Family Law Act Modernization Project:

Care of and Time with Children & Protection from Family Violence

Discussion Paper – Chapter 5: Family Violence & Protection Orders

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**.

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Chapter 5 : Family Violence & Protection Orders

Introduction

Phase 2 of the *Family Law Act* (FLA) Modernization Project includes a review of the provisions in the FLA related to family violence and protection orders. In the FLA, family violence is considered under Part 9 – *Protection from Family Violence* when decisions are being made about protection orders. Family violence is also a consideration under Part 4 – *Care of and Time with Children* when determining what is in a child's best interests with respect to guardianship, parenting arrangements and contact with the child. Family violence was also recently included as a factor a court must consider under Part 5 – *Division of Property* when determining the ownership of pets when spouses separate.[1]

Although there have been some amendments to family violence related provisions within the FLA since it was implemented,[2] as well as changes to court rules dealing with protection orders,[3] this project is an opportunity for a comprehensive discussion about how legislative change might help to address family violence-related issues. Early engagement with people with lived experiences, lawyers, advocates and those who work in the anti-violence sector identified the following issues that need to be reviewed in the FLA Modernization Project:

- Eligibility for protection orders based on the definition of "family member" (s.1);
- Definition of "family violence" (s.1);
- Risk factors the court must consider when making decisions about protection orders (s.184 and 185);
- Terms the court may include in a protection order (s.183);
- Problems enforcing protection orders;
- How long a protection order lasts and what happens when it expires (s.184(4));
- Enforcing protection orders from another province or territory (s.191);
- Enforcing protection orders on reserve in BC;
- Family violence and parenting arrangements / family violence within the best interests of the child test (sections 37 and 38);
- Any additional issues related to family violence as it is addressed in the FLA.

In reviewing the sections of the FLA relevant to family violence and protection orders, the following overarching themes should be considered:

1) **The FLA and the new *Divorce Act* family violence provisions.**

[1] The amendments to the FLA create a legislative process for determining who shall have ownership of family pets, referred to as "companion animals" in the Act, after spouses separate. The amendments were introduced in *Bill 17 – Family Law Amendment Act, 2023* and will come into force on January 15, 2024.

[2] For example, the definition of family violence in section 1 of the FLA was updated to clarify intention to cause harm to a family member is not an element of the definition.

[3] For example, *Provincial Court Family Rule* 72 and *Supreme Court Family Rule* 15-1 now provide that if a judge makes or changes a protection order the clerk will prepare the order unless the judge orders otherwise, and also arrange service on the person named in the order if they were not present when the order was made.

In March 2021, the federal *Divorce Act*[4] introduced its own definition of family violence in section 2(1) and in section 16(3) and (4) inserted family violence related factors in its new best interests of the child test. See Appendix F for a comparison table of the FLA and *Divorce Act* provisions. As protection orders are not available under the *Divorce Act*, its definition of family violence is only relevant to decisions about parenting arrangements. The two sets of best interests of the child factors and definitions of family violence are similar but slightly different. Both definitions of family violence set out a list of behaviours that may constitute family violence and both are worded in such a way that other behaviours may also be found to constitute family violence.

2) Indigenous considerations.

There is a long history of violence against Indigenous (First Nations, Inuit, and Métis) people in Canada and intergenerational trauma continues to deeply impact Indigenous people throughout the country. Indigenous women and girls face among the highest rates of violent and non-violent victimization of all population groups in Canada and are disproportionately impacted by family violence, which has long-lasting impacts on the victims, and their families and communities.[5] Many Indigenous communities are located in rural and remote regions of the province and may be on reserve land. It is important that the provisions in the FLA intended to protect people from family violence address the unique needs and circumstances of Indigenous people, whose experience of family violence is affected by factors including colonization, intergenerational trauma, socio-economic and cultural factors, and geography.

3) The gendered nature of family violence.

Statistics Canada data from 2019 reports that 79% of victims in cases of intimate partner violence reported to police were women.[6] Research further indicates that intimate partner violence is higher among 2SLGBTQIA+ people, Indigenous women, women with disabilities and young women.[7] Given these statistics, the risks and unique experiences faced by women and girls, persons with disabilities and the 2SLGBTQIA+ community need to be considered when reviewing provisions related to protection orders as well as provisions concerning disputes over parenting arrangements in situations involving family violence.

4) Advancements in technology.

Advancements in technology have impacted the way people communicate and interact with each other. Technology has made it possible to have parenting time with children using videoconferencing tools, and to communicate through text and social media. In some families where there is high conflict or violence, web-based communication tools can reduce conflict and risk by minimizing direct communication between parties.

However, these same technologies have also been weaponized, used to stalk, harass, surveil, and control victims of family violence. Studies on technology-facilitated violence found abuse perpetrated

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[4] *Divorce Act*, RSC 1985, c 3 (2nd Supp.).
[5] Loanna Heidinger, *Intimate partner violence: Experiences of First Nations, Metis and Inuit women in Canada, 2018* (Canadian Centre for Justice and Community Safety Statistics, 2021).
[6] Shana Conroy, *Family violence in Canada: A statistical profile, 2019* (Canadian Centre for Justice and Community Safety Statistics, 2021).
[7] Adam Cotter, *Intimate partner violence in Canada, 2018: An Overview* (Canadian Centre for Justice and Community Safety Statistics, 2021).

using smart phones and social media accounts is the most widely cited, however abuse using GPS tracking and hacking into financial accounts are also often used. Technology-facilitated abuse often occurs within a pattern of coercive and controlling behaviour, for example, restricting the use of smart phones, computers and social media networks; threatening to or actually destroying devices; hacking into accounts, changing passwords or removing friends; deleting or tampering with messages/emails. "Smart" appliances and systems within the home can be tampered with remotely, spyware monitors online activity, and GPS trackers and surveillance cameras can monitor physical movement.[8] As the FLA is reviewed, attention needs to be paid to the positive and negative impacts of technology on family law matters. More specifically, it should be considered whether referencing technology facilitated violence in the Act might reduce the misuse of technology and the accompanying risk of violence.

Definitions

"Family member"

The term "family member" was a new term introduced in the FLA. This term is important for the definition of "family violence" and for making decisions about protection orders under Part 9 – *Protection from Family Violence*, as protection orders under the FLA are only available between those who meet the definition of family member. "Family member" is defined in section 1 of the FLA,[9] however when an application for a protection order is made this definition needs to be read in conjunction with "at-risk family member" as defined in section 182.[10] Under these definitions, anyone who meets the definition of "family member" in Section 1 of the FLA is eligible for a protection order if their safety and security is or is likely at risk from violence carried out by another "family member."

The *Divorce Act* recently introduced definitions of family member and family violence, which are relevant only to determining the best interests of the child since protection orders are not available under that Act. The federal government explains, "To determine the best interests of a child, a court must consider violence involving the people who are in the child's family or in a family-like relationship with the child. This includes people in the child's household, in the household of one of the spouses and dating partners who participate in the activities of the household."[11]

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[8] Michaela M Rogers et al, "Technology-Facilitated Abuse in Intimate Relationships: A Scoping Review" (2023) 24(4) Trauma, Violence, & Abuse 2210.

[9] "**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);

[10] **182** In this Part and the regulations made under section 248 (1) (d) [general regulation-making powers]:
"**at-risk family member**" means a person whose safety and security is or is likely at risk from family violence carried out by a family member;

[11] Government of Canada, "The *Divorce Act* Changes Explained" (last modified 7 March 2022), online.

Dating Relationships

There has been feedback that the current definitions of "family member" and "at risk family member" are too restrictive and eligibility for protection orders under the FLA should be expanded to additional categories of interpersonal relationships. Dating relationships are the example most often raised. Although protection orders under the FLA are not available to individuals experiencing violence in a dating relationship, there are other avenues to seek protection through the courts in BC, including applying for a peace bond or reporting violence to police and seeking protection through the criminal justice system. The BC Prosecution Service (BCPS) Policy Manual thoroughly addresses and prioritizes intimate partner violence in any type of intimate relationship. The policy defines "intimate partner" as "any person – regardless of gender or sexual orientation – with whom the accused/defendant has, or has had, an ongoing close and personal or intimate relationship, whether or not they are legally married or living together at the time of the alleged criminal conduct."[12] A list of risk factors for violence is included, and charge assessments for these files are to happen as quickly as possible. However, people in dating relationships who would benefit from a protective order may not want to involve the police or navigate the complexities of trying to obtain a peace bond. Meeting the charge approval standards for a criminal charge may be difficult to do, especially if the violence has been characterized as psychological and emotional abuse rather than physical or sexual in nature. As a result, there may be a practical gap in protection for those experiencing abuse from a dating partner.

Some Canadian jurisdictions allow those in dating relationships to apply for a civil protection order, including Manitoba, New Brunswick, and Nunavut. However, the relevant legislation in these jurisdictions is specific to family violence and does not encompass other family law issues such as property division or support arrangements, unlike the FLA.[13] Therefore, dating relationships might fit better within the legislative scheme in these jurisdictions as compared to BC's FLA which deals with the many issues that arise in families that are separating.

There is little case law or commentary that directly discusses whether precluding those in dating relationships from applying for a protection order under BC's FLA is considered a legislative gap, however anti-violence organizations supporting survivors of intimate partner violence raised this as an area that needs to be addressed. These organizations also pointed out that many dating relationships now begin or are conducted entirely online. Although researchers have only recently begun studying violence and sexual harms perpetrated through modern dating platforms, early data shows that technology-facilitated sexual violence is common.[14] If eligibility for FLA protection orders were to expand to dating partners, consideration should be given to whether and how online relationships should be included.

Adult Children

Another scenario that occasionally arises in the case law is a parent applying for protection from their adult child. The case law is clear that if the child still lives with the parent, the court can make an order, but if the adult child lives apart from their parent, they are no longer a "family member". They no

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[12] BC Prosecution Service, "Crown Counsel Policy Manual – IPV 1 – Intimate Partner Violence" (20 May 2022) at 1, online (pdf).

[13] *The Domestic Violence and Stalking Act*, CCSM, c D93; *Intimate Partner Violence Intervention Act*, SNU 2006, c 18; *Family Abuse Intervention Act*, SNU 2006, c 18.

[14] Elena Cama, "Understanding Experiences of Sexual Harms Facilitated through Dating and Hook Up Apps among Women and Girls" in Jane Bailey et al, *The Emerald International Handbook of Technology-Facilitated Violence and Abuse*, (Leeds: Emerald Publishing Limited, 2021) 333.

longer meet the definition of "child" due to their age, and they do not meet the legislative requirement of "lives with, and is related to." In *K v K*, the court granted an order against the claimant's adult son, as he both lived with and was related to the claimant.[15] However, in *JK v GK*, an order was not granted, as the respondent adult child no longer lived with her 78-year-old mother.[16]

Extended Family

There are few reported cases concerning applications for protection against family violence from an extended family member. In families where there are intergenerational housing arrangements, the wording "lives with, and is related to" is usually broad to capture extended family relationships. However, extended family members who do not live together do not meet the *FLA* definition, as seen in *MacAulay v Meise,* where cousins who did not live together were not considered family members.[17] At least where children are involved, the courts have found there is no requirement to live together full-time - in *CJJ v AJ,* the child lived with his grandparents only on the weekends, but was deemed to be at risk of violence from them and a protection order against them was granted.[18]

A problem can arise where family members (other than a spousal relationship) lived together at one point and then moved into separate residences because of the violence. There have been instances where the abusive family member moved out because a protection order was made that no longer permitted them to remain in the home. As soon as that occurs, they no longer meet the FLA definition of a "family member" which has implications for the ability of either party to change the protection order. Legislative amendments are required if the protection order regime is intended to continue to apply to family members after a family member has moved out of the family residence in compliance with a protection order or as a safety measure.

Although the current definition does capture extended family members who live together, it relies on Eurocentric notions of family. As discussed in the text box below, the definition does not fit well with the more expansive notion of family held by Indigenous cultures. The FLA also does not capture what is sometimes referred to as "families of choice" or "found families". These are people who are linked together not through biology or marriage but through an intentional choice to support one another. In recent years there has been a rise in living arrangements that bring non-biological kin into family or family-like relationships. As stated in one article that discussed why the number of found families are rising, "(w)e're likely living through the most rapid change in family structure in human history. The causes are economic, cultural, and institutional all at once."[19] Many families of choice are found in the 2SLGBTQIA+ community, created when biological family ties became strained or broken. Others form when people redefine their sense of family to create committed relationships that are accepting and supportive, sharing emotional and material resources, raising children as a community and providing care to those who need it. The FLA does not contemplate families of choice in its definition of family member.

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[15] *K v K*, 2013 BCPC 223.
[16] *JK v GK*, 2015 BCPC 117.
[17] *MacAulay v Meise*, 2020 BCPC 135.
[18] *CJJ v AJ*, 2016 BCSC 676.
[19] David Brooks, "The Nuclear Family Was a Mistake", *The Atlantic* (March 2020).

Indigenous Considerations on Family Members – What We Heard

Indigenous communities, as well as some other cultural groups, have a more expansive view of family that can include immediate and extended relatives, chosen family members as well as the broader community. In Indigenous cultures, Indigenous family units have been described as going "beyond the traditional nuclear family living in one house. Families are extensive networks of strong, connective kinship; they are often entire communities."[20] Care for Indigenous children is not just the responsibility of a child's biological parents; often members of the child's broader family help to make decisions about and care for a child. In 2021, 17% of First Nations children and 17% of Inuit children lived with a grandparent— almost twice the proportion of non-Indigenous children (9%).[21]

One of the key themes that emerged when speaking with Indigenous people with lived experience in the family justice system is that a modern FLA needs to acknowledge the larger familial networks that form the structure of Indigenous families.[22] Although these comments were primarily made in relation to the importance of recognizing the role of extended family in caring for and making decisions about children (See Chapter 1—*Guardianship, Parenting Arrangements and Contact*), the notion of family member is also important with respect to family violence and eligibility for protection orders. Someone who lives in the same household and is considered to be an "uncle" or "cousin" or other extended relative would not technically be a "family member" under the current definition in the FLA unless there was a connection by blood or marriage. This affects whether a protection order is available under the FLA if there is family violence.

5-1. Should the FLA's definition of "family member" be amended to accommodate Indigenous cultures' more expansive view of extended family, broadening eligibility for protection orders?

Caregiving Relationships

Some Canadian jurisdictions also allow those receiving daily care to apply for a protection order against their caregiver. For example, Alberta's legislation covers caregiving relationships that apply via court order,[23] and legislation in Saskatchewan and Nunavut covers relationships that provide help with daily activities on an ongoing basis, regardless of whether parties live together. [24] Notably, the legislation in all three of these jurisdictions is specific to family violence and does not cover other aspects of family law. However, case law from these jurisdictions suggests that the legislation is not being used to issue protection orders for caregiving relationships outside of the parent-child relationship. Instead, situations where caregiver abuse is occurring in group homes or similar settings are often dealt with by way of criminal charges.

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[20] Tanya Talaga, "The power of Indigenous kinship: To heal the spirits of the next generation, Indigenous peoples are relearning rites of passage", *The Walrus* (14 November 2019).

[21] Nicole Armos et al, *Experiences of Indigenous families in the family justice system: A literature review and perspectives from legal and frontline family justice professionals*, (Department of Justice Canada, 2023) at 19.

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

[23] *Protection Against Family Violence Act*, RSA 2000, c P-27, s 1(1)(d)(v).

[24] *The Victims of Interpersonal Violence Act*, SS 1994, c V-6.02, s 2(a)(iii); *Family Abuse Intervention Act*, *supra* note 13, ss 2(1)(d), 2(6).

In BC, the *Adult Guardianship Act* provides protection to vulnerable adults in care and allows for confidential reports of abuse and neglect, investigation of these reports, and application for interim court orders to protect the vulnerable adult.[25] Additionally, section 51(1)(f) of this legislation allows an application to be made under the FLA for child or spousal support if the vulnerable adult may be eligible to receive either. However, early feedback has suggested that people living with disabilities, particularly women and people who identify as 2SLGBTQIA+, may need other options to address risk of violence from caregivers who are not necessarily intimate partners or family members that meet the definition in the FLA. It has been suggested that these people may benefit from being able to apply for FLA protection orders without fear of retaliation from the abusive caregiver or losing responsibility for their children. Any changes however should not draw away from the focus on gender-based violence or make protection orders more difficult to obtain or enforce.

Discussion Questions:

5-2. Does the definition of "family member" sufficiently capture everyone who should be eligible for protection under the FLA? Or should eligibility for protection orders be expanded to potentially include:

(a) Persons in dating relationships

(b) Adult children who do not live with the parent

(c) Care-giving relationships

(d) Other relatives who do not live with the person (e.g. should a protection order be available to a person who is at risk of violence from a sibling or uncle who does not live with them)

(e) Others

5-3. As an alternative to expanding eligibility for protection orders under the FLA, would it be more appropriate to introduce separate legislation to address relationship violence? If so, what types of relationships should fall within the scope of a new Act?

"family violence"

In 2013, the FLA introduced a broad definition of family violence. The definition was intended to give all family justice participants a clear and common understanding of what family violence is for the purposes of the FLA (i.e. for the purpose of making decisions about protection orders and considering family violence within the context of a best interests of the child determination). At the time the definition was developed, physical abuse was sometimes the only form of abuse that was recognized as family violence. The definition in section 1 of the FLA, which is referenced or reproduced in other provincial legislation that deals with violence,[26] is as follows:

"**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,

[25] *Adult Guardianship Act*, RSBC 1996, c 6.

[26] See *Residential Tenancy Act*, SBC 2002, c 78; *Employment Standards Act*, RSBC 1996, c 113.

(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 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;

The courts in BC have broadly interpreted family violence in many cases, although this has not occurred in every decision. An amendment to the FLA definition in 2021 added "with or without an intent to harm a family member" to respond to a court decision and to clarify there is no requirement to demonstrate an intention to harm a family member to meet the definition of family violence. Some behaviours that have been identified in case law as family violence, either on their own or in combination with other factors, include:

- Excessive phone calls, texts, and emails;
- Insistence on meeting in person when an issue could have been resolved virtually;
- Questioning the applicant about her relationship status while trying to resolve an unrelated issue;
- Failure to pay child support with the intent to inflict psychological and emotional trauma;
- Demeaning remarks about the other parent to the child;
- Threats to use physical force to compel the child to accompany the parent; and
- Suggestions that the other parent was responsible for the conflict in the family.

When the *Divorce Act* was amended in 2021, section 2(1) introduced a definition of family violence which is similar but not identical to the definition of family violence in the FLA.[27] For example, the FLA definition includes "psychological or emotional abuse" while the *Divorce Act* does not use the word emotional. The FLA definition includes threats to pets, while the *Divorce Act* includes threats to or actually killing or harming an animal. The FLA definition includes coercion as an example of psychological or emotional abuse, whereas the *Divorce Act* begins the definition by describing family

[27] ***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;
(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*)

violence as including conduct that constitutes a pattern of coercive and controlling behaviour. See Appendix F for a table comparing the provisions in the *Divorce Act* and the FLA.

Coercive and Controlling Behaviour

Both case law and literature highlight the prevalence of coercive and controlling behaviour as a type of family violence. While there is not a single definition of coercive control, it was recently described in a 2023 report prepared for the Department of Justice Canada as "a pattern of abuse over time that maintains the power of one intimate partner over another through a variety of means such as threats, intimidation, and emotional, sexual and financial abuse.[28] While this type of behaviour is listed as a risk factor under section 184 of the FLA, it is not included in the Act's definition of family violence itself. The FLA definition does include "intimidation, harassment, coercion, or threats," and the Section 184 risk factors require the court to consider "whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member."

Behaviours that could fit under the umbrella of 'coercive and controlling' are not always recognized as family violence if they are viewed outside a pattern of power and control. For example, litigation abuse, making derogatory or belittling remarks, withholding payments or otherwise threatening the victim's financial stability do not always fit with traditional notions of abuse. It is also important to recognize the intersectional nature of family violence – many factors including disability and neurodiversity, racialization, gender identity, sexuality, class, language, and immigration status profoundly impact how people experience violence. For example, in the 2SLGBTQIA+ community, outing or deliberately misgendering a person may be coercive and controlling violence. Someone living with a disability may experience violence as the abusive person withholding medication or threatening to harm a service animal.[29] Coercive and controlling behaviours may not consistently be recognized as family violence under the current definition, but are often "more dangerous, more likely to continue, and more likely to be associated with negative or even abusive parenting" than other forms of family violence.[30]

Jurisdictions in Canada that have recently defined family violence have included coercive and controlling behaviour in a more explicit way than the FLA currently does. The *Divorce Act* definition of family violence includes "any conduct… that constitutes a pattern of coercive and controlling behaviour," as does New Brunswick's *Family Law Act*.[31] Additionally, MP Randall Garrison introduced Bill C-202 on November 25, 2021 which seeks amendment of the *Criminal Code*[32] to add controlling or coercive conduct as an offence.[33]

There are reasons why updating BC's definition of family violence in the FLA to more explicitly reference coercive and controlling behaviour could be beneficial to families. Adding this language to the definition may encourage judges to consider this behaviour as a form of violence in and of itself, rather than just a risk factor for violence. While some judges do currently consider coercive and controlling behaviour to

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[28] Peter Jaffe et al, *Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices, 2023*, (Department of Justice Canada, 2023) at 9.
[29] Zara Suleman, Haley Hrymak & Kim Hawkins, *Are We Ready to Change? A Lawyer's Guide to Keeping Women and Children Safe in BC's Family Law System*, (Rise Women's Legal Centre, 2021) at 14.
[30] Linda Neilson, *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases*, 2nd ed, 2017 CanLIIDocs 2 (Canadian Legal Information Institute, 2020) s 4.4.9.
[31] *Divorce Act*, *supra* note 4, s 2(1); *Family Law Act*, SNB 2020, c 23, s 1.
[32] *Criminal Code*, RSC 1985, c C-46.
[33] Bill C-202, *An Act to amend the Criminal Code (controlling or coercive conduct)*, 1st Sess, 44th Par, 2021, (Introduction and first reading 25 November 25 2021).

be family violence,[34] others who regard it predominantly as a risk factor for other forms of violence may not be convinced to grant a protection order under the FLA on the basis of coercive and controlling behaviour alone.[35] Including coercive and controlling behaviour as a type of family violence may allow judges to better protect family members, particularly in cases where there is little evidence beyond the parties' accounts of their relationship history. An issue that often arises is that the two parties have vastly different narratives of whether or not family violence occurred. In some cases, judges have not been able to conclude on a balance of probabilities that family violence occurred but have made note of coercive and controlling behaviour.[36] Furthermore, the change may help individuals reading the legislation understand that coercive and controlling behaviour is a form of violence, and ensure it is considered in family violence assessments.

Although early feedback suggests strong support for more explicitly recognizing coercive control as a form of family violence, there is also a caution that this needs to be accompanied by education. Judges, lawyers, and others in the family justice system require training on how to recognize and appropriately address coercive and controlling behaviour. The federal government has introduced legislation that aims to ensure federally appointed judges in Canada receive training in this area. Bill C-233 (Keira's Law) came into effect in May 2023, amending the *Judges Act*[37] to require that there be seminars for the continuing education of judges, including seminars on matters related to sexual assault law, intimate partner violence, coercive control in intimate partner and family relationships and social context, which includes systemic racism and systemic discrimination.[38] Ontario approved similar legislative amendments that apply to provincially appointed judges and justices of the peace in June 2023 when Bill 102, *Strengthening Safety and Modernizing Justice Act, 2023*, received Royal Assent.[39] In BC provincial court judges receive training on sexual assault, family violence and intimate partner violence through a New Judge's Education Program and ongoing judicial education.[40]

Technology-Based Violence

Some literature suggests emerging forms of violence that make use of modern technology should be considered when defining family violence.[41] Examples of these types of violence include using texting and social media to bully, harass, stalk, or intimidate a current or former partner. It also includes non-consensual disclosure of intimate images and revenge pornography, identity theft, unauthorized collection and disclosure of personal information to shame or embarrass ("doxing") and using modern technology such as drones, GPS or other tracking systems for violence or stalking. While the definition of family violence could be more explicit, it is also possible that the current legislative scheme is already

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[34] See e.g., *CF v DV,* 2015 BCPC 309 at para 51.

[35] *SM v RM,* 2015 BCSC 1344 [*SM*] (coercive and controlling behaviour was found to be a risk factor for future violence, but the judge also found the behaviour itself to be violence); *NCR v KDC,* 2014 BCPC 9 (coercive and controlling behaviour was evident, judge considered it as a risk factor but did not include it in conclusions re family violence).

[36] See e.g., *JCP v JB,* 2013 BCPC 297.

[37] *Judges Act*, RSC 1985, c J-1.

[38] C-233, *An Act to amend the Criminal Code and the Judges Act (violence against an intimate partner)*, 1st Sess, 44th Par, 2022, cl 2—3.

[39] Bill 102, *Strengthening Safety and Modernizing Justice Act, 2023*, 1st Sess, 43rd Leg, Ontario, 2023 (assented to 8 June 2023), SO 2023, c 12.

[40] Judicial education is described on the BC Provincial Court Website.

[41] Neilson, *supra* note 30, s 4.6.3; Jennifer Koshan, Janet Mosher & Wanda Wiegers, "COVID-19, Domestic Violence, and Technology-Facilitated Abuse", *ABlawg: The University of Calgary Faculty of Law Blog* (13 July 2020), online (blog).

broad enough to capture technology-facilitated family violence, keeping in mind that non-consensual disclosure of intimate images has been recently addressed through the enactment of the *Intimate Images Protection Act* in May 2023.[42]

Discussion Questions:

5-4. Are there elements of family violence that are not adequately captured within the current definition of family violence in the FLA? For example:

(a) Should coercive and controlling behaviour be more explicitly included

(b) Should technology-based violence be explicitly referenced

(c) Any other elements

5-5. The definition of family violence in the FLA is similar but not identical to the definition of family violence in the *Divorce Act*. Has this created any problems that suggest the definition in the FLA should be changed to more directly mirror the definition in the *Divorce Act*?

Issues Related to Protection Orders

Risk Factors

A protection order may be granted on application by an "at-risk family member," by someone on behalf of an at-risk family member, or on the court's own initiative.[43] An at-risk family member is defined as "a person whose safety and security is or is likely at risk from family violence carried out by a family member."[44] To determine whether a family member is at risk and a protection order should be made, judges must consider the risk factors in sections 184 and 185, starting with a non-exhaustive list in s.184(1):

184 (1) In determining whether to make an order under this Part, the court must consider at least the following risk factors:

(a) any history of family violence by the family member against whom the order is to be made;

(b) whether any family violence is repetitive or escalating;

(c) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member;

(d) the current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any recent separation or intention to separate;

(e) any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence;

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[42] See Government of BC, "Protecting your images" (last updated 26 July 2023), online (Note: as of November 2023, the Act had not yet been brought into force by regulation).

[43] *Family Law Act*, SBC 2011, c 25, s 183(1)(a) [FLA].

[44] *Ibid*, s 182.

(f) the at-risk family member's perception of risks to his or her own safety and security;

(g) any circumstance that may increase the at-risk family member's vulnerability, including pregnancy, age, family circumstances, health or economic dependence

Section 184(4) goes on to clarify that the court may make a protection order regardless of whether certain circumstances exist, including:

- A protection order has previously been made, regardless of whether it was complied with;
- The family member who will be restrained by the order is temporarily absent from the residence;
- The at-risk family member is in a shelter or other safe place;
- Criminal charges have been or may be laid;
- There is a history of reconciliation (or resuming cohabitation) between the parties;
- An order restricting communication has been made under s.225 of the FLA.

If the family member that is at risk of violence is a child, the judge must consider two additional factors set out in s.185:

185 If a child is a family member, the court must consider, in addition to the factors set out in section 184 *[whether to make protection order]*,

(a) whether the child may be exposed to family violence if an order under this Part is not made, and

(b) whether an order under this Part should also be made respecting the child if an order under this Part is made respecting the child's parent or guardian.

In written decisions about protection order applications, judges often include the full text of Section 184 and sometimes consider each risk factor separately, but more commonly they simply state that they have considered all the factors in reaching their decision. This, along with the fact that many decisions are not reported, makes it difficult to analyse exactly how judges are considering the risk factors. As many cases proceed without any formal or standardized risk assessment being done, judges typically rely on the evidence presented by each party, which is often contradictory.

There are likely significant discrepancies amongst the judiciary with respect to the level of training and sensitivity to the nuances and complexities of family violence. While some judges do examine each risk factor and recognize behaviours that may seem innocuous but are actually coercive and controlling, the literature suggests that there is a general lack of knowledge amongst judges of the 'red flags' for risk of future violence.[45]

While judges must consider all of the factors in section 184, it is not a closed list, and they have discretion to consider additional factors when deciding whether to make a protection order. Some early feedback from advocacy organizations suggested that if judges do consider an additional factor, they typically either categorize it as a type of family violence under the section 1 definition, or under one of the existing section 184 risk factors.

[45] Suleman, Hrymak & Hawkins, *supra* note 29 at 49.

The list of risk factors in section 184 of the FLA is only one such list of factors; others have been developed for different purposes and may include additional or different risk factors. For example, the *Summary of Intimate Partner Violence Risk Factors* (SIPVR) is a job aid developed for police to use when conducting risk-focused intimate partner violence investigations.[46] The SIPVR has a longer and more detailed list of factors than section 184. A comparison of the two lists shows that the factors in the FLA are also included in the SIPVR, however the SIPVR looks at some factors in more detail. For example, the FLA includes threats in the definition of family violence while the SIPVR asks about specific types of threats including threats to kill other people or pets or oneself, the FLA asks about physical violence while the SIPVR asks about sexual coercion, strangulation and suffocation. The SIPVR looks beyond history of family violence to consider whether the person accused has any history of violence, and whether they support or condone violence. Although the SIPVR is a tool used for police investigations rather than making decisions about parenting arrangements or civil protection orders, there has been some feedback that there should be more consistency between the risk factors in the FLA and the SIPVR.

The SIPVR also flags certain risk factors as being associated with an increased likelihood, and severity, of future violence. There have been comments that it might be useful to flag higher risk factors in the FLA, however this suggestion raises concerns as well. Designating higher risk factors may create a two-tiered approach, minimizing the significance of the "lower" risk factors. There is fear that people who don't demonstrate the higher risk factors, but are still not safe, will not receive the orders they need. Further, many survivors already struggle with applying for protection orders and demonstrating they are at risk; creating categories of risk factors may further complicate the process and make it harder to prove a need for protection.

As set out above, section 184(4) describes a number of circumstances where it should not be assumed that a protection order would be inappropriate, clarifying that a protection order may still be made. In a submission regarding changes to the *Divorce Act*, Luke's Place, an Ontario-based non-profit organization serving women leaving abusive relationships as well as engaging in training, research and law and policy reform advocacy, recommended a provision that the court not draw adverse inferences about the existence of family violence based on myths or stereotypes around family violence.[47] Recommendations from this brief that are not currently reflected in the FLA include:

- The court shall not infer that the absence of disclosure of family violence prior to separation, including reports to the police or child welfare authorities, means the family violence did not happen, or that the claims are exaggerated.
- The court shall not infer that if claims of family violence are made late in the proceedings or were not made in prior proceedings, they are false or exaggerated.
- The court shall not infer that inconsistencies between evidence of family violence in the divorce proceedings and other proceedings, including criminal proceedings, mean the family violence did not happen, that the claims are exaggerated, or that the spouse making the claims is unreliable or dishonest.
- The court shall not infer that the absence of observable physical injuries or the absence of external expressions of fear means the abuse did not happen.

[46] The SIPVR is a tool intended to be used in intimate partner violence investigations by people trained in its use. To help ensure it is used appropriately, it has not been made publicly available.

[47] Luke's Place Support and Resource Centre & National Association of Women and the Law, *Joint Brief on Bill C-78*, (2018) at 6, online (pdf).

There are many reasons a victim may choose not to disclose or delay disclosure of family violence, including lack of trust in the justice system, advice from lawyers not to disclose, lack of recognition that what their experience constitutes family violence, and inability to access supports.[48] Ensuring that judges do not draw adverse inferences based on delayed or inconsistent disclosure would help ensure the safety of victims of family violence. While victims of family violence may be more attuned to the risks posed by their family member, they may also suffer trauma which lessens their awareness of dangers and impairs their memory, or be subject to gaslighting by their family member, resulting in doubtfulness of their own judgement.[49] It has been suggested that building more information into the legislation that reflects the impacts of trauma may assist the court, especially when credibility is questioned.

Indigenous Considerations, Intersection Between Risk and Living in Remote Communities – What We Heard

Indigenous people with lived experience of seeking protection from family violence in isolated and remote communities described what happens when judges and lawyers don't have a strong and consistent understanding of what falls within the umbrella of family violence.[50] Over 80 smaller communities in BC are served by a circuit court. A court team, including a judge, court clerk, sheriff, Native Court worker, probation officer, defence and family lawyers will travel to the community at scheduled times, sometimes only a few times a year, and hold court in the community. The judge and the lawyers who arrive in a community one month may be well-versed in family violence and understand how family violence, including coercive and controlling behaviour, may look within an Indigenous family. However, the judge and lawyers who arrive in the community three months later may not have a solid understanding, which impacts the survivors' ability to obtain the protection they need, with terms that are effective for a particular family in a particular community. When a survivor, who may have already waited several months for the circuit court to arrive, doesn't obtain a protection order, they may have to wait several more months for the court to return. In the meantime, they may or may not have access to support from a lawyer or advocate to assist with the legal process, or safe housing.

5-6. Should living in a remote community with limited opportunity to make a protection order application before a court be added as a risk factor?

Discussion Questions:

5-7. Are there additional risk factors that should be added to s.184(1) or s.185?

5-8. Should a separate "high-risk" section or some other mechanism be used to flag factors that are recognized as being linked to escalating violence or increased lethality?

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[48] Donna Martinson & Margaret Jackson, "The 2021 Divorce Act: Using statutory interpretation principles to support substantive equality for women and children in family violence cases" (2021) 5 Family Violence & Family Law Brief 1 (Vancouver: The FREDA Centre for Research on Violence Against Women and Children, 2021) at 19, online (pdf).

[49] Arlene Weisz, Richard M Tolman & Daniel G Saunders, "Assessing the risk of severe domestic violence: The importance of survivors' predictions" (2000) 15:1 J of Interpersonal Violence 75 at 76.

[50] Mahihkan Management, *supra* note 22.

5-9. Should additional circumstances be added to Section 184(4) that might support judges to apply a trauma informed lens when considering the information and evidence available in a matter involving family violence?

Terms used in Protection Orders

Under the former *Family Relations Act*, there was little direction on the specific terms that would be appropriate to include in a protective order, and they were often combined with terms about parenting arrangements. This undermined the seriousness of the protective order and made enforcement difficult. Section 183 of the FLA introduced guidance on the types of terms that are appropriate to include in a protection order:

Orders respecting protection

183 …

(3) An order under subsection (2) may include one or more of the following:

(a) a provision restraining the family member from

(i) directly or indirectly communicating with or contacting the at-risk family member or a specified person,

(ii) attending at, nearing or entering a place regularly attended by the at-risk family member, including the residence, property, business, school or place of employment of the at-risk family member, even if the family member owns the place, or has a right to possess the place,

(iii) following the at-risk family member,

(iv) possessing a weapon, a firearm or a specified object, or

(v) possessing a licence, registration certificate, authorization or other document relating to a weapon or firearm;

(b) limits on the family member in communicating with or contacting the at-risk family member, including specifying the manner or means of communication or contact;

(c) directions to a police officer to

(i) remove the family member from the residence immediately or within a specified period of time,

(ii) accompany the family member, the at-risk family member or a specified person to the residence as soon as practicable, or within a specified period of time, to supervise the removal of personal belongings, or

(iii) seize from the family member anything referred to in paragraph (a) (iv) or (v);

(d) a provision requiring the family member to report to the court, or to a person named by the court, at the time and in the manner specified by the court;

(e) any terms or conditions the court considers necessary to

(i) protect the safety and security of the at-risk family member, or

(ii) implement the order.

The terms that may be included in a protection order must be safety-focused and appropriate for enforcement by the police and criminal justice system. Although the list of terms in s.183 is a closed list, subsection (e) states that a protection order may include any terms or conditions the court considers necessary to protect the safety and security of the at-risk family member or implement the protection order. This gives the judge discretion to include any protective term that is needed in a particular situation.

Protection orders are commonly used to restrain communication, restrict attendance at certain locations such as homes, businesses, or schools, and prohibit the possession of weapons. There are sometimes exceptions to allow the claimant or the children to contact the respondent if they wish[51] or to permit specified, limited communication. It is also clear from case law that judges use their discretion under section 183(3)(e) to include terms that address particular issues in specific cases.

One barrier for some survivors of family violence trying to leave a relationship is difficulty accessing certain types of personal property. Family violence legislation in several other jurisdictions includes terms specific to financially abusive and controlling behaviour. Saskatchewan, Manitoba, New Brunswick, Nova Scotia, PEI, Newfoundland, NWT, and Nunavut all have terms that either grant the applicant temporary control over personal property such as chequebooks, bank cards, identification documents, or children's items, or prevent the applicant from cutting off utilities or similar. [52] While judges already have discretion under section 183(3)(e) to include terms like these in protection orders, they may be under-used. Adding this as a further subsection in section 183 could maintain a focus on safety while better reflecting the increasing awareness that family violence is not just physical abuse.

Another issue that has been raised around the terms used in protection orders is difficulty understanding the orders. New Brunswick has tried to address this by providing in its family violence regulations that "an emergency intervention order shall be written in plain language, to the fullest extent possible."[53] The BC courts have developed "pick lists" of standard terms to encourage consistent wording, making orders easier to understand and enforce.[54] However, in some cases protection orders may still benefit from plainer language and explanations describing the consequences of breaching the order.[55] For example, an order that restrains a person from being within a certain distance of the protected person, or a location where the protected person often goes, can be difficult to understand without very clear language or a map. Without clear examples, it can be difficult to understand what terms like "direct or indirect contact" mean in practice. Also, it may be helpful to have more specific terms around online and social media behaviour and contact.

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[51] See e.g., *SM*, *supra* note 39.

[52] *The Victims of Interpersonal Violence Act*, *supra* note 24, ss 7(1)(g)—(h); *The Domestic Violence and Stalking Act*, *supra* note 13, ss 7(1)(e), 14(1)(f),(k); *Intimate Partner Violence Intervention Act*, *supra* note 13, ss 4(5)(d),(g),(l); *Domestic Violence Intervention Act*, SNS 2001, c 29, ss 8(1)(f)—(g); *Victims of Family Violence Act*, RSPEI 1988, c V3.2, ss 4(3)(g)—(h),(j.1); *Family Violence Protection Act*, SNL 2005, c F-3.1, ss 6(f)—(g),(l)—(m); *Protection Against Family Violence Act*, SNWT 2003, c 24, ss 4(3)(e)—(f); *Family Abuse Intervention Act*, *supra* note 13, ss 7(2)(e),(g), 18(2)(e),(g).

[53] General Regulation, NB Reg 2018-34, s 13.

[54] For example, the BC Provincial Court publishes its picklist online. See section F for terms related to protection orders.

[55] Donna Martinson & Margaret Jackson, "Judicial Leadership and Domestic Violence Cases – Judges Can Make a Difference" (Prepared for the NJI National Judges Conference: Managing the Domestic Violence Case in Family and Criminal Law, Vancouver, October 29 – November 2, 2012) at 40, online (pdf): *The FREDA Centre for Research on Violence Against Women and Children.*

Early feedback on this issue suggests that for the most part, s.183 already allows judges to include terms that are needed in protection orders; accessing and enforcing protection orders present bigger problems. There was a suggestion it would be helpful to ensure that the entire protection order application, not just a copy of the order, is served on a respondent who was not in court when the protection order was made. A related suggestion is to include information with the order that supports compliance, for example contact information for duty counsel and legal advice lines so a lawyer can explain to the respondent the terms of the order, how to comply with the order, and consequences if the order is not followed. These suggestions may improve compliance with protection orders, however they do not necessarily require legislative amendments to implement.

Discussion Question:

5-10. Should s.183(3) include any different or additional terms that a judge can make in a protection order?

How Long a Protection Order Lasts and What Happens When it Expires

Under the former *Family Relations Act*, a restraining order would remain in effect indefinitely unless the order specified an end date or there was an order to cancel or terminate it. In many cases, neither happened and the order lingered on. When asked to enforce an order without an end date that had been made several years previously, police were sometimes uncertain whether the order was still in effect. To improve consistency and enforcement, and prevent outdated orders from lingering indefinitely, s.184(4) of the FLA sets out a 1-year expiry period unless the order specifies otherwise. It is not uncommon for judges to make a protection order that is longer or shorter than the 1-year default; in particular, shorter orders are made when the application is made without notice.

There is some frustration with short-term protection orders being made when the order is applied for on a without notice basis. In some cases, the order is made for only a few weeks, giving just enough time for the other party to be served with the application and the order before the matter goes back before a judge to decide whether there is evidence to support a longer-term order. One suggestion is that the burden on the survivor would be reduced if it was up to the other party to apply to court to have the protection order set aside or changed, instead of having the order end or the applicant having to prove the matter a second time.

Once a protection order expires, it is up to the applicant to return to court and prove that there is a continued safety risk and a new protection order should be made – under the FLA there is no onus on the person responsible for the violence to prove the circumstances have changed and their behaviour is no longer a threat.[56] In contrast, there is at least one jurisdiction in Canada with family violence legislation that puts the onus on the respondent. Yukon's *Family Violence Prevention Act* states that at a "rehearing" of an emergency protection order the respondent must demonstrate, on a balance of probabilities, why the order should not be confirmed.[57] However, this applies to a rehearing by a judge within a few days of an emergency protection order being made by a justice of the peace. This is somewhat different than renewing an order made several months or a year before. Nonetheless, putting the onus on the perpetrator to show that they no longer pose a risk, at least in some

[56] *BHC v FGJP,* 2017 BCPC 378.
[57] *Family Violence Prevention Act*, RSY 2002, c 84, s. 7.

circumstances, may preserve the often-limited resources of the victim, and seem fairer since the onus to obtain the order is on the victim at the initial hearing.

Many advocates and organizations that support survivors of family violence feel strongly that the current provisions requiring survivors to return to court and prove they continue to need a protection order perpetuates litigation abuse, increases risk to safety, and creates an access to justice issue as survivors often have limited financial and legal resources. Moreover, it is re-traumatizing to have to prove their case over and over. One argument made in support of changing the onus is that although family violence may be situational in some cases, arising for short time during the emotional period during separation, in many other cases it is a persistent aspect of the relationship. In these cases, the terms of the protection order and the potential consequences of breaching the order may be preventing the violent behaviour. However, if the protection order is removed, the violence may recur. In other words, just because the protection order is doing its job doesn't mean the order is no longer needed. There have been some early suggestions made in response to concerns about short-term protection orders, the existing 1-year default period, and placing the onus on the survivor to continually prove a protection order is still needed. These suggestions include:

- having protection orders last until a party applies to have the order changed or terminated (i.e., removing the default expiry period),
- lengthening the 1-year default period to 3 years,
- creating an automatic "renewal" of the protection order after the 1-year expiry period unless the restrained party makes an application to change or terminate the order, and
- creating a minimum time that the order will be in effect, to prevent the protected party from having to reapply after only a few weeks or months.

Discussion Questions:

5-11. The FLA currently provides that the court may specify a protection order is in effect for any period of time, however if the order does not specify a time period it will expire 1 year after it is made. Should changes be made to this 1-year default period? If so, what should the changes be?

5-12. When a protection order expires, the onus is on the protected party to return to court and prove that the risk of violence continues to exist and another protection order is needed. Should this model continue or should the onus shift at some point to require the person restrained by the order (i.e., the person responsible for the risk of violence) to prove there is no longer a risk of violence?

Enforcing Civil Protection Orders from Another Province or Territory

Section 191 of the FLA says that a civil protection order made in another province or territory that is "similar" to a protection order made under Part 9 of the FLA can be enforced in BC, without having to register the order or go to court in BC.[58] For example, a person may obtain a protection order in Alberta

[58] Section 191 of the FLA must be read together with section 9.1 of the *Enforcement of Canadian Judgments and Decrees Act*, which says that a Canadian civil protection order is deemed, without registration, to be an order made

that says their former spouse may not text or phone or otherwise communicate with them, or be within 500 meters of their home or workplace. If the protected person moves to Cranbrook and their former spouse finds out, follows them, and parks outside their new home sending threatening texts, the protected person can phone the Cranbrook RCMP. The Cranbrook RCMP can enforce the order if they are shown or provided with a copy, even though the order was not made by a BC court. In practice however, many people are not aware of this. Police may be reluctant to enforce an order that was made in another province or territory, not realizing the FLA gives them the authority. In some cases, there may be terms included in the order that cannot be enforced in BC. In the example above, if the Alberta order said the former spouse could not be within 500 meters of the survivor's previous address in Calgary, the Cranbrook RCMP could not enforce that in Cranbrook.

Despite section 191 of the FLA, the survivor may believe or be told that they have to apply for a new protection order in BC, perhaps using the Alberta order as evidence. As long as the terms of the order made in another province or territory are enforceable in BC (for example, do not contain addresses or locations that are specific to the other province) there is no requirement to apply for a new protection order in BC. There is also no obligation to register an extraprovincial protection order with the court before it can be enforced, although some people choose to do so. Registering an extraprovincial protection order in BC Provincial or Supreme Court requires completing a court form and filing the form and a copy of the protection order in a court registry. A copy of the protection order will then be forwarded to BC's Protection Order Registry. This process is less involved than making an application for a new protection order but is still more effort for the survivor than relying on the order they already have.

Discussion Questions:

5-13. Have you experienced difficulty enforcing a civil protection order from another Canadian province or territory (i.e., an extraprovincial order) in BC?

5-14. Would amendments to section 191 of the FLA or some other change make enforcing an extraprovincial protection order easier? Please explain.

Indigenous Considerations, Enforcing Protection Orders on Reserve – What We Heard

FLA protection orders have been considered available throughout BC, including on reserve, unless a First Nation has enacted its own protection order laws. There is federal legislation, the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (FHRMIRA),[59] that sets out default rules for the use, possession, or division of a couple's real property on reserve in the case of a break-up, divorce, or death. FHRMIRA also sets out default rules regarding Emergency Protection Orders (EPOs) in cases of family violence on reserve if a province or territory has specifically designated judges to order EPOs under the act. BC, like most other provinces and territories, has not designated judges; only New Brunswick, Nova Scotia and Prince Edward Island have done so.[60] The development of the protection order regimes in BC's FLA and in FHRMIRA occurred close in time. BC consulted with Indigenous communities on whether to designate judges in BC to order EPOs under FHRMIRA. The decision was made not to designate judges at that time for several reasons. Protection orders under the FLA were considered to

under the FLA, although nothing prevents a party from registering an extraprovincial protection order if they choose.

[59] *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20 [FHRMIRA].

[60] Indigenous Services Canada, "Matrimonial real property on reserve" (last modified 29 August 2022), online.

offer broader protection than orders available under FHRMIRA. The process of obtaining protective orders under FHRMIRA is also more complex than under the FLA. If an EPO were to be made by a BC Provincial Court judge it would require confirmation by a BC Supreme Court judge shortly after. Further, EPOs are short-term orders.[61] Although the applicant could subsequently obtain an exclusive occupancy order under FHRMIRA, the protective conditions in the EPO would be lost if they were not confirmed in the exclusive occupancy order.[62]

Early feedback from Indigenous communities has highlighted that getting and enforcing a protection order when one or both parties live on a reserve is difficult to do for many reasons.[63] Lack of awareness is one reason. Although most people are aware they can report family violence to the police, at least if it is a type and level of abuse that is recognized as family violence, many do not know civil protection orders are available under the FLA without having to involve the police. Other reasons include access to justice issues. Many people living on reserve in remote areas of the province have very little access to family lawyers or legal resources. Even fewer of the available lawyers and legal resources are Indigenous, or sensitive to Indigenous culture as it pertains to family law issues. If there is a lawyer available, they can only speak to one of the parties, as it would be a conflict of interest to speak to both parties.

Timeliness is another barrier. Many reserves have circuit courts, where there are weeks or even months between court sittings. Meanwhile the family violence may be continuing or escalating. Although there is a process for protection order applications to be heard by phone or video on an urgent basis, many people are not aware this is an option.

In those situations where a person living on reserve has obtained a protection order, enforcement can be an issue. A history of colonization and negative experiences with police means many Indigenous people are hesitant to report breaches to police, sometimes choosing instead to rely on family members to help protect them. In other Indigenous communities, relationships with police are more positive and police do respond to family violence complaints and enforce protection orders. Some communities have also described having security officers that are available to help prevent or de-escalate situations where family violence or conflict is happening. Other communities have used Band Council Resolutions to ban a member responsible for family violence from being in the community until a list of conditions has been met. The rights of an individual with respect to Indigenous land adds another layer of complexity when it comes to enforcing protection orders. For example, when the person responsible for the violence owns or has the right to possess a property (e.g., has a certificate of possession to the family home pursuant to the federal *Indian Act*),[64] there may be questions about whether a judge can make a protection order that prevents the person from being at or in the property. For survivors of family violence, being able to remain in the family home with the children, at least for a period of time, can be the most important term in a protection order, particularly for people living on rural or remote reserves where there are few housing options. Having to leave the reserve to find housing can be a financial hardship and may mean losing family support networks.

Serious housing shortages in Indigenous communities impact those responsible for the violence as well. If they are required to leave the family residence, there may be few places for them to move to within the community, particularly if they have been ordered to remain a certain distance away from the victim

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[61] See FHRMIRA, *supra* note 63, ss 16(1), 18(2) (EPOs can be granted "for a period of up to 90 days," although on application the court may extend the duration of the order).
[62] See *Ibid*, s 20(5).
[63] Mahihkan Management, *supra* note 22.
[64] *Indian Act*, RSC 1985, c I-5.

and the children. Leaving the community often means losing jobs, family support networks, and connections to the land and culture. This can exacerbate problems with mental health and addictions. Many Indigenous people agree there is a critical lack of resources and families struggling with violence would benefit from services that supported them to heal and address the root causes of the violence rather than pushing one family member or the other out of the community.

5-15. Please describe any problems you have encountered with obtaining a protection order on reserve.

(a) What would have helped to improve the experience?

5-16. Please describe any problems you have encountered with enforcing a protection order on reserve.

(a) What would have helped to improve the experience?

5-17. Please add any additional information you feel would be helpful for us to know about your experience with situations involving family violence and protection orders.

Family Violence and Parenting Arrangements

The FLA introduced family violence within the factors that must be considered when deciding what parenting arrangements are in the best interests of a child:[65]

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.

(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;

(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;

[65] FLA, *supra* note 47, s 37.

(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.

The legislation recognizes that violence – even if directed exclusively at the spouse – is still harmful to a child. Section 37 also includes any relevant prior civil or criminal proceedings as a factor. This requires decision-makers to consider the involvement of parties in other proceedings that are relevant to the safety, security or well-being of the child and promotes greater information-sharing between the family, child protection, and criminal systems where children are involved. Section 38 follows up on section 37 by providing guidance for decision-makers on how to assess family violence as a factor in considering the best interests of the child:

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.

This approach is designed to produce a more nuanced risk assessment and avoid a one-size-fits-all approach regarding parenting arrangements in cases where there has been family violence.

However, there are still concerns that family violence is not adequately or appropriately being taken into account when decisions about parenting arrangements are made. One theme that is raised in almost all conversations about family violence is that violence is often not acknowledged, particularly when the violence manifests as coercive and controlling behaviour or some form other than physical abuse. Family violence is also given less credence when the victim is disabled, a member of the

2SLGBTQIA+ community, an immigrant, refugee, member of a racialized group, or otherwise marginalized. Even when the violence against a parent is acknowledged and protection orders or other mechanisms are used to address the risk to their safety, parenting orders do not always reflect the intersection between the violence and the parenting relationship. Abusive parents often involve children in their abusive behaviour, having them spy and report on the victim parent, trying to undermine the child's relationship with the victim parent, threatening or actually reporting the victimized parent to child protection agencies, making parental alienation claims, or threatening or abusing the child as a way of controlling the victim parent.[66] Victimized parents are often told or expected to speak positively about the abusive parent, and to convince reluctant children and teenagers to comply with parenting time orders. The victimized parent may feel unable to protect their children, and the situation may damage their own relationship with the children.[67]

Early feedback emphasizes that shared parenting arrangements when there is family violence often increase the conflict and risk to safety. There is a resistance to seeing family violence as impacting parenting and there are few tools to address this. Stopping parenting time entirely is usually not desirable and there are seldom affordable options for supervised parenting. While technology makes online parenting time possible, it is a poor substitute for in-person time. Moreover, focusing on the future and how parenting arrangements will look moving forward can lead to ignoring the past, including patterns of behaviour that may indicate future risk.

Allegations of parental alienation in cases where there may be a history or presence of family violence create additional complexities. The recognition of parental alienation needs to be carefully balanced against the need to protect and support survivors of family violence, keeping in mind that the perpetrators of family violence often make false allegations of parental alienation against the other parent as a way to shift blame and continue the abuse.[68] Some argue that when court proceedings focus on parental alienation allegations, protection and safety for the children and the abused parent often take a back seat. A review of recent Canadian research concluded that parental alienation is often misused when the family law proceeding involves family violence. There are a number of reasons for this, including lack of training and education amongst those working in the family justice system, assumptions that violence ends when the relationship ends, minimizing accounts of violence or questioning the credibility of survivors, encouraging shared parenting arrangements, and requiring survivors to cooperate with the abusive parent.[69] The misuse of parental alienation allegations when family violence is an issue can have serious detrimental impacts on survivors and children. For example, evidence of family violence may be ignored or not presented, parenting arrangements may be imposed that did not adequately consider the risk to children or protect their safety, children may be retraumatized by court-mandated time with an abusive parent, and significant changes in parenting time or reunification programs may create a loss of security.[70]

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[66] Jaffe et al, *supra* note 28, s 3.3.
[67] *Ibid*, s 4.0.
[68] Ibukun Ogunfuwa & Joanna Harris, "Allegations of Parental Alienation and Family Violence", *Luke's Place* (11 July 2023), online (blog).
[69] Jassamine Tabibi, Peter Jaffe & Linda Baker, *The Misuse of Parental Alienation in Family Court Proceedings with Allegations of Intimate Partner Violence – Part 1: Understanding the Issue*, Learning Network, Issue 33 (London: Centre for Research & Education on Violence Against Women & Children, 2021).
[70] Jassamine Tabibi, Peter Jaffe & Linda Baker, *The Misuse of Parental Alienation in Family Court Proceedings with Allegations of Intimate Partner Violence – Part 2: Impacts on Survivors and Children*, Learning Network, Issue 34 (London: Centre for Research & Education on Violence Against Women & Children, 2021).

While many have identified the biggest obstacle that survivors of family violence face in a family court proceeding as lack of education and a culture that does not adequately protect the safety of women and children, the National Association of Women and the Law (NAWL) has pointed out opportunities to adopt legal rules that prioritize safety. These include:

- a presumption against shared parenting in cases of family violence or setting out in legislation that an abusive parent have parenting time only in cases where it is demonstrated to be in the child's best interests and safe for all parties involved;
- giving primary importance to family violence factors when determining what is in a child's best interests, perhaps by legislating that family violence is a primary consideration or that the child's safety is the primary objective;
- considering an additional best interests of the child factor to protect a child's positive relationship with a primary caregiver over building a relationship with a violent parent; and
- enabling the court to consider the interests and safety of a parent who is a survivor of family violence in addition to the best interests of a child when determining parenting arrangements.[71]

The recommendations above are indirect ways to address the harm that can result when parental alienation allegations overshadow family violence. NAWL also supports addressing the problem directly by banning the use of parental alienation allegations and concepts in family law cases on the grounds that it leads to problematic results in most cases and does far more harm than good.[72] There are many cases under the FLA that include allegations of parental alienation or estrangement, and they typically also feature allegations of family violence. Although the FLA does not specifically address parental alienation, the BC Court of Appeal has said it is a serious allegation and expert evidence should be required to prove it.[73] Cross allegations of family violence and parental alienation can potentially become a contest of experts and a battle over evidence which is often not available to survivors who have not reported or documented their abuse.

The *Divorce Act* amendments introduced provisions that are similar to sections 37 and 38 of the FLA. The table in Appendix F sets out the relevant provisions from each act. The factors in each Act (section 37 of the FLA and section 16(3) of the *Divorce Act*) related to family violence that the court must consider in a best interests of the child analysis are very similar, although organized a bit differently. Each of the Acts includes a list of factors that are intended to help the court assess the impact of family violence on the child's safety, security and well-being (section 38 of the FLA and section 16(4) of the *Divorce Act*). The lists are similar, although some of the language is slightly different. Also, section 38 of the FLA does not include factors that can be directly compared to section 16(4)(e) of the *Divorce Act* which requires the court to consider "any compromise to the safety of the child or other family member" or section 16(4)(f) "whether the family violence causes the child or other family member to fear for their own safety or for that of another person."

Discussion Questions:

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[71] Suzanne Zacour, *Addressing Intimate Partner Violence and Parental Alienation Accusations* (National Association of Women and the Law, 2022) at 18, online (pdf).
[72] *Ibid* at 9.
[73] *Williamson v Williamson*, 2016 BCCA 87 at paras 47—48.

5-18. Do you have concerns with the way that family violence is being taken into account when families or the court are making decisions about what is in a child's best interests with respect to guardianship, parenting arrangements and contact?

5-19. Do you have any specific suggestions about how to improve the factors linked to family violence in s.37, or the list of factors the court must consider under s.38?

5-20. Do you feel the FLA should address parental alienation allegations in cases involving family violence? If so, how do you think this is best achieved?

5-21. Are there any issues created by the differences in wording used in the FLA and the *Divorce Act* to describe family violence factors that the court must consider when deciding what is in a child's best interests?

5-22. The discussion and questions posed in this chapter relate to issues that have been raised concerning family violence in the context of parenting arrangements and protection orders. Do you have any other concerns or suggestions for amendments to provisions in the FLA related to this topic?

Appendix F : Family Violence Legislative Comparison Table

Note: Underlining added to emphasize differences between the legislation

	FAMILY LAW ACT [SBC 2011] CHAPTER 25	**DIVORCE ACT** (R.S.C., 1985, c. 3 (2nd Supp.))
Definition	*Section 1* **Part 1 — Interpretation** **Definitions** **1** In this Act: … **"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,	*Section 2 (1)* **Interpretation** **Definitions** **2 (1)** In this Act, **…** ***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; **(c)** threats to kill or cause bodily harm to any person; **(d)** harassment, including stalking; **(e)** the failure to provide the necessaries of life;

	(ii) unreasonable restrictions on, or prevention of, a family 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;	**(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*)
Best Interests of the Child Factors	*Sections 37 (2) (g) – (j), 38* **Part 4, Division 1 — Best Interests of Child** **Best interests of child** **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: … (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;	*Section 16 (3) (j) – (k), (4)* **Best Interests of the Child** **Best interests of child** **16 …** **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 … **(j)** any family violence and its impact on, among other things, **(i)** the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and **(ii)** the appropriateness of making an order that would require

	(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. *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;	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. **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

	(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.	their own safety or for that of another person; **(g)** any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and **(h)** any other relevant factor.