in a family law dispute:

> [49] …Within the common law tradition, the institutions and practices of family litigation are adversarial. They pit parties against one another. Appointing a lawyer for the children in such a system pits the children against one or perhaps both parents.

[22] *DARE v RJBE*, 2023 BCSC 1770.

Early engagement with family law practitioners and advocates indicated that section 203 of the FLA should be amended to remove the high bar for appointing a children's lawyer and that more children should have access to a lawyer in family law disputes involving them. Suggestions for replacing the test included focusing more on the child's best interests, the child's desire to be involved, the child's ability to instruct a lawyer, and whether the child's views are being adequately represented in other ways. It was also suggested that the FLA could include a presumption that appointing a children's lawyer is in the child's best interests, and the burden would therefore be on the opposing party to rebut that presumption.

In BC, the Society for Children and Youth of BC operates the Child and Youth Legal Centre which provides legal support for children experiencing legal issues, including problems related to family law disputes. The Centre's lawyers can provide legal advice and representation to children in family law proceedings relating to them. The services are free to children, but the Centre may apply for reimbursement of legal services against another party to the proceeding who is not a child. According to their website, the Centre must be notified prior to any court order being made in relation to the Centre under section 203 of the FLA. According to the Society for Children and Youth of BC's 2021 Annual Report, more than 1000 clients accessed services through their Child and Youth Legal Centre that year.[23]

Although a lawyer may represent the child's interests once they are appointed, it appears that accessing and requesting a child's lawyer still depends on the parties making an application to the court. For example, in a 2021 BCSC decision, one party made an application to the court to appoint a lawyer for the children, but the other party opposed.[24] Although the Child and Youth Legal Centre agreed to provide legal representation to the children, court approval was still required. In this case, the court was advised that it would take up to three months before a lawyer would be able to meet with the children once approval was received. The court ultimately granted the order after considering the children's ages, their desire to have their voices heard and to have a lawyer appointed to them.

Indigenous Considerations on Legal Representation for a Child – What We Heard

During the Indigenous dialogue sessions, the Ministry heard not only that the voices of children themselves must be heard, but that in some instances a child should have an advocate that can speak on their behalf.[25] It was suggested that an advocate for an Indigenous child could be an Elder, a Matriarch, or another respected or chosen person within the child's Indigenous community.

In a 2023 decision, the BCSC recently considered an application to appoint a children's lawyer for an Indigenous child under section 203 of the FLA.[26] The issues before the court were related to the FLA, but the case also included a history of proceedings under the CFCSA. Although the application was rejected because the court found that the parties were acting in the best interests of the Indigenous child, the court noted that if it were to make an order to appoint a children's lawyer to the Indigenous child, it would have sought guidance from the Indigenous Nation:

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[23] Society for Children and Youth of BC, *Annual Report* (Society for Children and Youth of BC, 2021) at 2.
[24] *STC v DJB*, 2021 BCSC 1987.
[25] Mahihkan Management, *supra* note 11.
[26] *JW v BC*, *supra* note 9 at para 117.

[117] While I dismiss the application to have a lawyer appointed for X, I note that if I were to make such an order, I would find it useful to have guidance from the Indigenous Nation itself as to how the voice of the child is heard according to their laws and traditions, and to ensure that is reflected in any order. Further, that any lawyer appointed should be well-versed in the purposes of [*An Act respecting First Nations, Inuit and Métis children, youth and families*].

3-13. Should the FLA provide any unique factors or processes the court should consider or follow when appointing a lawyer for an Indigenous child?

3-14. Should the FLA allow for an Indigenous child to be represented by an Indigenous advocate in a family law dispute?

Discussion Questions:

3-15. Should the test for appointing a children's lawyer in family law disputes under the FLA be amended in any way? If so, how?

3-16. Should the FLA provide more direction to the court on when or how to appoint a lawyer for a child? For example, should the FLA specifically require the court to consider any of the following factors:

- **(a) The age of the child**
- **(b) The child's ability to instruct legal counsel**
- **(c) The child's desire to have their views heard**
- **(d) The child's desire to have their own legal counsel**
- **(e) Whether the child's views are being adequately obtained in other ways**

3-17. Should the FLA explicitly address the appointment of a children's lawyer when the parties are not in agreement?

3-18. The discussion and questions posed in this chapter relate to issues that have been raised concerning child-centred decision making. Do you have any other concerns or suggestions for amendments to provisions in the FLA related to this topic?

Appendix D : Best Interests of the Child Legislative Comparison Table

Note: Underlining added to emphasize important points of comparison between the legislation

FAMILY LAW ACT [SBC 2011] CHAPTER 25 (Current to Oct 19, 2022)	**DIVORCE ACT** (R.S.C., 1985, c. 3 (2nd Supp.))	**AN ACT RESPECTING FIRST NATIONS, INUIT AND MÉTIS CHILDREN, YOUTH AND FAMILIES** (S.C. 2019, c. 24)	**CHILDREN, FAMILY AND COMMUNITY SERVICES ACT** [RSBC 1996] CHAPTER 46	ADOPTION ACT [RSBC 1996] CHAPTER 5
https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/11025_04#section37	https://laws-lois.justice.gc.ca/eng/acts/d-3.4/page-3.html#h-173218	https://laws.justice.gc.ca/eng/acts/F-11.73/page-1.html#h-1150592	https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/9604601	Adoption Act (gov.bc.ca)
Part 4 — Care of and Time with Children **Division 1 — Best Interests of Child**	**Corollary Relief**	**Best Interests of Indigenous Child**	**Part 1 – Introductory Provisions**	**Part 1 – Introductory Provisions**
Best interests of child **37(1)** In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.	**Best interests of child** 16 **(1)** The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.	**Best interests of Indigenous child** 10 **(1)** The best interests of the child must be a primary consideration in the making of decisions or the taking of actions in the context of the provision of child and **family services** in relation to an Indigenous child **and**, in the case of **decisions or actions related to child apprehension**, the best interests of the child must be the paramount consideration.		**Purpose of the Act** **2** The purpose of this Act is to provide for new and permanent family ties through adoption, giving paramount consideration in every respect to the child's best interests.

(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following: **(a)** the child's health and emotional well-being; **(b)** the child's views, unless it would be inappropriate to consider them; **(c)** the nature and strength of the relationships between the child and significant persons in the child's life; **(d)** the history of the child's care; **(e)** the child's need for stability, given the child's age and stage of development; **(f)** the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities; **(g)** the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;	**Primary consideration** **(2)** 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. **Factors to be considered** **(3)** In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including **(a)** the child's needs, given the child's age and stage of development, such as the child's need for stability; **(b)** the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life; **(c)** each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;	**Primary consideration** **(2)** When the factors referred to in subsection (3) are being considered, primary consideration must be given to the child's physical, emotional and psychological safety, security and well-being, **as well as** to the importance, for that child, of having an ongoing relationship with his or her family and with the Indigenous group, community or people to which he or she belongs and of preserving the child's connections to his or her culture. **Factors to be considered** **(3)** To determine the best interests of an Indigenous child, all factors related to the circumstances of the child must be considered, including **(a)** the child's cultural, linguistic, religious and spiritual upbringing and heritage; **(b)** the child's needs, given the child's age and stage of development, such as the child's need for stability; **(c)** the nature and strength of the child's relationship with his or her parent, the care provider and any member of his or her family who plays an	**Best Interests of Child** **4 (1)** Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child's best interests, including for example: **(a)** the child's safety; **(b)** the child's physical and emotional needs and level of development; **(c)** the importance of continuity in the child's care; **(d)** the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship; **(e)** the child's cultural, racial, linguistic and religious heritage; **(f)** the child's views; **(g)** the effect on the child if there is delay in making a decision. **(2)** If the child is an Indigenous child, in addition to the relevant factors that must be considered under subsection (1), the following factors must be	*Best interests of child* **3** (1)All relevant factors must be considered in determining the child's best interests, including for example: **(a)** the child's safety; **(b)** the child's physical and emotional needs and level of development; **(c)** the importance of continuity in the child's care; **(d)** the importance to the child's development of having a positive relationship with a parent and a secure place as a member of a family; **(e)** the quality of the relationship the child has with a parent or other individual and the effect of maintaining that relationship; **(f)** the child's cultural, racial, linguistic and religious heritage; **(g)** the child's views and preferences, without discrimination, including discrimination relating to Indigenous identity, race, colour, ancestry, place of origin, religion, family status, physical or mental disability, sex, sexual orientation

(h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs; **(i)** the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members; **(j)** any civil or criminal proceeding relevant to the child's safety, security or well-being. **(3)** An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being. **(4)** In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.	**(d)** the history of care of the child; **(e)** the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained; **(f)** the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage; **(g)** any plans for the child's care; **(h)** the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child; **(i)** the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child; **(j)** any family violence and its impact on, among other things, **(i)** the ability and willingness of any person who engaged in the family	important role in his or her life; **(d)** the importance to the child of preserving the child's cultural identity and connections to the language and territory of the Indigenous group, community or people to which the child belongs; **(e)** the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained; **(f)** any plans for the child's care, including care in accordance with the customs or traditions of the Indigenous group, community or people to which the child belongs; **(g)** any family violence and its impact on the child, including whether the child is directly or indirectly exposed to the family violence as well as the physical, emotional and psychological harm or risk of harm to the child; and **(h)** any civil or criminal proceeding, order, condition, or measure that is relevant to	considered in determining the child's best interests: **(a)** the importance of the child being able to learn about and practise the child's Indigenous traditions, customs and language; **(b)** the importance of the child belonging to the child's Indigenous community.	<u>and gender identity or expression;</u> **(h)** the effect on the child if there is delay in making a decision. (2)[Repealed 2022-40-2.] *Best interests of child — Indigenous children* **3.1** (1)If the child is an Indigenous child, in addition to the relevant factors that must be considered under section 3 (1), the following factors must be considered in determining the child's best interests: **(a)** cultural continuity, including the transmission of languages, cultures, practices, customs, traditions, ceremonies and knowledge of the child's Indigenous community; **(b)** the development of the child's Indigenous cultural identity, including the child being able to practise the child's Indigenous traditions, customs and language; **(c)** the preservation of the child's connections to the child's Indigenous community and the region where the child's family and Indigenous community is located;

	violence to 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; and **(k)** any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.	the safety, security and well-being of the child. **Consistency** **(4)** Subsections (1) to (3) are to be construed in relation to an Indigenous child, to the extent that it is possible to do so, in a manner that is consistent with a provision of a law of the Indigenous group, community or people to which the child belongs.		**(d)** the child being connected to family; **(e)** any plans for the child's care, including care in accordance with the customs and traditions of the child's Indigenous community. (2)In this section, "family", in relation to an Indigenous child, includes the child's relatives.

Assessing family violence **38** For the purposes of section 37 (2) (g) and (h) *[best interests of child]*, a court must consider all of the following: **(a)** the nature and seriousness of the family violence; **(b)** how recently the family violence occurred; **(c)** the frequency of the family violence; **(d)** whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member; **(e)** whether the family violence was directed toward the child; **(f)** whether the child was exposed to family violence that was not directed toward the child; **(g)** the harm to the child's physical, psychological and emotional safety, security	**Factors relating to family violence** **(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			

and well-being as a result of the family violence; **(h)** any steps the person responsible for the family violence has taken to prevent further family violence from occurring; **(i)** any other relevant matter.	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.			

	Past conduct **(5)** In determining what is in the best interests of the child, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order. **Parenting time consistent with best interests of child** **(6)** In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child. **Parenting order and contact order** **(7)** In this section, a parenting order includes an interim parenting order and a variation order in respect of a parenting order, and a contact order includes an interim contact order and a variation order in respect of a contact order.			
Relevant Definitions				

FLA	DA	AFNIMCYF	CFCSA	Adoption Act
"child", except in Parts 3 *[Parentage]* and 7 *[Child and Spousal Support]* and section 247 *[regulations respecting child support]*, means a person who is under 19 years of age; "family member", with respect to a person, means **(a)** the person's spouse or former spouse, **(b)** a person with whom the person is living, or has lived, in a marriage-like relationship, **(c)** a parent or guardian of the person's child, **(d)** a person who lives with, and is related to, **(i)** the person, or **(ii)** a person referred to in any of paragraphs (a) to (c), or **(e)** the person's child, and includes a child who is living with, or whose parent or guardian is, a person referred to in any of paragraphs (a) to (e);	***family justice services*** means public or private services intended to help persons deal with issues arising from separation or divorce; ***family member*** includes a member of the household of a child of the marriage or of a spouse or former spouse as well as a dating partner of a spouse or former spouse who participates in the activities of the household; ***family violence*** means 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 of coercive and controlling behaviour 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;	***child and family services*** means services to support children and families, including prevention services, early intervention services and child protection services. ***family*** includes a person whom a child considers to be a close relative or whom the Indigenous group, community or people to which the child belongs considers, in accordance with the customs, traditions or customary adoption practices of that Indigenous group, community or people, to be a close relative of the child.	***"care",*** *when used in relation to the care of a child by a director or another person, means physical care and control of the child;* ***"Indigenous child"*** *means a child* ***(a)*** *who is a First Nation child,* ***(b)*** *who is a Nisg̲a'a child,* ***(c)*** *who is a Treaty First Nation child,* ***(d)*** *who is under 12 years of age and has a biological parent who* **(i)** *is of Indigenous ancestry, including Métis and Inuit, and* ***(ii)*** *considers himself or herself to be an Indigenous person,* ***(e)*** *who is 12 years of age or over, of Indigenous ancestry, including Métis and Inuit, and considers himself or herself to be an Indigenous person, or* ***(f)*** *who an Indigenous authority confirms, by advising a director,*	"child" means an unmarried person under 19 years of age; "First Nation child" means a child (a) who is a member or entitled to be a member of a First Nation, or (b) who a First Nation confirms, by advising a director or an adoption agency, is a child belonging to a First Nation; "Indigenous child" means a child (a) who is a First Nation child, (b) who is a Nisg̲a'a child, (c) who is a Treaty First Nation child, (d) who is under 12 years of age and has a biological parent who **(i)** is of Indigenous ancestry, including Métis and Inuit, and (ii) considers himself or herself to be an Indigenous person, (e) who is 12 years of age or over, of Indigenous ancestry, including Métis and Inuit, and considers

"family violence" includes, with or without an intent to harm a family member, **(a)** physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm, **(b)** sexual abuse of a family member, **(c)** attempts to physically or sexually abuse a family member, **(d)** psychological or emotional abuse of a family member, including **(i)** intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property, **(ii)** unreasonable restrictions on, or prevention of, a family	**(c)** threats to kill or cause bodily harm to any person; **(d)** harassment, including stalking; **(e)** the failure to provide the necessaries 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; (*violence familiale*)		*is a child belonging to an Indigenous community;*	himself or herself to be an Indigenous person, or (f) who an Indigenous community confirms, by advising a director or an adoption agency, is a child belonging to an Indigenous community; "Indigenous community information", in relation to an Indigenous community to which an Indigenous child belongs, means the following information: (a) if the child is a First Nation child, the name and location of the First Nation; (b) if the child is a Nisg̲a'a child, the location of the Nisg̲a'a Nation or the child's Nisg̲a'a Village; (c) if the child is a Treaty First Nation child, the name and location of the Treaty First Nation; (d) if the child is not a First Nation child, a Nisg̲a'a child nor a Treaty First Nation child, the name and location of the child's Indigenous community;

member's financial or personal autonomy, **(iii)** stalking or following of the family member, and **(iv)** intentional damage to property, and **(e)** in the case of a child, direct or indirect exposure to family violence;				"relative", subject to subsection (3) of this section, means a person (a) who is related to another by birth or adoption, or (b) who, in the case of an Indigenous child, is considered to be a relative by the child or by the child's Indigenous community in accordance with that community's customs, traditions or customary adoption practices;