Family Law Act Modernization Project:

Care of and Time with Children & Protection from Family Violence

Discussion Paper

January 2024

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

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

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

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

By regular mail:

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EXECUTIVE SUMMARY

When the *Family Law Act* (FLA) came into force in 2013, its primary objective was to modernize family law. Since then, case law has developed, and many societal changes have occurred. It is important that the FLA keeps pace. To ensure that it does, the Ministry of Attorney General is undertaking a project to modernize the Act. The project is being conducted in phases over a number of years to allow government, stakeholders, and the public adequate time to address various issues.

Phase One of the FLA Modernization project reviewed issues related to division of family property and pensions as well as spousal support. Public consultation on those issues closed in September 2023 and amendments that were informed by the review and feedback from the engagement processes were introduced in Bill 17 - *2023 Family Law Amendment Act, 2023*.[1]

Phase Two of the FLA Modernization project is focused on issues related to caring for and spending time with children as well as protection from family violence. The FLA introduced a host of changes to family law, including establishing a new regime for care and time with a child in *Part 4 – Care of and Time with Children*. This Part, probably more so than any other Part in the Act, represented the greatest departure from the previous *Family Relations Act*. Not only did it add clarity to the law surrounding time and care with children, but it also changed the framework for looking at family law issues where children are involved to promote a more collaborative approach to parenting after separation, where appropriate. Some of the key changes introduced in the FLA included adding family violence factors to the "best interests of the child" test and changing terminology and the underlying concepts from custody and access to parental responsibilities, parenting time and contact. The FLA was also the first Canadian jurisdiction to set out a legislative framework to guide decisions about the relocation of children and their guardians. In addition, Part 9 – *Protection from Family Violence* of the FLA introduced a new protection order regime that responded to numerous recommendations on how to improve safety when there is a risk of family violence. Under the new regime, protection orders are available to a broader range of family members and a breach of a protection order is a criminal offence. The provisions in Part 9 help to ensure that protection orders are accessible, clear and effective and a list of risk factors offers guidance to the court on when protection orders may be appropriate.

Since 2013, there has been continued change impacting Canadian families, including a trend towards increasing diversity of family structures and the impacts of technology on how we communicate and interact. Case law and feedback from the public and the legal community have identified where there may be legislative gaps as well as opportunity to increase clarity and ensure the FLA better meets the diverse needs of all families in BC. There were also significant amendments to the federal *Divorce Act* that were implemented in 2021 which should be compared against the FLA. Given the breadth and complexity of these issues, this discussion paper has been organized into five chapters, with each chapter focusing on a specific topic:

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[1] *Bill 17, Family Law Amendment Act, 2023*, 4th Sess, 42nd Parl, British Columbia, 2023 (assented to 11 May 2023), SBC 2023, c 12.

- Chapter 1 – Guardianship, Parenting Arrangements & Contact
    - Explores ways of determining guardianship and who is responsible for caring for a child, the time guardians spend with a child, and who can have contact with a child.
- Chapter 2 – Relocation of a Child
    - Explores issues that may arise when one guardian wants to move with a child to another community that could affect the child's relationships with other guardians and important people in their lives.
- Chapter 3 – Child-Centered Decision Making
    - Explores the various ways that a child may participate in family law disputes involving them, including what factors must be considered in determining what is in a child's best interests and ways to have a child's views heard by the parties and decision makers.
- Chapter 4 – Children's Views & Parenting Assessments and Reports, and
    - Explores methods for obtaining and presenting the views and needs of a child and parents' abilities and willingness to meet those needs in a family law dispute specifically through reports prepared by professionals.
- Chapter 5 – Family Violence & Protection Orders
    - Explores issues of family violence as it relates to parenting arrangements and obtaining and enforcing protection orders under the FLA.

Note – the British Columbia Law Institute (BCLI) is currently leading a policy review and public consultation on the Part 3 – *Parentage* provisions in the FLA. Part 3 sets out a comprehensive scheme for determining who a child's parents are, including when a child is born through assisted reproduction and surrogacy. More information about the review and consultation on Part 3 – Parentage is available on the BCLI website.

Each chapter discusses issues and concerns that have been identified through case law as well early feedback on these topics. Early feedback has been provided by legal practitioners, advocates, professional report writers, representatives from professional governing bodies, and from people with lived experiences in these topics from across the province. The Ministry conducted some early engagement with Indigenous Peoples through regional in-person dialogue sessions that are referenced throughout the paper as "What We Heard." A What We Heard Report prepared by the Indigenous facilitator summarizing the dialogue sessions is available on the FLA Modernization engagement govTogetherBC webpage.[2] The Ministry also conducted early engagement with the anti-violence community through virtual dialogue sessions. These early engagements helped the Ministry identify the issues that are presented in this technical paper for your feedback. We are seeking your feedback on specific questions asked in each chapter, as well as any other issues or concerns you may have.

For your convenience, you may review the discussion paper in its entirety, or you can read or download each chapter individually. Also, to make it easier to provide feedback, the discussion questions asked in the individual chapters have been compiled into a single list in Appendix A.

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

Chapter 1 : Guardianship, Parenting Arrangements & Contact

Introduction

Phase 2 of the *Family Law Act* (FLA) Modernization Project includes a review of the provisions in the FLA under Part 4 – *Care of and Time with Children* that are related to guardianship, parenting arrangements and contact with a child. Most of the provisions concerning responsibility for and spending time with a child were substantially reformed when the FLA was implemented, not only replacing the old custody and access terminology but fundamentally shifting the way we think about responsibility for children. This project is an opportunity to consider whether those reforms have been effective, or whether certain sections should be amended to make them clearer or to better accommodate the needs and diverse structures of all families in BC.

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

- Basis for establishing guardianship as a child's parent (s.39)
    - A parent who has lived with the child, or
    - A parent who has never lived with the child but has regularly cared for the child, or
    - A parent who has never lived with the child but is the child's guardian through an agreement with the child's other guardian(s);
- Whether non-parents should be able to become guardians by agreement (s.39(3)(b));
- Recognition of kinship care and customary adoption;
- Issues related to applications for a court order appointing a guardian (s.51);
- Issues related to applications for a court order terminating guardianship (s.51);
- Issues related to appointing a guardian for a child in the event the child's guardian dies (s.53);
- Issues related to appointing a stand-by guardian when a child's guardian is facing terminal illness or permanent mental capacity (s.54);
- Issues related to the temporary exercise of parental responsibilities (s.43(2));
- Issues related to the allocation of parental responsibilities (s.40);
- Issues related to contact;
- Any additional issues related to guardianship, parenting arrangements and contact with a child as addressed in the FLA.

Guardianship

Parent of a Child

Under the FLA, only a child's guardians may have parenting time or parental responsibilities. In most cases, a child's parents are also their guardians. However, if a parent has never lived with or regularly cared for the child, they will not be the child's guardian without an agreement or court order appointing them as a guardian. Infrequently, a parent who would otherwise be a child's guardian will agree they will not assume a guardianship role. The FLA also authorizes the court, upon application by a guardian, to terminate a person's guardianship if that is in the best interests of the child. Case law has referred to terminating a parent's guardianship as "draconian" and courts have generally ruled that

"terminating guardianship of a parent should only occur in the most serious circumstances and only where there are no other means of protecting the best interests of the children."[1]

Parents are Guardians - Section 39(1)

The objective of section 39 is to establish that the parents of a child are the child's default guardians. Subsection (1) states that, "While a child's parents are living together and after the child's parent separate, each parent of the child is the child's guardian." This wording seems to assume a nuclear family, where a child's parents live together as a couple, separating upon the breakdown of their relationship. It does not clearly address situations where a child is born to a single parent or to parents that have never lived together. Case law has weighed in and clarified that a single parent – as long as they lived with the child – is the child's guardian under 39(1). However, there are situations where a child requires a guardian to make medical or other decisions before a parent has lived with the child (e.g., medical decisions needed shortly after the child is born). Is a parent the guardian of their newborn child for the purposes of matters that fall under the FLA, or child protection proceedings under the *Child, Family and Community Services Act*,[2] even when the child is still in the hospital? Although the courts have found children's parents to be their guardians in these situations, the language could be clarified to prevent the legislation from being read to permit a child being born without a legal guardian.

When Parents are Not Guardians - Section 39(2) – (4)

What is clear under the FLA is that parents are not automatically guardians in all situations. To establish guardianship of their child, a parent must have lived with or regularly cared for the child.[3] The meaning of "regularly cared for" is not set out in the legislation and has been the subject of some debate in the case law. Disputes typically arise in situations where a child is born as the result of a dating relationship, the infant resides with the birth parent and the other parent is trying to establish guardianship after having limited time with the child. A notable case that addressed the meaning of regular care was *AAAM v British Columbia (Children and Family Development)*. In that case the British Columbia Court of Appeal held that the intention of a parent to regularly care for a child was enough to cause a presumption of guardianship if the actions of others have prevented the parent from exercising that intention.[4] More specifically, the court defined regular care as "a parent who has demonstrated a continuing willingness to provide for the child's ongoing needs and a record of 'usually' or 'normally' doing so in fact."[5]

Although that precedent remains, most subsequent cases assess the actions of the parent to determine whether they meet a standard of regular care. Although regular care is more than just visiting or playing together, it has still been described as "a relatively low threshold of ordinary care."[6] Despite the case law suggesting that this is a very low bar to meet, non-residential parents argue it is unfair to require them to prove they have met a standard of care or that it is in their child's best interests for them to be

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[1] *RF v TM*, 2022 BCPC 215 (CanLII) at para 24.
[2] *Child, Family and Community Services Act*, RSBC 1996, c 46 [CFCSA].
[3] *Family Law Act*, SBC 2011, c 25, s 39(3)(c) [FLA].
[4] *AAAM v British Columbia (Children and Family Development)*, 2015 BCCA 220.
[5] *Ibid* at para 63.
[6] *LP v AE*, 2021 BCPC 281 (CanLII) at para 92.

a guardian when this is not required of the parent whom the child lives with.[7] The opposing argument is that a parent who has had minimal time and care of a child should not automatically be a guardian without demonstrating this is in the child's best interests. If the FLA is changed to make all parents automatically guardians, even in situations where a parent has never lived with or regularly cared for a child, the onus would shift and require the parent predominantly responsible for the child to apply for an order limiting the other parent's parental responsibilities, or terminating their guardianship if that was in fact in the child's best interests. Some feel this would be an unfair burden in cases where one parent has chosen not to be involved in the child's life.

If a parent is not a guardian by virtue of having lived with or had the opportunity/chosen to regularly care for their child, they may obtain guardianship under section 39(3)(b), "if the parent and all of the child's guardians make an agreement providing that the parent is also a guardian." Under the current provisions, only a parent may become a guardian by agreement. Any other person who wishes to become a child's guardian must apply for a court order appointing them as guardian, even if the child's parent(s)/guardian(s) are in agreement. An application for a court order appointing a person as guardian of a child is made under section 51 of the FLA, either by a non-parent or by a parent who is not a guardian through one of the other provisions in the FLA (i.e. as result of having lived with or regularly cared for their child or by agreement).

Although this does not appear to have been an issue in case law yet, the FLA does not require that the agreement be in writing.

Discussion Questions:

1-1. Should the FLA continue to require a person who is a parent of a child to meet residency or care requirements to be considered the child's guardian without an agreement or court order (i.e., by default)? Or,

(a) Should the requirement to have lived with or regularly cared for the child be changed to some other requirement?

(b) Should the requirements be removed so that a parent of a child is also a guardian under Part 4 unless there is an agreement or court order otherwise?

Persons Other than a Child's Parent

There is no limitation on who may be a child's guardian, however under the FLA a person who is not the child's parent may only acquire guardianship by court order under section 51, and the decision must be in the child's best interests (this does not apply to testamentary or stand-by guardianship as discussed below). In some cases, another person (e.g., a relative or family friend) will apply under section 51 to be a child's guardian in addition to, or in place of, a parent.

Early feedback has suggested that consideration should be given to expanding the ability to enter into an agreement for guardianship to include someone other than a child's parent. Those in favour of expanding guardianship agreements in situations where all of the children's guardians agree argue that

[7] In many cases, the non-residential parent is the biological father of a child that was conceived during a casual or dating relationship. The biological mother is the primary caregiver, with whom the child lives and it is not uncommon for the parents to disagree on how much time and responsibility the biological father will have with respect to the child, especially during infancy.

a child's guardians are best positioned to make this decision and should be able to do so without the procedural impediments imposed by court applications. They feel expanding the uses of guardianship agreements will improve certainty for some children and help to ensure that people taking on the role of guardian for a child have the recognition and documentation needed to carry out their parental responsibilities towards the child, without a cumbersome and sometimes costly and lengthy legal process.

Guardianship applications under section 51 of the FLA can occur when there are concurrent child protection concerns or proceedings under the *Child, Family and Community Services Act*.[8] In some of those cases, social workers may suggest a relative or another suitable person apply under section 51 of the FLA for a guardianship order to prevent the child going into or remaining in the care of the Director. In other situations, the child's parent(s)/guardian(s) may identify it would be in the child's best interests to have the support of another guardian. Section 51(2) requires an applicant for guardianship to provide evidence to the court about the best interests of the child, in accordance with the rules of court. Currently, both the *Provincial Court Family Rules* and the *Supreme Court Family Rules* require applying for criminal record, child protection, and protection order registry checks as part of the evidence that must be filed.[9] Feedback suggests this is daunting for some people, particularly those without the support of a lawyer or advocate.

On the other hand, the reason for requiring a criminal records check, a check for child protection involvement, and a protection order registry check is to ensure that this information is available to the court and considered as part of the best interests of the child analysis. At the time the FLA was developed, the then Representative for Children and Youth strongly encouraged including these checks as a way to improve children's safety when a non-parent was being granted guardianship of a child. These recommendations followed changes made to Ontario's *Children's Law Reform Act* in 2009, requiring persons other than parents who were applying for a parenting order to file a criminal records check and a child protection records check.[10] Expanding the use of guardianship agreements would remove these checks and the general oversight of the court, which was intended to ensure children are protected and that any guardianship appointments are in their best interests. Early feedback from those opposed to expanding the use of guardianship agreements raised concerns about the potential for a person in a relationship with abuse or power imbalances to be coerced into agreeing to another person becoming a guardian. As described below however, there are no similar pre-emptive oversight requirements for testamentary or standby guardians.

A further requirement under section 51(4) is that the court cannot appoint a person other than the child's parent as a guardian of a child who is 12 years or older without the child's written approval, unless the court is satisfied the appointment is in the child's best interests. The FLA does not provide any details about what constitutes written approval and there is no prescribed form. Although this allows for flexibility, families may be uncertain how to provide the approval to the court or be unaware the requirement exists. There have been very few reported cases that deal with section 51(4). The requirement for written approval was raised in *KRP v OMP*,[11] where a stepparent who had acted in the place of a parent to a 14-year-old since infancy applied for guardianship. The application was denied on

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[8] CFCSA, *supra* note 2.

[9] *Provincial Court Family Rules*, BC Reg 120/2020, rule 26(1); *Supreme Court Family Rules*, BC Reg 169/2009, rule 15-2.1(1), Appendix A – Form F101.

[10] *Children's Law Reform Act*, RSO 1990, c C12, ss 21.1—21.2.

[11] *KRP v OMP*, 2022 BCSC 37 (CanLII).

the basis that there was no written approval from the child before the court, and there was evidence that since separating from the child's parent, the stepparent's relationship with the child had deteriorated. The court found that it was not in the child's best interests to make a guardianship order without the child's approval in this case but did make an order for contact.

Discussion Questions:

1-2. Should the FLA allow the use of written agreements to appoint someone other than a parent as a child's guardian in situations where all of the child's guardians are in agreement?

1-3. Are there any issues or concerns about the requirement that a child 12 years of age or older approve an order for guardianship of a person who is not their parent?

Testamentary Guardianship

A testamentary guardian is someone who has been appointed by a child's guardian under section 53 of the FLA to take on their guardianship responsibilities upon the guardian's death. The FLA specifies that the appointment may be made using a will that meets the requirements in the *Wills, Estates and Succession Act*[12] or using the Appointment of Standby or Testamentary Guardian form.[13] This form was developed when the FLA was implemented to address the concern that not having a will should not be an impediment to appointing a testamentary guardian. The form is simple and can be completed and executed quickly if need be. The FLA also specifies what happens if a guardian dies without having appointed a testamentary guardian.[14] The parental responsibilities of the deceased guardian pass to the surviving guardian(s) if they are also a parent of the child. If there is a surviving parent who is not also a guardian, they will only become a guardian if they have been appointed through a will or the Appointment of Standby or Testamentary Guardian form, or they apply under section 51 for a court order appointing them as guardian.

One issue that has been raised is the difficulty that testamentary guardians sometimes experience having third parties recognize their guardianship status. One person who had been appointed in a will as testamentary guardian for their nephew described having to carry around death certificates and wills for each of his parents in order to do things like enrol the child in school. It was difficult to apply for a passport or access the child's medical records. It has been suggested that there should be a simple, inexpensive process to apply for a declaration of guardianship in cases like these, without requiring a court appearance. A court order recognizing the testamentary guardian's status may make it easier for testamentary guardians to exercise parental responsibilities. Developing a court process to recognize testamentary guardianship would need to consider whether to require criminal records, child protection and protection order registry checks as required in a section 51 guardianship application.

Stand-by Guardianship

Under section 55 of the FLA, a child's guardian who is facing a terminal illness or permanent mental incapacity (e.g., terminal cancer or dementia) can use the Appointment of Standby or Testamentary Guardian form to appoint a standby guardian to carry out the guardian's parental responsibilities when the guardian is no longer able to do so. The form specifies that the appointment will take effect when

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[12] *Wills, Estates and Succession Act*, SBC 2009, c 13 [WESA].
[13] Family Law Act Regulation, BC Reg 347/2012, Appendix A, Form 2 (Family law Act Regulation, section 23.
[14] FLA, *supra* note 3, s 53(3).

the guardian is unable to care for the child due to their illness or incapacity and gives the option of having a specified person (e.g., a particular doctor) certify this condition is met. The form includes a reminder that the standby guardian must consult with the appointing guardian as much as possible about the care and upbringing of the child. The form also states that the standby guardian will have the same parental responsibilities as the appointing guardian unless restrictions are set out in the form. A standby guardian will continue as the child's guardian after the appointing guardian dies, unless the appointment provides otherwise, or the appointing guardian revokes the appointment while still capable.

The standby guardianship provisions introduced in the FLA were recommended by the British Columbia Law Institute in a 2004 report, *Report on Appointing a Guardian and Standby Guardian*.[15] The report describes standby guardianship legislation having developed in the United States in response to children being orphaned by the AIDS crisis. The objective of standby guardianship is to facilitate permanency planning that is in a child's best interests and create a constant caregiving bridge for the child in the time between their guardian's illness and death.

There has been very little mention of standby guardianship in case law. One of the few reported decisions is *GWM v WCM*.[16] This was a high conflict case involving family violence directed towards both the mother and the children. The mother had a serious medical condition and sought to have the father's guardianship terminated, rather than address concerns about the father's parenting ability by limiting parental responsibilities and parenting time. Under section 53(3), if a child's guardian dies and there is a surviving guardian who is also the child's parent, the surviving guardian has all parental responsibilities for the child unless an order provides otherwise. In this case, the judge terminated the father's guardianship, stating that in view of her advancing illness the mother could now protect her children in the event of her incapacity or death by appointing someone under the standby and testamentary guardianship provisions. There has also been little feedback on the standby guardianship provisions.

Discussion Questions:

1-4. Are there any issues or concerns regarding the standby guardianship provisions?

1-5. Are there any issues or concerns regarding the testamentary guardianship provisions?

1-6. Are there any issues or concerns regarding the Appointment of Standby or Testamentary Guardian form?

1-7. Should there be an administrative court process to recognize standby guardians and/or testamentary guardians, i.e., to provide a declaration or formal recognition of guardianship?

Temporary Exercise of Parental Responsibilities

Section 43(2) allows a guardian to, in writing, authorize another person to exercise one or more section 41 parental responsibilities on their behalf on a temporary basis because the guardian is "unable" to do so. This provision was added to the FLA as a way for guardians to enable another person to care for and

[15] British Columbia Law Institute, *Report on Appointing a Guardian and Standby Guardian* (British Columbia Law Institute, 2004) 2004 CanLIIDocs 211.
[16] *GWM v WCM*, 2015 BCSC 1624 (CanLII).

make decisions about their child for a period of time. For example, a parent who is the primary caregiver for their child and is also employed in the armed forces may need to leave their child with a relative while they are deployed on a ship or in a combat zone. The relative would need the authority to make day-to-day and emergency decisions for the child. A similar need may arise if either the parent or the child will be living elsewhere for a period of time to attend school or training, or if the parent will be temporarily unable to make decisions for the child due to surgery or medical treatment. When written authorization is given under section 43(2), the parent or guardian does not give up their role as guardian or their ability to make decisions for the child. Similarly, the person given authority does not become a guardian, they are simply able to make certain types of decisions on behalf of the guardian while the guardian cannot do so themselves.

The parental responsibilities under section 41 that can temporarily be given to another person include:

(a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
(c) making decisions respecting with whom the child will live and associate;
(d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
(f) subject to section 17 of the *Infants Act*, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
(g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
(h) giving, refusing or withdrawing consent for the child, if consent is required;
(i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
(j) requesting and receiving from third parties health, education or other information respecting the child;
(l) exercising any other responsibilities reasonably necessary to nurture the child's development.

The objectives underlying this section may be better understood by examining the parental responsibilities that are **not** included in section 43(2). The section 41 parental responsibilities that a guardian cannot authorize someone else to exercise on their behalf are responsibilities for longer-term matters, which should not need to be exercised during the temporary absence of a guardian. Those specifically excluded are:

(b) making decisions respecting where the child will reside;…
(e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an Indigenous child, the child's Indigenous identity;…
(k) subject to any applicable provincial legislation,
    (i) starting, defending, compromising or settling any proceeding relating to the child, and
    (ii) identifying, advancing and protecting the child's legal and financial interests.

There has been little case law on section 43(2) to date. One of the few cases to consider section 43(2) is *FKL v DMAT*,[17] where the court considered the provision in the context of a relocation case. The mother wished to move with the child. The father opposed the move, however if the child were to live primarily

[17] *FKL v DMAT*, 2023 BCSC 1535 (CanLII).

with him, they would be left in the care of a stepparent for two-week periods while the father travelled for work. The court discussed section 43(2) and found it could be used to delegate parental responsibilities to someone serving as a stepparent while the parent was absent, including in situations where the absences were regular and predictable (e.g., shift work away from home). The court was tasked with determining "the relative abilities of the parties to exercise their responsibilities for the day-to-day care, control, and supervision of their child under the alternative residence arrangements that are under consideration, and the degree to which, relative to the other factors enumerated in s. 37(2) and any other relevant circumstances, this impacts the child's best interests."[18] On the facts of the case, the court found it was in the child's best interests to reside with the father rather than relocate with the mother, and the father could give written authorization to the stepparent to exercise certain parental responsibilities while he was working away from home, with a copy of the authorization to be provided to the mother.

Some feedback has suggested the intention underlying section 43(2) is not always clear. There have been some instances where people have misunderstood section 43(2) as conveying "temporary guardianship." Section 43(2) is not an appropriate mechanism to use in a situation where there are child protection concerns such that the child's parent or guardian should not have responsibility for making decisions for the child. It does not terminate the status of the existing guardian, who would be able to "override" any decision made by the person authorized to make decisions on their behalf or revoke the authorization at any time.

There is no mention in section 43(2) about the child's other guardians and whether they must agree, or whether they would have any ability to interfere with a section 43(2) authorization. Can a parent or guardian authorize another person to exercise certain parental responsibilities under section 43(2) without the agreement of the child's other guardian(s)? This is not a requirement specified in the legislation, and the court in *FKL v DMAT* did not suggest agreement was needed, although the court did suggest providing a copy of the written authorization to the other guardian(s).

Currently, there are no prescribed forms that a guardian can use to authorize another person to exercise parental responsibilities on their behalf. A form may make it easier for families to become aware of and understand how a guardian can authorize another person to exercise their parental responsibilities.

Kinship Care

While Western society regards parents as having primary responsibility for their children, Indigenous (First Nations, Inuit, and Métis) cultures and many other cultures around the world, have a wholistic view of families as interconnected networks. They see children as the responsibility not just of the parents, but of the extended family and the entire community. A communal approach to child-rearing instills a sense of belonging and ensures that the wisdom and values of the community endure across generations.[19]

For example, Islamic law recognizes a type of long-term legal guardianship known as kafala. Kafala aims to protect children who are either abandoned or whose parents are unable to care for them.[20]

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[18] *Ibid* at para 31.

[19] Lara di Tomasso & Sandrina de Finney, "A discussion paper on Indigenous custom adoption–Part 2: Honouring our caretaking traditions" (2015) 10:1 First Peoples Child & Family Review 19.

[20] Ray Jureidini & Said Fares Hassan, *The Islamic Principle of Kafala as Applied to Migrant Workers: Traditional Continuity and Reform*, In Migration and Islamic Ethics (Leiden: Brill, 2019).

Extended family members as well as others who may not have a biological connection to the child may assume care of the child. In some countries, kafala has become a legal framework for granting guardianship rights over children who are not biologically related to the guardian.[21] This is important as Islamic law does not allow an adoption that would sever the legal rights of the parent. Instead, kafala comes to an end when the child reaches the age of majority (much like guardianship) unless the parents have revoked it. These arrangements can encompass orphaned or abandoned children, as well as cases where individuals voluntarily assume guardianship of children due to various reasons, such as family circumstances or the inability of biological parents to fulfill their caregiving duties.[22]

Kinship care is also deeply rooted in Chinese traditional values and familial relationships. In China this usually involves the care and upbringing of children by extended family members, such as grandparents, aunts, uncles, or older siblings, when the parents are unable to fulfill their caregiving responsibilities.[23] Kinship care reflects the significance of family bonds, duty, and respect in Chinese society, and it has been an essential part of the social fabric for centuries.[24]

The Islamic and Chinese traditions described above are only two examples among many that are found in cultures around the world. The FLA does not currently recognize kinship care or customary adoption arrangements that may create roles analogous to what the FLA describes as a "guardian" or a "parent." As discussed directly below, this issue has been raised particularly in the context of Indigenous traditions and practices.

Indigenous Considerations on Kinship Care and Customary Adoption – What We Heard

Community, environmental and spiritual connectedness are all fundamental to Indigenous identity. This is why Indigenous traditions of caregiving emphasize maintaining these connections and building a web of relationships around a child rather than severing a child's relationships and removing them from family, the land, community, and culture. "Kinship care refers to the practice of extended family and community members caring for children until parents are able to assume or resume their role as primary caregiver (First Nations Child & Family Caring Society (FNCFCS), 2019). Customary adoption refers to 'a complex institution by which a variety of alternative parenting arrangements, permanent or temporary, may be put in place to address the needs of children and families in Aboriginal communities' (Trerise, 2011, p. 2)."[25]

Although there is currently no recognition of Indigenous kinship care or customary adoption in the FLA, these concepts are beginning to be recognized in Canadian child protection legislation. Bill C-92 – *An Act respecting First Nations, Inuit and Metis children, youth and families*[26] came into effect January 1, 2020. The Act defines family in clause 1 to include "a person whom a child considers to be a close relative or whom the Indigenous group, community or people to which the child belongs considers, in accordance

[21] *Ibid*.
[22] *Ibid*.
[23] Wenting You, "Parent-Child Relationship in the Civil Code of China" (2023) 12:1 Laws 1, online (2023 CanLIIDocs 6).
[24] *Ibid*.
[25] Jessica Ball and Annika Benoit-Jansson, "Promoting Cultural Connectedness Through Indigenous-led Child and Family Services: A Critical Review with a Focus on Canada" (2023) 18:1 First Peoples Child and Family Review 34 at 40.
[26] Bill C-92, *An Act respecting First Nations, Inuit and Metis children, youth and families*, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019), SC 2019, c 24.

with the customs or traditions or customary adoption practices of that Indigenous group, community or people, to be a close relative of the child." Clause 16 of the Act establishes a priority list of people that are to be considered when determining where a child should be placed for care. The child's parent is the top choice, followed by another adult member of the child's family, an adult who belongs to the same Indigenous group or community, and so on. Clause 16(2.1) goes on to clarify that a decision about placing a child "must take into account the customs and traditions of Indigenous peoples such as with regards to customary adoption." British Columbia's *Child Family and Community Service Act* states in the preamble at section 2(e) that "kinship ties and a child's attachment to the extended family should be preserved if possible." [27]

In speaking with Indigenous people with lived experience, we heard that Indigenous children are often cared for by extended family members or other people with close relationships to the family. Caregivers need to be recognized as having authority to make decisions for the child without having to go to court. The circumstances when agreements can be used need to be expanded, and guardians need the ability to temporarily give others the ability to make important decisions for the child. Guardianship arrangements should be recognized as needing to change over time in some cases, rather than being considered static and permanent. Further, there should be recognition of Indigenous documentation concerning guardianship, like band affidavits.[28]

Would authorizing another person to exercise parental responsibilities on behalf of the child's guardian under section 43(2) be one way to recognize a kinship care arrangement for an Indigenous child? The mechanism is informal, requiring only that the child's guardian set out in writing who is authorized, and which parental responsibilities they may exercise. There is no court application required, which makes the process easier to use. It may also fit with the intentions of the parties in some kinship care arrangements, i.e., that the child's parent does not give up their role as guardian and can resume care of the child at any time they are able to do so. However, it may not be broad enough to encompass all kinship care arrangements, including arrangements that are intended to be more than temporary. Also, the current wording says authorization may be given when the child's guardian is "unable" to exercise their parental responsibilities themselves. Even if "temporarily unable" is interpreted broadly, there may be some customary care arrangements where this wording is a poor fit with the individual circumstances (e.g., where the customary care arrangement results from a cultural practice).

Alternatively, expanding the use of agreements to allow someone other than a child's parent to be appointed as the child's guardian may better meet the needs of Indigenous families wishing to use a longer-term care arrangement for the child. It may be possible to use a written agreement to extend guardianship to a non-parent, reflecting a customary adoption that did not sever the child's relationships with their existing parent(s) or guardian(s). Although this could be used to add a legal guardian and reflect a customary adoption, it would not create a "legal parent," meaning it could not be used to add another person to the child's birth certificate. Nor would the child be considered the child of the person appointed in the agreement for the purposes of the current *Wills, Estates and Succession Act*. [29] Despite these limitations, a written agreement could perhaps be used to put in place the intentions of at least some customary adoptions.

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[27] CFCSA, *supra* note 2, s 2(e).

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

[29] WESA, *supra* note 12.

1-8. Is an authorization to exercise parental responsibilities under section 43(2) an effective way to recognize Indigenous kinship care arrangements, or is it too limited?

1-9. Are there any specific parental responsibilities that someone given care of an Indigenous child in a kinship care arrangement would not exercise (i.e., certain types of decisions that the child's parent would remain responsible for)?

1-10. Could a written agreement be used to reflect Indigenous customary adoptions, even if the written agreement had the effect of creating a guardian for the child rather than a legal parent?

Discussion Questions:

1-11. Should section 43(2*) (temporary exercise of parental responsibilities)* more clearly explain the effect of authorizing a person to exercise parental responsibilities on a guardian's behalf? For example, should the FLA be clear that the guardian making the authorization continues to be the child's guardian and the person authorized to exercise specific parental responsibilities on the guardian's behalf only does so until the guardian ends the authorization?

1-12. Should a form be developed that guardians can use to authorize someone to exercise specified parental responsibilities on their behalf?

1-13. Questions specific to the recognition of Indigenous kinship care and customary adoption within the FLA are included in the text box above. Should kinship care arrangements used in other cultures be recognized in the FLA? If so, how?

Parenting Arrangements

One of the ways that the FLA sought to minimize conflict and adversarial positions between parties in family law disputes was to shift away from the concepts of "custody" and "access" which were rights-based notions. The FLA introduced parenting arrangements, including parental responsibilities and parenting time. Both are available only to a child's guardian; the time a non-guardian spends with a child is called "contact" under the Act. Section 41 contains an open list of responsibilities that a guardian has towards the child and includes making decisions about healthcare, education, legal matters, residency, and who the child associates with as well as decisions related to the child's participation in their "cultural, linguistic and spiritual upbringing and heritage, including…the child's Indigenous identity." The final responsibility in the list is an open-ended responsibility related to anything "reasonably necessary to nurture the child's development."

Parental Responsibilities

Allocation of Parental Responsibilities - Section 40

Section 40 addresses the allocation of parental responsibilities among guardians of a child. It provides that an agreement or court order can allocate or assign responsibilities amongst the guardians of a child, and in the absence of such an agreement or order each guardian may exercise all parental responsibilities. Subsection (2) provides that the exercise of parental responsibilities in the absence of agreement or court order requires consultation with the child's other guardian(s) unless such

consultation would be "unreasonable or inappropriate" in the circumstances of the case. Subsection (3) authorizes the making of agreements or orders allocating parental responsibilities and explicitly provides that they may be exercised by one or more guardians only, each guardian acting separately, or all guardians acting together. Finally, subsection (4) states that no specific parenting arrangement is considered to be in the best interests of the child, and explicitly provides that the following should not be presumed:

(a) parental responsibilities should be allocated equally among guardians
(b) parenting time should be shared equally among guardians
(c) decisions made by guardians should be made separately or together.

The FLA establishes a child-centric model for making decisions related to caring for and spending time with children. All such decisions are to be made based only on what is in the best interests of the child.[30] The directions in section 40(4) underscore this fundamental premise. In contrast, there are other jurisdictions that have legislative presumptions in favour of equal decision-making responsibility and equal time with children, although "equal" does not always mean 50/50. These include roughly twenty percent of American states.[31]

Equal shared parenting was considered recently in Canada when the federal government amended the *Divorce Act*.[32] Prior to the amendments, section 16(10) of the *Divorce Act* was described in the marginal note as the "maximum contact" provision and stated that the court should give effect to the principle that a child should have as much time with each parent as was consistent with the best interests of the child, considering the willingness of the parent to facilitate the arrangement. This was amended and what is now the marginal note for section 16(6) (see Appendix B) of the Act reads "Parenting time consistent with best interests of the child." The language of the section is mostly unchanged, however the "friendly parent rule" requiring the court to consider each parents' willingness to support the child's relationship with the other parent was reframed as a best interests of the child factor. The *Divorce Act* amendments intentionally did not include an equal shared parenting provision and removing the "maximum contact" phrasing helps to stress that parenting arrangements must reflect what is in a child's best interests based on their individual circumstances. The federal government explained that presumptive equal shared parenting arrangements do not work for all families, and have the potential to increase conflict and litigation, as well as risk of family violence. Legislating a presumption of equal shared parenting was considered inconsistent with the emphasis on children's best interests.[33]

List of Parental Responsibilities - Section 41

Section 41 of the FLA sets out a list of the parental responsibilities that a guardian may have with respect to a child, with the exercise of a particular responsibility being subject to how responsibilities have been allocated between the child's guardians:

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[30] FLA, *supra* note 3, s 37(1).

[31] American states that have passed legislation with a rebuttable presumption of shared parenting that refers to equal time or something close to equal time include Arkansas, Florida, Kentucky, Missouri, South Dakota, West Virginia.

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

[33] Government of Canada, "*Legislative Background: An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act (Bill C-78 in the 42nd Parliament)*" (last modified 28 December 2022) online: *Department of Justice Canada*.

41 For the purposes of this Part, parental responsibilities with respect to a child are as follows:

(a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;

(b) making decisions respecting where the child will reside;

(c) making decisions respecting with whom the child will live and associate;

(d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;

(e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an Indigenous child, the child's Indigenous identity;

(f) subject to section 17 of the *Infants Act*, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;

(g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;

(h) giving, refusing or withdrawing consent for the child, if consent is required;

(i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;

(j) requesting and receiving from third parties health, education or other information respecting the child;

(k) subject to any applicable provincial legislation,

(i) starting, defending, compromising or settling any proceeding relating to the child, and

(ii) identifying, advancing and protecting the child's legal and financial interests;

(l) exercising any other responsibilities reasonably necessary to nurture the child's development.

In 2021, amendments to the *Divorce Act* replaced the outdated "custody" and "access" terminology, replacing them with language that is similar to the FLA. The *Divorce Act* uses "decision-making responsibilities" rather than "parental responsibilities." Decision-making responsibility is defined in section 2(1) as the responsibility for making significant decisions about a child's well-being, including in respect of: health; education; culture, language, religion and spirituality; and significant extracurricular activities. Although the list of responsibilities set out in the *Divorce Act* is less detailed than the FLA, it is also a non-exhaustive list. See Appendix B for a comparison of the relevant provisions in the *Divorce Act* and the FLA.

The *Divorce Act* also deals with access to information about a child differently than the FLA; the FLA includes "requesting and receiving from third parties health, education or other information about a child" as a parental responsibility while the *Divorce Act* addresses this separately from decision-making responsibilities. Under the *Divorce Act*, any person with parenting time or decision-making responsibilities can request information about the child's well-being under section 16.4. Although the language has been updated, section 16.4 pre-dated the inclusion of a list of decision-making responsibilities in the *Divorce Act*.

Indigenous Considerations on Parental Responsibilities –What We Heard

The FLA currently refers to responsibility for making decisions about a child's Indigenous identity, within the context of making decisions about a child's cultural, linguistic, religious and spiritual upbringing and heritage. Although there have been few comments about how the FLA describes parental responsibilities for making decisions about an Indigenous child's Indigenous identity, there were comments that the FLA needs to more specifically set out factors that are unique to determining what is in the best interests of an Indigenous child.[34] This is discussed more in Chapter 3 – *Child-centred Decision Making*.

1-14. Is there anything further that should be added to the list of parental responsibilities with respect to Indigenous children?

Discussion Questions:

1-15. Are the any issues or concerns with the current list of parental responsibilities?

1-16. Is the current model, which requires the allocation of parental responsibilities and parenting time be made based only on what is in the child's best interests in their particular circumstances, without making any presumptions about equal allocation or joint decision-making, effective?

1-17. Are there any issues in practice with the differences between how parental responsibilities are described and allocated in the FLA and how decision-making responsibilities are described and allocated in the Divorce Act? If so, how should these issues be addressed?

Time With the Child

Parenting Time - Section 42

Section 42 of the FLA explains that parenting time is time that a child is with a guardian, as allocated under an agreement or court order. During that time, the child's guardian makes day-to-day decisions and is responsible for the care, control, and supervision of the child. In contrast, the time that someone other than a guardian spends with a child is called contact. A non-guardian does not have responsibility for making significant decisions concerning the child while they are spending time together or otherwise in contact with each other. Contact is discussed further below.

Contact with a Child - Division 4

Contact is the word used to describe communication or time spent with a child by a person who is not the child's guardian. Arrangements for contact with a child can be set out in a court order or an agreement as long as the agreement is made between all of the child's guardians who have responsibility for deciding with whom the child may associate.[35] Section 59(2) of the FLA stipulates that the court may grant contact to any person who is not a guardian of the child, including a parent or grandparent. Many of the court applications regarding contact with a child are made by grandparents. Like other decisions concerning the care of and time with children, decisions about contact must be in the best interests of the child. *LP and DP v CC* was a recent case that dealt with an application by

[34] Mahihkan Management, *supra* note 28.
[35] FLA, *supra* note 3, s 58(1)–(2).

Indigenous grandparents for contact following the death of their grandchild's father (i.e., their son).[36] The child's mother was not Indigenous and did not acknowledge her child's Indigenous identity. The court reviewed the case law and noted that "while the views of the custodial parent continue to be a consideration, those views can never trump the best interests of the child."[37] The court confirmed that the principles that apply to an application for contact continue to be as follows:

(a) There is no presumption that grandparent contact is in the best interests of the child;
(b) The onus to establish grandparent contact time is in the best interests of the child is on the grandparent – not on the parent to establish otherwise;
(c) The custodial parent has a significant role. The courts should be reluctant to interfere with a custodial parent's decision in this sort of matter and should only do so where it is in the best interests of the child;
(d) While judges must be vigilant to prevent parents from alleging fictitious or imagined conflicts as a reason to deny contact time, in cases of 'real conflict or hostility' between the parent and grandparent, the child's best interests will rarely be served by granting access.[38]

This case went on to find that the child had Indigenous ancestry and to consider how Indigenous ancestry impacted the child's best interests in this particular case. Judge Archer emphasized his task was not to consider whether access to Indigenous culture would be in the best interests of children generally, but whether it would be in this child's best interests to have access to his Indigenous culture through his grandparents, keeping in mind that deference should be paid to the mother's right to make decisions on her child's behalf. The court concluded that the child's Indigenous ancestry was one of the factors to be considered along with the other factors in the best interests of the child test and determined that in this case the grandparents had met the onus of proving a contact order would connect the child with his Indigenous ancestry and was in his best interests. Although this case involved an application for contact by Indigenous grandparents and some of the discussion focused on the relationship between Indigenous ancestry and the best interests of the child test, it is a good example of the principles that apply to any application for contact by a grandparent or any other person.

Like the FLA, the *Divorce Act* also uses the term contact however its use is slightly different because the *Divorce Act* applies exclusively to married spouses. Under section 16.5 of the *Divorce Act*, someone other than a spouse may apply for the court's permission to make an application for contact with a child. The *Divorce Act* does not contemplate a child's parent applying for contact with a child – a parent who is married to the child's other parent will always be in the position of applying for a parenting order setting out parenting time and decision-making responsibilities. Although only a non-parent would apply for contact under the *Divorce Act*, the provisions are similar (see the comparison table at Appendix B). One difference is that section 16.5(4) of the *Divorce Act* specifically requires the court to consider "all relevant factors, including whether contact between the applicant and the child could otherwise occur, for example during the parenting time of another person." This was considered in *KLB v SWB*.[39] In that case the court denied the grandparents' application for parenting time on the basis that the grandparents would be able to spend time with the child during the father's parenting time which included overnight visits in the grandparents' home. The judge emphasized the decision was intended to promote stability for the child and took into account the increase in the father's parenting time. It

[36] *LP and DP v CC*, 2022 BCPC 34 (CanLII).
[37] *Ibid* at para 29.
[38] *Ibid*.
[39] *KLB v SWB*, 2021 BCSC 1437 (CanLII).

was not intended to diminish the importance of maintaining close relationships with extended family and could be revisited if parenting arrangements changed. Although courts have made similar analyses under the FLA and found that extended family members could spend time with the child during parent time, or making a contact order to be exercised concurrently with a guardian's parenting time order, this factor is not specifically included in the FLA.[40]

Discussion Questions:

1-18. Are there any issues or concerns with the provisions for contact in the FLA?

1-19. Are there any issues in practice with the differences between the contact provisions in the FLA and the Divorce Act? If so, how should these issues be addressed?

1-20. The discussion and questions posed in this chapter relate to issues that have been raised concerning guardianship, parenting arrangements and contact. Do you have any other concerns or suggestions for amendments to provisions in the FLA related to this topic?

[40] *HSA v SKA*, 2022 BCSC 1492 (CanLII).

Chapter 2 : Relocation of a Child

Introduction

Phase 2 of the FLA Modernization Project includes a review of Part 4, Division 6 - *Relocation*. Division 6 includes provisions on the following:

- a definition for "relocation" and in what circumstances the term applies,
- when, how, and to whom notice of an intended relocation is required (s. 66),
- a requirement for parties to try to resolve relocation issues (s. 67),
- when and how an objection to an intended relocation can be made (s. 68),
- orders the court can make regarding relocation (s. 69 and 70), and
- clarification that an order prohibiting relocation is not a change in the child's circumstances justifying an application to change parenting arrangements (s. 71).

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

- When relocation provisions apply
- Notices and objections of relocation
- Presumptions and burdens on parties in relocation cases Factors to be considered in relocation applications

In reviewing Part 4, Division 6 - *Relocation* with a view to modernize the provisions, the following are important to consider:

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

   In March 2021, the federal *Divorce Act*[1] introduced a relocation regime in sections 16.9 to 16.96. Married parties seeking a divorce may apply for relocation either under the FLA or under the *Divorce Act*. Unmarried parties can only apply under the FLA relocation provisions. Having two parallel but distinct relocation regimes may cause confusion, create inconsistent results, and lead to different treatment under the law based on whether parties were married or not. It has been suggested that married parties in BC often make relocation applications under both the FLA and *Divorce Act*.[2] However, the workability of this approach seems suspect as the statutes differ on the notification and objection processes, the effects of parenting time, the burdens placed on the parties, and what factors must be established in a relocation claim. See Appendix C for a comparison table of the FLA and *Divorce Act* provisions.

2) **The gender and relationship considerations of relocation applications.**

[1] *Divorce Act*, RSC 1985, c 3 (2nd Supp.).
[2] Rollie Thompson, "*Barendregt* and B.C. Relocation Law" (Presentation delivered at the 14th Biennial Family Law Conference, 7 July 2023) [unpublished] [Thompson, "*Barendregt*"].

It has been estimated that 90 to 95 per cent of parents applying to relocate with their child are women.[3] It has been found that the reasons for relocation are often a combination of economic needs and relationships and support systems.[4] Other reasons for relocation seen in case law include fleeing family violence and the affordability or availability of housing.[5] Given this information, the unique experiences faced by women and mothers need to be considered when reviewing the relocation provisions of the FLA. Consideration also needs to be given to whether the FLA relocation provisions adequately address any unique issues that may arise for 2SLGBTQIA+ parties or parties that are in a polyamorous relationship.

For example, it has been suggested that the FLA could be amended to specifically require the courts to consider gender-related factors in relocation applications:

> …I conclude that the courts and the legislature could make space in the analysis for attention to the gendered experiences of family violence and the socio-economic realities that many applicants, the majority of them mothers, face.[6]

3) **Advancements in technology.**

There have been significant advancements in technology and the way we communicate since the FLA came into force in 2013. The use of video chat, texting, and social media to communicate is widespread. Technological advancements in how families communicate with each other need to be considered when determining whether or how the relocation provisions of the FLA could be modernized.

What is Relocation under the FLA?

Section 65 of the FLA defines "relocation" by the degree to which a change in residence affects the child's relationship with specified people. Under the FLA, "relocation" means a change in the location of the residence of a child or a child's guardian, that reasonably can be expected to have a significant impact on the child's relationship with a guardian or one or more other persons having a significant role in the child's life. The relocation provisions apply if it is a child's guardian, the child, or both who plan to relocate, and a written agreement or order related to parenting arrangements or contact applies to the child.

For comparison, the definition of "relocation" in section 2(1) of the *Divorce Act* is similar but less broad than the FLA. The *Divorce Act's* definition only references the relationships with persons who have parenting time, decision-making responsibilities or contact under the Act.[7] The FLA requires the court to

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[3] Rollie Thompson, "Legislating About Relocating Bill C-78, N.S. and B.C." (Paper delivered at the 28th Annual Institute of Family Law Conference 20, Quebec, 5-6 April 2019) 2019 CanLIIDocs 3939 at 3 [Thompson, "Relocating Bill C-78"].

[4] Magal Huberman, *Between Court and Context: Relocation Cases in British Columbia* (LLM Thesis, University of British Columbia, 2022) [archived at University of British Columbia Library] at iii.

[5] Meredith Shaw, "A Gendered Approach to 'Quality of Life' After Separation Under the British Columbia Family Law Act Relocation Regime" (2021) 26 Appeal 121, 2021 CanLIIDocs 676 at 123.

[6] *Ibid* at 139.

[7] **2 (1):** In this Act, …

> ***relocation*** means a change in the place of residence of a child of the marriage or a person who has parenting time or decision-making responsibility — or who has a pending application for a parenting order — that is likely to have a significant impact on the child's relationship with

consider whether the relocation would have a significant impact on the child's relationship with other people who have a significant role in the child's life, regardless of whether they are a guardian or if there is a contact order or not. "Other people" who are not guardians or who do not have contact with the child are not entitled to receive notice of relocation or to object to a relocation, but their relationship with the child may still affect whether it is considered a relocation.

The FLA's relocation provisions are in contrast to the "Changes to a child's residence" provisions in section 46 of the Act. Section 46 applies if:

- there is no written agreement or order respecting parenting arrangements for a child,
- a guardian applies for an order about parenting arrangements,
- the child's guardian plans to change the child's residence, and
- it is reasonable that the change will have a significant impact on the child's relationship with another guardian.

Section 46 does not provide requirements for notice, opportunities for objections, or presumptions. Instead, like with other applications setting parenting arrangements, the court must consider whether the change of residence would be in the best interests of the child according to the factors in section 37 (2) and the reasons for the move. There is an additional direction (also found in the Act's relocation provisions) that prohibits a court from considering whether the guardian would move without the child.[8]

It has been suggested that because the changes to a child's residence and the relocation provisions are similar, but apply in different circumstances, moving the relevant sections closer together would improve the readability of the Act.

There is some question about whether relocation provisions apply when there is an interim parenting arrangement order as opposed to a final order.[9] In the 2018 case of *KW v LH*, the BC Court of Appeal held that the relocation notice was given before the interim order was made, so the interim order did not qualify as an "order" and the relocation application should have been considered under section 46.[10] There also remains a question of timing of written agreements and orders and whether the relocation provisions would apply if, for example, an order was made prior to the notice of relocation being given or prior to the relocation hearing. The BC Court of Appeal concluded the following in *KW v LH*:

> [92] I agree with Justice Punnett and adopt his analysis set out at paras. 54–60 of *S.J.F.* reproduced above. Absent an existing agreement between the parties, when an initial application is brought for an order respecting parenting arrangements under s. 45 and a guardian indicates in his or her pleadings or by notice in writing of an intention to change the child's residence, s. 46 applies notwithstanding that an interim order is made in the course of the proceedings. To the extent that *L.J.R., A.J.D.*, *Pepin*, and *Wong* suggest otherwise, those cases were wrongly decided and should not be followed.

(a) a person who has parenting time, decision-making responsibility or an application for a parenting order in respect of that child pending; or
(b) a person who has contact with the child under a contact order;

[8] *Family Law Act*, SBC 2011, c 25, s 46(2)(b) [FLA].
[9] Thompson, "Relocating Bill C-78", *supra* note 3 at 10—11.
[10] *KW v LH*, 2018 BCCA 204 (CanLII).

> [93] Whether an interim order made in advance of any claim or notice of intention to relocate would transfer the matter from Division 2 to Division 6 raises somewhat different policy considerations. Arguably, such an order may create legitimate expectations about existing arrangements, particularly if the order has remained in effect for an extended period of time. This issue however does not arise on this appeal and I will say no more about it.

It has similarly been observed that there is inconsistent treatment of whether the relocation provisions apply when there are interim orders under the *Divorce Act*.[11]

Discussion Questions:

2-1. Does the definition of "relocation" accurately capture the people, relationships and situations that need to be considered in relocation applications?

2-2. Should the differences between the relocation provisions and the changes to child's residence provisions be clarified or better distinguished in the FLA?

2-3. Should the FLA clarify if, when, and how the relocation provisions apply to interim orders, in addition to final orders and agreements?

Notice of and Objections to Relocation

Notice of Relocation

Section 66(1) of the FLA requires a guardian who is planning to relocate to give all other guardians and people who have contact with the child at least 60 days written notice of the date of the relocation and the name of the proposed location. Whether notice was given under section 66 is a factor the court must consider when determining whether the relocation application is being made in good faith.[12]

As a comparison, the *Divorce Act* is much more prescriptive in its notice requirements under section 16.9. In both Acts, notice of relocation must be given at least 60 days before the relocation. However, while the FLA and *Divorce Act* both require the date of relocation, the FLA also requires the name of the proposed location compared to the following requirements in the *Divorce Act* and the Notice of Relocation Regulations:[13]

- the new address, and contact information;
- a proposal as to how parenting time, decision-making-responsibility, or contact (whichever applies) could be exercised;
- the name of the relocating person and any relocating child of the marriage;
- the name of any other child of the marriage regarding whom the relocating person has parenting time or decision-making responsibility;
- the relocating person's current address and contact information; and

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[11] Rollie Thompson, "The New Relocation Laws: Questions and Some Early Answers" (Paper delivered ahead of the 14th Biennial Family Law Conference, May 2023) online (pdf) [Thompson, "New Relocation Laws"].
[12] FLA, *supra* note 8, s 69(6)(c).
[13] Notice of Relocation Regulations, SOR/2020-249.

- the name of any person who has parenting time, decision-making responsibility or contact regarding any child of the marriage, whether that child is relocating or not.

Section 3 of the Notice of Relocation Regulations also prescribes a form – Form 1 – for giving notice that must include the required information.

Although a prescribed form can add certainty and may make it easier to ensure all relevant information is included in applications, it may sometimes be difficult to complete if information is not known (e.g., a specific address versus a general location for the proposed relocation). Creating a template instead of a form may help prevent applicants from being penalized for failing to properly completing a form.

Notice Exemptions

Both the FLA and the *Divorce Act* allow for exemptions to their notice requirements. Section 66(2) of the FLA allows the court to grant an exemption in two circumstances:

1) if the court is satisfied that notice cannot be given without incurring a risk of family violence, or
2) the other guardians or people with contact do not have an ongoing relationship with the child.

An application for these exemptions may be brought without notice to other parties under section 66(3) of the FLA. Under the *Divorce Act*, a court seemingly has more discretion to grant exemptions or modifications to the notice requirements, because section 16.9(3) does not restrict the court to specified reasons.[14] The *Divorce Act* section does state that a reason for an exemption can be "where there is a risk of family violence."

Some legal practitioners suggest that courts are reluctant to grant a notice exemption under either Act, even in cases where the circumstances might support one. For example, although case law suggests that family violence is a likely reason why a relocation application may be granted, many of those cases involve the relocating party giving notice rather than being exempted from giving notice.[15] Given the serious nature of family violence and a guardian's potential desire to relocate because of it, section 66 could be amended to provide further guidance to the court for when notice exemptions should be granted in such cases. Similarly, additional notice exemption guidance could be provided in the FLA for when there is no ongoing relationship between a child and a person who could object.

Consequences of Failing to Give Notice

Whether notice was given under section 66 is a factor the court must consider when determining whether the relocation application is being made in good faith.[16] In contrast the *Divorce Act* requires the court to consider whether the person who applies to relocate has complied with any applicable notice requirement, including a requirement under the *Divorce Act*, a provincial statute, an order, an

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[14] **16.9** (3) Despite subsections (1) and (2), the court may, on application, provide that the requirements in those subsections, or in the regulations made for the purposes of those subsections, do not apply or may modify them, including where there is a risk of family violence.

[15] Thompson, "New Relocation Laws", *supra* note 11 at 16—17.

[16] FLA, *supra* note 8, s 69(6)(c).

arbitral award or an agreement, when determining the best interests of a child in a relocation application.[17]

It has been suggested that a legislated presumption against permitting the relocation if the party already relocated without providing notice[18] could be added and may discourage child abductions.

Resolving Issues Arising from Relocation

Section 67 of the FLA triggers a requirement, if notice is required, for the relocating child's guardians and persons having contact with the child to use their best efforts to cooperate in resolving issues related to the proposed relocation once notice has been given and before the date of relocation. This direction aligns with a purpose of the Act articulated in section 4 of encouraging parties to resolve matters through the use of agreement rather than court.[19]

This cooperation requirement, however, does not prevent a guardian from seeking a court order to permit or prohibit the relocation under section 69, and does not prevent a person having contact with the child from making an application to maintain their relationship with the child under section 59 (*Orders respecting contact*) or section 60 (*Changing, suspending or terminating orders respecting contact*) of the FLA.

It is unclear whether this provision is useful in relocation cases or whether it causes potential for confusion. The provision does not provide any guidance for what "best efforts to cooperate" might mean and there are no legislated consequences for failing to comply.

Objections to Relocation

Both the FLA and *Divorce Act* allow relocation unless there is an objection filed within 30 days after the notice of relocation is received.

Section 68 of the FLA states if a guardian gives notice of their intention to relocate a child, the relocation may occur on or after the date set out in the notice unless another guardian files an application for an order to prohibit the relocation within 30 days of receiving the notice. Although notice is required to be given to both a guardian and persons having contact with a child, only a guardian may file for an application to prohibit the relocation. Persons having contact with a child may only apply for a contact order under section 59, or to change, suspend or terminate a contact order under section 60.

The *Divorce Act* is again more prescriptive than the FLA, as it requires the objection to be set out in the prescribed Form 2 of the Notice of Relocation Regulations. [20] Another express condition that must be met before relocation is permitted under the DA is that there cannot be an order prohibiting the relocation.[21]

Under section 16.91 of the *Divorce Act*, a person may object by:

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[17] DA, *supra* note 1, s 92(1)(d).
[18] Thompson, "New Relocation Laws", *supra* note 11 at 14.
[19] DA, *supra* note 1, s 4(b).
[20] Notice of Relocation Regulations, *supra* note 13, s 5.
[21] DA, *supra* note 1, s 16.91(1)(b)(ii).

- filing a Notice of Objection to Relocation form[22] which sets out their reasons for objecting and their views on the proposal about the exercise of parenting time or decision-making responsibility, or
- making an application for parenting time or decision-making responsibility under section 16.1(1) or an application for the court to rescind, vary, or suspend a parenting order under section 17(1)(b).

Neither the FLA nor the *Divorce Act* require the notice of relocation to be served. With various forms of communication, this means that the notice could be sent by e-mail, text message, social media direct message, regular mail, registered mail, etc. Given the potential importance of a relocation, it may be difficult for the relocating party to know when the other guardian "receives" the notice and when the 30-day objection period is over.

Indigenous Considerations on Relocation – What We Heard

In speaking with Indigenous peoples with lived experience, one of the themes the Ministry heard is that the FLA needs to recognize Indigenous family networks.[23] Indigenous (First Nations, Inuit, and Métis) "families" extend beyond the colonial concept of nuclear family, and include aunts, uncles, grandparents, and even non-related community members who may step in and act as a child's guardian. The FLA's relocation provisions require notice to be given to a child's other guardians and people who have formal contact with the child. The people who may object to a relocation application is even further limited to a child's guardian. The FLA relocation provisions currently do not provide a role for other people who may play a role in an Indigenous child's life unless they have formally obtained guardianship or an order for contact with the child.

2-4. Should the FLA's relocation provisions allow for other family and community members in an Indigenous child's life to expressly be given notice or be able to object to the relocation of that child? If so, how?

Discussion Questions:

2-5. Should the FLA require that a notice of relocation or a notice of objection of relocation include additional information or be in a prescribed form?

2-6. Are the two permissible exemptions to the requirement to provide notice of a proposed relocation under the FLA adequate?

(a) If not, should any exemptions be added, removed or amended? Or should the FLA remove the list and allow the court to determine when an exemption may be allowed?

2-7. Should the FLA establish additional consequences for failing to give notice of a relocation in cases where no exemption applies?

[22] Notice of Relocation Regulations, *supra* note 13, schedule – Form 2.
[23] Mahihkan Management on behalf of the B.C. Ministry of Attorney General, *What We Heard: Family Law Act Modernization Dialogue Sessions*, (Coming Soon).

2-8. Does the requirement under section 67 for a child's guardians and persons having contact with a child to use their best efforts to cooperate to resolve any issues related to the relocation need to be updated? If so, how?

Presumptions and Burdens

Section 69 of the FLA allows the court to make an order either permitting or prohibiting the relocation of a child by the relocating guardian. In making its decision, the court must consider the best interests of the child factors in section 37 (1) and (2).[24] The court must also consider additional factors in section 69 (4) or (5), depending on whether the guardians have substantially equal parenting time with the child or not. The court is specifically prohibited from considering whether a guardian would still relocate if the court does not allow the child's relocation.[25]

If the guardians do not have substantially equal parenting time with the child, the burden is on the relocating guardian to satisfy the court that the proposed relocation is made in good faith and that they have proposed reasonable and workable arrangements to preserve the child's relationship with other guardians, persons with contact with the child and others who have a significant role in the child's life.[26] If the court is satisfied that those factors have been complied with adequately, then the burden shifts to an objecting guardian to prove that the relocation is not in the best interests of the child.[27]
If, on the other hand, the guardians do have substantially equal parenting time with the child, the burden is on the relocating guardian to satisfy the court of both the factors listed in section 69(4)(a) and that the relocation is in the best interests of the child.[28] There is no shift of burden in these circumstances.

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[24] **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 the person's responsibilities;
(g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
(h) whether the actions of a person responsible for family violence indicate that the person may be impaired in the person's ability to care for the child and meet the child's needs;
(i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
(j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

[25] FLA, *supra* note 8, s 69(7).

[26] *Ibid*, s 69(4)(a).

[27] *Ibid*, s 69(4)(b).

[28] *Ibid*, s 69(5)(a)–(b).

It has been suggested that the FLA's two presumptions based on whether the guardians have substantially equal parenting time is overly simplistic[29] and that the FLA essentially presumes the relocation is in the child's best interests if the guardians do not have substantially equal parenting time. In contrast, Nova Scotia's legislation creates a three-way presumption, where relocation is presumed to be in the child's best interests only in cases where the guardians do not have substantially equal parenting time and there is a clear primary caregiver parent.[30]

The *Divorce Act* also has a three-way presumption in section 16.93, where the relocation is only presumed to be in the best interests of the child if the child spends the vast majority of their time in the care of the relocating party.[31]

The idea of identifying a "primary care giver" was deliberately steered away from in the development of the FLA because it was a prominent feature of orders for joint custody under the former *Family Relations Act*. Requiring the court to identify one party as "primary" was counterproductive to encouraging the parties to cooperate with joint parental responsibilities.

The FLA's use of the wording "substantially equal parenting time" has been judicially considered. It appears that most of the "substantially equal parenting time" decisions are based on truly equal parenting time.[32] However, the BC courts have also found that having 40 per cent of parenting time is considered "substantially equal parenting time" for the purposes of the relocation provisions. There is also inconsistency in relocation decisions about whether parenting time that is around 35 per cent and even as low as 29 per cent[33] is substantially equal parenting time.

Section 69(7) of the FLA specifically prohibits the court from considering whether a guardian would still relocate if the court does not allow the child's relocation. However, it has been noted that this "double-bind" provision only addresses what the relocating guardian would do, and not the other guardians, family members or other people in the child's life.[34] It has also been noted by an assessor and report writer that the double bind restriction makes it difficult to conduct parenting assessments and to write views of the child or full section 211 reports in cases where there is a relocation application.

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[29] Thompson, "Relocating Bill C-78", *supra* note 3 at 13.

[30] *Parenting and Support Act*, RSNS 1989, c 160, s 18H.

[31] *Divorce Act*, *supra* note 1*:*

Burden of proof – person who intends to relocate child

16.93 (1) If the parties to the proceeding substantially comply with an order, arbitral award, or agreement that provides that a child of the marriage spend substantially equal time in the care of each party, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child.

Burden of proof – person who objects to relocation

(2) If the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child of the marriage spends the vast majority of their time in the care of the party who intends to relocate the child, the party opposing the relocation has the burden of proving that the relocation would not be in the best interests of the child.

Burden of proof – other cases

(3) In any other case, the parties to the proceeding have the burden of proving whether the relocation is in the best interests of the child.

[32] Thompson, "Relocating Bill C-78", *supra* note 3 at 13—14.

[33] *CMB v BDG*, 2014 BCSC 780 (CanLII).

[34] Thompson, "New Relocation Laws*", supra* note 11 at 17---18.

"Good faith" and "Reasonable and Workable Arrangements" Requirements

Unlike the *Divorce Act*, the FLA places two additional burdens on the relocating guardian. Regardless of whether the guardians have substantially equal parenting time or not, the relocating guardian always has the burden of satisfying the court that the relocation is made in good faith and that they have proposed reasonable and workable arrangements to preserve the child's relationships with other guardians, persons entitled to contact with the child, and other persons who have a significant role in the child's life.[35]

Section 69(6) of the FLA gives further direction with respect to the section 69(4)(a)(i) "good faith" requirement. In order to determine whether the proposed relocation is made in good faith, the court must consider all of the factors set out in the non-exhaustive list, including the reasons for the relocation, whether the relocation is likely to enhance the child's general quality of life and, if applicable, the relocating guardian's general quality of life (including emotional well-being, financial, or educational opportunities), whether notice of the relocation was given, and any restrictions on relocation contained in a written agreement or order.

These "good faith" and "reasonable and workable arrangements" requirements are unique to the FLA. There is a requirement to establish similar "good faith" factors when looking at the best interests of the child under the section 16.92(1) of the *Divorce Act*.[36] It has been suggested that these FLA requirements have resulted in an unintended burden being placed on the relocating guardian and have led to a decrease in court decisions permitting relocation in BC.[37] Considering that about 90-95 per cent of parents applying to relocate with their child are women, [38] it is questionable whether this requirement is

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[35] FLA, *supra* note 8, s 69(4)(a).

[36] *Divorce Act*, *supra* note 1:

Best interests of child — additional factors to be considered

16.92 (1) In deciding whether to authorize a relocation of a child of the marriage, the court shall, in order to determine what is in the best interests of the child, take into consideration, in addition to the factors referred to in section 16,

- **(a)** the reasons for the relocation;
- **(b)** the impact of the relocation on the child;
- **(c)** the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;
- **(d)** whether the person who intends to relocate the child complied with any applicable notice requirement under section 16.9, provincial family law legislation, an order, arbitral award, or agreement;
- **(e)** the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;
- **(f)** the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and
- **(g)** whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.

[37] Thompson, "Relocating Bill C-78", *supra* note 3 at 12—13.

[38] *Ibid* at 3.

putting an added burden on mothers and their ability to move with their child for various reasons which often include social support networks, employment, [39] housing, and fleeing family violence. [40]

Furthermore, given advancements in technology and communications, there may now be more options to establish reasonable and workable arrangements to preserve the child's relationships with others.

Discussion Questions:

2-9. Are the FLA's two presumptions for when the relocation is or is not in the best interests of the child adequate?

2-10. Should the FLA's "substantially equal parenting time" continue to be the line between when each presumption applies?

(a) If so, should the FLA provide more direction on what "substantially equal parenting time" means?

(b) If not, what should be the line between the presumptions?

2-11. Do the "good faith" and "reasonable and workable arrangements" requirements in section 69 (4)(a) place too much of a burden on the relocating guardian?

2-12. Is it still appropriate to prevent the court under section 69(7) from considering whether a guardian would still relocate alone, if the court denied their application to relocate with the child?

2-13. Should the fact that the vast majority of relocation applications are made by women or technological advancements in the way families can communicate be considered in modernizing the FLA's relocation provisions? If so, how?

Factors to Be Considered

Best Interests of the Child Factors

In any relocation application, the court must consider the best interests of the child. In order to determine this, the court must consider all the factors listed in section 37(2) of the FLA.[41] The court

[39] Huberman, *supra* note 4.
[40] Shaw, *supra* note 5 at 39.
[41] See note 24 for full list of factors in section 37(2).

must also consider all the factors listed in section 38 to assess family violence and the impact it has on a child and on the ability of a person to care for and meet the needs of the child.[42]

Section 16.92 of the *Divorce Act* also provides additional best interests of the child factors that are to be considered in a relocation application.[43] As mentioned above, some of these factors are similar to the factors that the court must currently consider under the "good faith" requirement in section 69(6) of the FLA.

It is noteworthy that the FLA focuses on whether the relocation is in the best interests of the child. There is currently no requirement for the objection of a relocation application to also be in the best interests of the child.

Indigenous Considerations on Relocation – What We Heard

In speaking with Indigenous peoples with lived experience, one of the themes the Ministry heard is that it is vital for every Indigenous child to grow up with their culture and that the FLA should emphasize the importance of staying connected with both sides of their Indigenous families.[44] Ideally, an Indigenous child should live within their Indigenous community, but if this is not possible, then maintaining the child's connection to their community and culture must be a priority.

Although the FLA requires a relocation to be in the best interests of a child, the legislation does not provide specific considerations for the relocation of an Indigenous child. For example, if a proposed relocation of an Indigenous child will result in the child moving into or out of their Indigenous community, should there be a requirement to maintain the child's connection to their Indigenous community? Should other or additional factors be considered when determining whether a relocation application is in the best interests of an Indigenous child?

2-14. Do you think the FLA's relocation provisions should require consideration of specific best interests of the Indigenous child factors? If so, what should the factors be?

2-15. Do you think there should be a requirement for a relocating guardian to maintain an Indigenous child's connection to their Indigenous culture and community if they are being relocated out of their community?

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[42] **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

[43] See note 36 for full list of factors in section 16.92.

[44] Mahihkan Management, *supra* note 23.

Discussion Questions:

2-16. Should the best interests of the child factors considered in relocation cases under the FLA be updated? If so, how?

2-17. Should the FLA require that an objection to a relocation application also be in the best interests of a child?

Barendregt Decision

In the 2022 case of *Barendregt v. Grebliunas* ("*Barendregt*"), the Supreme Court of Canada examined a relocation decision involving a mother relocating with her children from Kelowna to Telkwa, BC. [45] It has been suggested that the Court's new relocation framework established in *Barendregt* was only meant to fill the gap and update the common law in jurisdictions that continue to not have relocation legislation.[46] One view is therefore, that the *Barendregt* decision should not affect the application of the FLA's relocation regime, or similar relocation legislative regimes in other provinces.

However, the *Barendregt* decision has been applied by BC courts in some relocation decisions, even after the court considered the FLA's relocation provisions.[47] For example, the court has said that the *Barendregt* framework applies under the FLA, and after applying the FLA's relocation provisions, has proceeded to apply additional factors set out in *Barendregt*.

The framework established by the Court in *Barendregt* centres on the child's best interests:

> [152] The crucial question is whether relocation is in the best interests of the child, having regard to the child's physical, emotional and psychological safety, security and well-being. This inquiry is highly fact-specific and discretionary.

The Court provided a non-exhaustive list of relevant factors that should be considered when determining the best interests of a child:

- the child's views and preferences;
- the history of caregiving;
- any incidents of family violence;
- a child's cultural, linguistic, religious and spiritual upbringing and heritage;
- each parent's willingness to support the development and maintenance of the child's relationship with the other parent; and
- the principle that a child should have as much time with each parent, as is consistent with the best interests of the child.[48]

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[45] *Barendregt v Grebliunas*, 2022 SCC 22 (CanLII) [*Barendregt*].
[46] Rollie Thompson, "Rethinking Barendregt v. Grebliunas on relocation", *The Lawyer's Daily* (29 June 2022).
[47] For example, *RP v GU*, 2022 BCCA 255 (CanLII); *JHF v KB*, 2022 BCSC 1219 (CanLII); *TMP v TML*, 2022 BCSC 1092 (CanLII); *Hull v Kornilov*, 2022 BCSC 898 (CanLII); *KBM v DBI*, 2022 BCPC 170 (CanLII).
[48] *Barendregt*, *supra* note 45 at para 153.

When determining the best interests of the child in relocation cases, a court should also consider:

- the reasons for the relocation;
- the impact of the relocation on the child;
- the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons;
- the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside;
- the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and
- whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.[49]

The court should not consider whether the outcome of the relocation application would affect either party's plans to relocate or not.[50]

Discussion Questions:

2-18. Should the FLA be amended to accommodate the framework outlined by the SCC in *Barendregt* for relocation applications under the FLA? If so, how?

2-19. The discussion and questions posed in this chapter relate to issues that have been raised concerning relocation of a child. Do you have any other concerns or suggestions for amendments to provisions in the FLA related to this topic?

[49] *Ibid* at para 154.
[50] *Ibid*.

Chapter 3 : Child-Centred Decision Making

Introduction

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

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

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

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

Best Interests of the Child

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

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

> **37 (2)** To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
>
> (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 the person's responsibilities;

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

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

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

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

In addition, section 37(3) clarifies that:

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

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

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

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

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

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

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[1] **Assessing family violence**

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

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

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

…

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

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

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

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

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

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

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

…

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

…

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

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

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

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

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

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

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

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

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

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

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

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

Discussion Questions:

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

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

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

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

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

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

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

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

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

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

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

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

Children's Evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion Questions:

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

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

Affidavits & Letters to the Court

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

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

Judicial Interviews

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

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[16] *Ibid* at paras 107—117.

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

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

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

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

The Age 12 Cut-Off

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

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

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

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

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

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

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

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

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

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

Discussion Questions:

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

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

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

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

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

Children's Lawyer

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion Questions:

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

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

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

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

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

Chapter 4 : Children's Views & Parenting Assessments and Reports

Introduction

Phase 2 of the *Family Law Act* (FLA) Modernization Project includes a review of child-centred decision making. This includes the best interests of the child provisions in Part 4 of the FLA, and the various mechanisms by which the views of a child can be provided for consideration in family law disputes that relate to them.

One way a child's views on a family law dispute may be obtained and presented is through interview or assessment processes and reports prepared under sections 202[1] and 211[2] of the FLA. These include "Full" Section 211 reports, Views of the Child reports, and Hear the Child reports.

Although the authority for some types of reports is under section 202, that provision is intended to give the court flexibility in ensuring that a child's evidence is heard, which can include other mechanisms for obtaining a child's views such as:

- letters written by the child,
- affidavits of the child,
- judicial interviews of the child, and
- the appointment of a lawyer to represent the child (i.e., a children's lawyer).

Please see Chapter 3 – *Child-Centred Decision Making* of this discussion paper for a discussion on these topics.

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[1] **Court may decide how child's evidence is received**

202 In a proceeding under this Act, a court, having regard to the best interests of a child, may do one or both of the following:

(a) admit hearsay evidence it considers reliable of a child who is absent;

(b) give any other direction that it considers appropriate concerning the receipt of a child's evidence.

[2] **Orders respecting reports**

211 (1) A court may appoint a person to assess, for the purposes of a proceeding under Part 4 [*Care of and Time with Children*], one or more of the following:

(a) the needs of a child in relation to a family law dispute;

(b) the views of a child in relation to a family law dispute;

(c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child.

(2) A person appointed under subsection (1)

(a) must be a family justice counsellor, a social worker or another person approved by the court, and

(b) unless each party consents, must not have had any previous connection with the parties.

(3) An application under this section may be made without notice to any other person.

(4) A person who carries out an assessment under this section must

(a) prepare a report respecting the results of the assessment,

(b) unless the court orders otherwise, give a copy of the report to each party, and

(c) give a copy of the report to the court.

(5) The court may allocate among the parties, or require one party alone to pay, the fees relating to an assessment under this section.

Early engagement with people with lived experiences and some report writers, lawyers, advocates and representatives from professional oversight bodies identified the following issues that need to be reviewed in the FLA Modernization Project:

- types of reports,
- criteria for ordering a report,
- qualifications of report writers,
- practice standards for interviews, assessments and report writing, and
- complaints processes.

Assessments and Reports

Types of Reports

Early engagement has indicated that there are various types of reports that can be prepared to communicate the views of children involved in a family law proceeding to the parties and the court. Although sections 202 and 211 of the FLA do not specify different types of reports, the following are some of the reports being requested by parties or ordered by the court:

- "Full" s. 211 reports,
- Views of the Child reports, and
- Hear the Child reports.

The FLA does not list, define, or describe in detail the types of reports that may be ordered or prepared under the Act. This may contribute to a lack of awareness or confusion about what reports are available under the FLA and what each report should include. Amending the FLA to include definitions or more clearly describe different types of reports may improve the type of report that is ordered in a particular case and increase consistency in reports. The following are descriptions of the different types of reports that are currently being prepared for private family law matters:

- **Evaluative Report** – A report containing opinions or expert opinions obtained through the use of procedures such as interviews and observations to collect adequate and sufficient information from each individual assessed. An evaluative report should not include opinions which are not based on direct and thorough assessment of the individual and relationships involved.
- **Non-Evaluative Report** – A report of hearsay collected from an individual. This report contains an individual's statements and perspectives pertaining to selected topics. No opinion is offered; involves a nearly verbatim report of the child's views, but no assessment or evaluation of information by the report writer.
- **Full Section 211 Report** – An evaluative report containing opinions to assist the court in assessing all factors under section 211(1) – the needs and views of a child in a family law dispute, and the ability and willingness of a party to satisfy the child's needs. The best interests of the child are the only considerations in these reports, and the factors under sections 37 *(Best Interests)*, 38 (*Family Violence*), 41 (*Parenting Responsibilities*), and, where relevant, 69 (*Relocation*) must be assessed or considered within the report. These reports use a multi-method assessment approach, including extensive interviews with each party, home observations of parent-child interactions, interviews with children and other people in the child's life (i.e., collateral interviews), and other forms of data collection that may include culturally appropriate methods of assessment, or psychological/psychometric testing.

- **Views of the Child Report –** A report assessing section 211(1)(b), "the views of a child in relation to a family law dispute." The report is focused on providing the court with the views of the child and an assessment related to those views. Opinions are limited to those pertaining to the individual child or recommendations as to further assessments. No parenting arrangement recommendations are made in these reports.
- **Hear the Child Report** – A non-evaluative report of a child's voice pertaining to target questions such as preferences for residence, school, and/or relocation. The interviewer does not assess the child or the parents, but rather reports the child's views, usually verbatim, so that the views can be heard and considered by the adults making decisions about the child's best interests. No opinion or recommendations are given.

Judges, lawyers, and the parties may not be aware of the different types of reports available and how they may assist in resolving family law disputes.

Discussion Questions:

4-1. Would it be helpful if the FLA explicitly identified different types of reports the court can order?

4-2. What terms and definitions do you think would make it easier to understand the different types of reports that can be ordered under the FLA?

Criteria for Ordering Reports

The FLA does not provide guidance to the court on when it may be appropriate to order the different types of evaluative or non-evaluative reports. This may result in one type of report being ordered or requested when another type may be more suitable based on the issues and circumstances in the individual case. It may also result in unnecessary cost and delay if, for example, a Full Section 211 report is ordered when a less costly and less time-consuming Hear the Child report or a Views of the Child report would be adequate.

In its *Section 211 Toolkit*, Rise Women's Legal Centre highlights that Section 211 reports are often exempted from many admissibility requirements that apply to other expert reports in legal proceedings. The *Section 211 Toolkit* suggests that the first step should be to critically assess whether a report is required before it is ordered or agreed upon.[3]

Based on early engagement with report writers and people with lived experience, different types of reports can vary significantly in terms of cost and length of time to complete. For example, a Hear the Child report may be completed within 2 to 3 weeks compared to a Full Section 211 report which may take up to 18 months to complete. The cost of Full Section 211 reports also varies from no cost for a publicly funded report by a family justice counsellor, to over $30,000 for a report by a private report writer.

Private Full s. 211 reports may be too costly for many parties to afford and may result in significant delay due to the time it takes to prepare such a report. Some private report writers have indicated that even

[3] Haley Hrymak & Kim Hawkins, *Section 211 Toolkit*, (Rise Women's Legal Centre, 2021) at 14—18, 47—48. ["*Section 211 Toolkit*"].

if a Full s. 211 report is ordered, they will initially prepare a shorter report (e.g., a Views of the Child report) and will only prepare a Full s. 211 report afterwards if it is still requested by the parties or the court. However, early engagement with report writers also cautioned that a Views of the Child report should not be prepared in cases where there is high conflict, intense family violence, mental health concerns, substance abuse concerns, or if the child is very young.

Some jurisdictions have established factors the court must consider before ordering reports. For example, in Alberta a Child Custody/Parenting Evaluation report can only be ordered if the court decides that an earlier "Intervention" (see description below) is inappropriate or has not resulted in the resolution of parenting issues, and if the parties can afford the cost of a report.[4]

In Alberta, if the Court orders a report, the starting point is generally an "Intervention" where a "Parenting Expert" conducts interviews and makes observations about a family in conflict and reports back to the court.[5] An Intervention Report assists the court in identifying challenges and facilitating resolution of those challenges. There are two categories of Interventions:

- **Evaluative:** The Parenting Expert provides information to the Court to assist in decision-making; and
- **Therapeutic:** The Parenting Expert helps the family work toward resolution of disputes, manage conflict and make changes to the existing family dynamic.

The Parenting Expert can make recommendations to the Court in the Intervention Report. The Court is only permitted to order an Intervention if the parties are able to pay the costs, taking into consideration any available subsidies or coverage, and there are procedural differences depending on whether the parties have legal representation and whether they agree on an Intervention being needed or not.

The Court can order a Child Custody/Parenting Evaluation ("Evaluation") only if an Intervention is inappropriate or has not resulted in the resolution of parenting issues.[6] Evaluations seem similar to Full Section 211 reports in BC, and can generally involve home visits/observations, interviews with parents and children, and can include psychological testing, collateral interviews, and document review. The Parenting Expert's Evaluation Report includes recommendations to assist the Court in making a final determination about the parenting and decision-making arrangements that are in the best interests of the children. Again, the Court is only permitted to order an Evaluation if the parties are able to pay the costs, taking into consideration any available subsidies or coverage.

A 2017 study estimated the costs of private parenting assessments in Alberta to be higher than in British Columbia.[7] Based on a review of family law cases between 2014 and 2015, the cost range was between $15,000 to $30,000 in Alberta, compared to approximately $10,000 to $15,000 in British Columbia at the

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[4] Court of Queen's Bench of Alberta, *Family Law Practice Note 8: Child Custody/Parenting Evaluation* (1 May 2019) at paras 1, 9 [*Child Custody/Parenting Evaluation*].
[5] Court of Queen's Bench of Alberta, *Family Law Practice Note 7: Interventions,* (1 May 2019) [*Interventions*].
[6] *Child Custody/Parenting Evaluation*, *supra* note 4 at para 1.
[7] Zoe Suche & John-Paul E Boyd, *Parenting Assessments and Their Use in Family Law Disputes in Alberta, British Columbia and Ontario* (Canadian Research Institute For Law and The Family, 2017) 2017 CanLIIDocs 191 at 10—11, 16—17.

time. Unlike British Columbia, Alberta does not offer publicly funded parenting assessments, however, the court may order legal aid to fund parenting assessments for low-income parties.[8]

Manitoba has established factors, including costs and delay, that the court must consider when deciding whether to appoint a family evaluator in a family law proceeding about parental responsibilities, contact or another related matter:[9]

> **49 (2)** In deciding whether to order an evaluation, the court must consider the following:
>
> (a) whether an evaluation would provide information about the child or children that would not otherwise be discoverable;
>
> (b) whether an evaluation is necessary for the court to determine the best interests of the child or children;
>
> (c) the affordability of the evaluation for the parties;
>
> (d) the potential delay resulting from the evaluation and the impact of delay on the child or children;
>
> (e) any other factor the court considers relevant.

New Zealand provides an example in legislation specifically restricting the court from ordering a psychological report unless certain criteria are met:[10]

> **133 Reports from other persons**
>
> …
>
> (6) The court may act under subsection (5) only if—
>
> (a) the court is satisfied that the information that the psychological report will provide is essential for the proper disposition of the application; and
>
> (b) the court is satisfied that the psychological report is the best source of the information, having regard to the quality, timeliness, and cost of other sources; and
>
> (c) the court is satisfied that the proceedings will not be unduly delayed by the time taken
>
> (d) to prepare the psychological report; and
>
> (e) the court is satisfied that any delay in the proceedings will not have an unacceptable effect on the child; and
>
> (f) the court does not seek the psychological report solely or primarily to ascertain the child's wishes.
>
> (7) If the court is entitled by subsection (6) to act under subsection (5) and if the court knows the parties' wishes about the obtaining of a psychological report or can speedily ascertain them, the court must have regard to the parties' wishes before deciding whether or not to act under subsection (5).

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[8] Rachel Birnbaum, *Voice of the Child Programs and Services in Canada by Province and Territory* (Ottawa: Department of Justice Canada, 2023) at 7 – footnote 13.

[9] *The Court of King's Bench Act*, CCSM c C280, s 49(1); also see *The Provincial Court Act*, CCSM c C275, s 20.4.

[10] *Care of Children Act*, 2004, s 133.

Discussion Questions:

4-3. Should the FLA specify factors the court may or must consider when ordering a non-evaluative report? If so, what factors should the court consider?

4-4. Should a non-evaluative report be the default starting point for court-ordered reports?
- **(a) If yes, should there be exceptions to requiring an initial non-evaluative report in certain circumstances?**
- **(b) If so, what are those circumstances (for example, high conflict, a history of family violence, substance abuse, mental health concerns, etc.)?**

4-5. Should the FLA specify factors the court may or must consider when ordering an evaluative report? If so, what factors should the court consider?

4-6. Similar to New Zealand, should the FLA specify factors the court may or must consider when ordering that psychological testing be included in a report? If so, what should those factors be?

When A Report is Ordered

It has been suggested that obtaining the views of children involved in family law disputes earlier in the dispute resolution processes may help resolve disputes in a timelier and more cost-effective way and help reduce escalation of the conflict.

It often occurs that a report is ordered by a judge after parties have been unsuccessful in resolving their family law dispute using out-of-court processes. For example, Rule 62 of the BC *Provincial Court Family Rules* (PCFR) allows a judge to make orders about a Section 211 report in a Family Management Conference[11] or a Case Management Conference,[12] however, there is no corresponding rule that would apply to reports prepared under section 202. Similar rules apply to a family justice manager at a Case Management Conference however they are not permitted to make an order requiring a report writer to attend a trial as a witness.[13] The PCFR provides some rules on trial processes pertaining to children's evidence and reports on a child's views under Part 9, Division 4 – *Trial Processes*.

Early engagement with report writers and family law practitioners suggested that it would be helpful if the FLA provided that the views of children should be obtained earlier in the dispute resolution process, including in mediation.

Discussion Question:

4-7. Would it be helpful if the FLA specified that the views of a child may or must be obtained through reports or in other ways earlier in the resolution process of a family law dispute?
- **(a) If so, are there circumstances where the views of a child should not be obtained earlier in the resolution process?**

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[11] *Provincial Court Family Rules*, BC Reg 120/2020, rules 48(1), 62(n) [PCFR].
[12] *Ibid*, rule 62(n).
[13] *Ibid*, rule 63(2)(e).

Report Writers

Who Can Write Reports

Section 211(2) of the FLA specifies that a person appointed by the court to assess the needs and views of a child, and the ability and willingness of a party to satisfy those needs, must be a "family justice counsellor, a social worker or another person approved by the court." The person must also not have any previous connections with the parties unless they agree.

Family justice counsellors are employees of the Ministry of Attorney General, Family Justice Services Division and prepare publicly funded Section 211 reports. Other Section 211 report writers, such as social workers, psychologists, and clinical counsellors are generally professionals who are not employed by the government and who charge for their services.

Section 202 of the FLA does not refer to the preparation or admission of reports. However, it is being used as authority for accepting reports other than Section 211 reports into evidence. Not surprisingly therefore, section 202 also does not specify any profession or other qualification a person must have to write a report or submit evidence on the views of a child in a family law dispute. The BC Hear the Child Society has established a Child Interviewer Roster of professionals who conduct non-evaluative child interviews and prepare reports referred to as Hear the Child Reports, but membership on this roster is not required under the FLA.

The FLA is silent on qualification or membership criteria for report writers. Some report writers may be members of professional governing bodies or rosters or employed by the Ministry of Attorney General as family justice counsellors with specialized training to prepare reports. Some professional governing bodies and employers may establish their own qualification requirements for the professional generally, or for report writers specifically. However, the qualification requirements differ based on which body established them, and membership or employment with certain bodies is not always mandatory.

The FLA regulations also do not provide any qualification requirements for report writers. As a comparison, Part 3 of the Family Law Act Regulation establishes qualification requirements for three types family dispute resolution professionals – family law mediators, family law arbitrators, and parenting coordinators.[14]

It is notable that sections 21 and 23 of Bill 14 – *Justice Statutes Amendment Act, 2014*[15] ("Bill 14") proposed to amend the FLA in the following ways:

- remove social workers as specific people the court can appoint under section 211, and replaced it with allowing the Lieutenant Governor in Council to prescribe classes of people who can be appointed under section 211 in addition to the specified family justice counsellors,
- allow the Lieutenant Governor in Council to establish in regulation the training, experience and other qualifications a person must have or meet to be qualified to be appointed to conduct section 211 assessments and prepare reports, and

[14] Family Law Act Regulation, BC Reg 347/2012, ss 4—6 .
[15] Bill 14, *Justice Statutes Amendment Act, 2014*, 2nd Sess, 40th Parl, British Columbia, 2014 (assented to 9 April 2014), SBC 2014, c 9.

- allow the Lieutenant Governor in Council to establish in regulation the practice standards a person must meet to act or to continue to qualify to be appointed under section 211.

Section 23 of Bill 14 specifies that the Lieutenant Governor in Council make different regulations for different types of assessments and for subclasses of assessments.

Although Bill 14 received Royal Assent on April 9, 2014, government continues to engage with stakeholders on these amendments and they have not been brought, nor have any regulations enabled by the legislation been developed.[16]

Indigenous Considerations on Report Writer Qualification Requirements – What We Heard

In speaking with Indigenous peoples with lived experience, one of the themes the Ministry heard is that the FLA should recognize that certain members of an Indigenous community may be qualified to assess their community members' parenting abilities and to obtain their children's views.[17] Indigenous (First Nations, Inuit, and Métis) communities may have Elders, Matriarchs, knowledge keepers, or other community members such as Indigenous family support workers who should be qualified to make assessments or write reports to submit to the court related to their own member families.

It was suggested that in determining who is qualified to conduct interviews, assessments and write reports to the court about Indigenous families and children, that the FLA should include individuals who an Indigenous community considers as being qualified. The FLA could specify that these individuals are qualified to be report writers for families and children who are members of their Indigenous community.

Some concern was raised about potential difficulty in finding an Indigenous community member to write a report who has no previous connection with the parties. There could also be challenges if the parties are members of different Indigenous communities with different community members who may write reports. It was suggested that in those cases, it could be open to the parties to consent to a particular report writer, or the report could be jointly written by multiple report writers, for example, by one report writer from each community.

4-8. Should the FLA specifically allow Indigenous communities to decide which of their members are qualified to conduct assessments and write reports about parents and the views of children in their community?

(a) If so, should the FLA provide any guidance or parameters to assist Indigenous communities in determining which of their community members are qualified?

(b) Should the FLA provide any guidance or procedures to assist parties in obtaining a report writer from their Indigenous community if they cannot agree on the report writer or if the parties are members of different Indigenous communities?

Discussion Questions:

[16] *Ibid*, cl 74, item 2.

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

4-9. Under section 211(2)(a) of the *Family Law Act*, a report writer must be a "family justice counsellor, a social worker or another person approved by the court." Section 202 does not specify who can write reports.

(a) Should the list of people who the court can appoint to write s. 211 reports be modified in any way? For example, should the list be expanded, contracted, or replaced with something else, such as mandatory qualifications for all report writers?

4-10. Should there be consistent qualification requirements for all individuals who assess and write reports on the needs and views of a child and willingness of a party to satisfy those needs?

4-11. Should the qualification requirements be the same or different for individuals who write evaluative and non-evaluative reports?

Types of Qualifications

If it is desirable to establish consistent qualification requirements for report writers, there are various types of qualifications that can be established. As a comparison, Part 3 of the FLA Regulation establishes mandatory qualification requirements for Family Dispute Resolution Professionals, including the following:

- Membership with a Professional Governing Body,
- Experience Requirements, and
- Training Requirements.

The FLA Regulation provides an example of the types of qualifications that could be made mandatory for report writers through legislation or regulation, including membership in a professional organization, meeting or maintaining certain levels of experience, and completion of mandatory training or courses.

See Appendix E for a summary of the mandatory qualification requirements for Family Dispute Resolution Professionals.

Membership with a Professional Governing Body

Membership in good standing with a professional governing body could ensure a report writer meets certain criteria and are subject to complaint or accountability policies and mechanisms. For example, registered psychologists who write Section 211 reports could be required to be members of the College of Psychologists of BC and social workers who write Section 211 reports or Views of the Child reports could be required to be members of the BC College of Social Workers. Lawyers who write Hear the Child reports could be required to be members of the Law Society of BC. The BC Hear the Child Society establishes a roster of Hear the Child report writers who meet the society's qualification requirements. The Society does not have a disciplinary function, however its members must meet the qualification requirements. Although some professions have registration requirements, some have exemptions to registration, meaning that a professional report writer may not currently be registered with a professional governing body.

Although not a professional governing body, the Family Justice Services Division of the Ministry of Attorney General similarly establishes training requirements and has a complaint resolution policy for family justice counsellors who write reports.

As a comparison, the FLA Regulation provides some requirements for family dispute resolution professionals to have membership with a professional governing body, or sometimes additional training or experience requirements apply if the professional is not a member of a professional governing body.

Discussion Question:

4-12. Should membership in good standing with a professional governing body or employment with the Family Justice Services Division be a qualification requirement for report writers?

Experience

The experience of Section 211 report writers may vary considering some may be government-employed family justice counsellors, and others may be private practitioners who are social workers, psychologists, or some other person approved by the court. Individuals who write reports under section 202 may also be lawyers or other professionals.

Similar to the regulations for family dispute resolution professionals, requiring report writers to meet and/or maintain certain levels of experience could involve a minimum number of years of practicing in a certain area (e.g., family-related practice), a minimum number of hours of work or reports written within a specified timeframe, or some other requirement.

Discussion Question:

4-13. Should the FLA or regulation provide for experience requirements for all report writers? If so, what should the experience requirement be?

Training Requirements

As there are no consistent training requirements for all report writers, report writers likely receive different training based on their professions and backgrounds. For example, all family justice counsellors complete mandatory training, including training on family violence, and use a standardized tool to screen for family violence. Private report writers including psychologists and social workers have varying training requirements, including on family violence, depending on their membership or affiliation with professional governing bodies and other voluntary associations.[18] The need for knowledge of and training in screening for family violence has specifically been identified as being important for all report writers.[19]

The FLA Regulation establishes specific training requirements for the three types of dispute resolution professionals: family law mediators, family law arbitrators, and parenting coordinators.[20] The training

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[18] *Section 211 Toolkit*, *supra* note 3 at 10—13; Shahnaz Rahman & Laura Track, *Troubling Assessments: Custody and Access Reports and their Equality Implications for BC Women* (West Coast Leaf, 2012) at 8—9, 12—17.
[19] *Section 211 Toolkit, supra note 3* at 70—72; Rahman & Track, *supra* note 18 at 37—44.
[20] Family Law Act Regulation, *supra* note 14, ss 4—6.

requirements include the specific type of training required (for example, "family law training"), the minimum hours required for each type of training, and sometimes where the training must be completed. For example, if they are not a member of a specified organization, all three dispute resolution professionals are required to take at least 14 hours of family violence training provided by the Justice Institute of British Columbia, the Continuing Legal Education Society of British Columbia, or any other training provider that is recognized as providing high quality training in that field.[21]

Establishing training requirements in the FLA or the FLA Regulation could ensure that all report writers have standard training in common. For example, the legislation could specify that all report writers are required to complete training in family violence, related areas of family law including children's rights, cultural and/or Indigenous aspects of family, or other areas related to reports.

Rosters are one way of establishing a list of qualified individuals who have met minimum training requirements. For example, the BC Hear the Child Society maintains a roster of Hear the Child report writers who meet the society's qualification requirements.[22] The roster includes professionals from multiple professions (for example, lawyers, social workers, and psychologists), but they have all met the society's qualification requirements. Rosters, however, are administratively intense to establish and maintain and therefore may require a corporate body (such as a society) to operate.

Indigenous Considerations on Report Writer Training – What We Heard

In speaking with Indigenous peoples with lived experience, one of the themes the Ministry heard is that all report writers should be required to receive training in Indigenous culture. The training should be more substantial than two or three hours that is often offered in courses.

It was suggested that if a report writer is going to assess or interview an Indigenous family, the writer should have specific training and experience with that family's Nation or community.[23] The report writer should have knowledge and experience with that Nation's or community's laws, traditions, and processes for dealing with family law issues concerning children.

What we heard from Indigenous peoples with lived experience is consistent with Rise Women's Legal Centre's 2022 report which stated that "Section 211 reports should not be ordered in the case of Indigenous parents and children except by an expert who has the necessary training, background, and expertise to adequately and fairly address their circumstances and needs."[24]

4-14. Should the FLA specifically require all report writers to have training related to Indigenous families, laws, and culture? If so, what training should be required?

4-15. Should the FLA provide additional requirements for report writers to have specific training or experience working with the Indigenous Nation or community in which the assessment will be conducted or about which the report will be written? If so, what should the additional requirements be?

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[21] *Ibid*, ss 4(2)(d)(iv), 5(2)(b)(v), 6(1)(b)(ii)(E).
[22] BC Hear the Child Society, "Roster" (2012) online.
[23] Mahihkan Management, *supra* note 17.
[24] Myrna McCallum & Haley Hrymak, *Decolonizing Family Law Through Trauma-Informed Practices* (Rise Women's Legal Centre, 2022) at 22.

Discussion Questions:

4-16. Should the FLA or regulation establish training requirements for all report writers? If so, what should those requirements be?

(a) For example, what type of training requirements, if any, should be established for report writers on the following topics:

(i) Family violence

(ii) Cultural competence, including for Indigenous and other multi-cultural families

(iii) Interviewing and assessing children

(iv) Mental health and substance abuse

(v) Psychological testing

4-17. Are there any other types of qualification requirements other than membership in a professional governing body, experience, and training requirements that should be established for report writers?

4-18. Would it be helpful to establish a roster of all qualified report writers? If so, how should such a roster be administered?

Practice Standards

Similar to the qualifications of report writers, there are currently no consistent mandatory practice standards evaluative and non-evaluative report writers must follow. Report writers who are members of professional governing bodies, rosters, associations, or are employees of the Ministry of Attorney General, may be required to follow certain practice standards or guidelines when conducting assessments and writing reports. However, the practice standards that apply to report writers may differ based on which body established them, and there is no requirement for all report writers to be members of the same body. Also, some practice standards may be mandatory for some report writers to follow, while others may be non-mandatory guidelines.

In the *Section 211 Toolkit*, Rise Women's Legal Centre strongly recommended establishment of practice standards that would govern all report writers and assessments in family law proceedings in BC.[25] Rise recommended that seven core components would be necessary for a report writer to achieve competency, including the need to screen for family violence, justify the use of psychological testing, and address all forms of bias including cultural bias.

Indigenous Considerations on Practice Standards for Report Writers – What We Heard

In speaking with Indigenous peoples with lived experience, one of the themes the Ministry heard is that all report writers should be required to follow laws, customs and processes used by the Indigenous Nation or community to which the family they are assessing belongs.[26]

[25] *Section 211 Toolkit*, *supra* note 3, at 69 - Appendix A.

[26] Mahihkan Management, *supra* note 17.

It was suggested that this may require the report writer to speak with or work with certain members of the community in conducting the interviews or assessments and in writing the report. For example, it could be a requirement for the report writer to work with an Elder, a Matriarch, or another person chosen by the community. It could be that the community member provides the report writer with information about how to conduct the assessments and interviews in a culturally appropriate way, or it could be that the community member participates in the assessments and interviews. Similarly, the community member could be involved in writing the report or could simply confirm that they advised the report writer in the process.

As an example, the *Australian Standards of Practice for Family Assessments and Reporting* ("Australian Standards") require "family assessors" to consider cultural issues specific to Indigenous peoples. Sections 34 and 35 of the Australian standards include the following requirements for family assessors:

- to inquire into whether engagement with an Indigenous consultant or advisor is needed to assist Indigenous family members in the process or to advise the assessor about culturally appropriate interview practices;
- to consider the impact of requiring Indigenous families to attend interviews in a court building and the possible benefits of other locations; and
- to include specific information in the assessment report, such as a description of the party's Indigenous background, the child's involvement with their extended Indigenous family, and an assessment of both parents' ability to support the child to "explore the full extent of their Indigenous heritage, consistent with the child's age, developmental level and wishes."[27]

4-19. Should report writers be required to follow the laws, customs and processes of the Indigenous Nation or community to which the family they are assessing belongs? If so, how could the requirement be reflected in the FLA?

4-20. Should the FLA require a report writer to meet with or work with an Indigenous community member, such as an Elder or a Matriarch when conducting an assessment or interview or writing a report about family within that Indigenous community?

Existing Practice Standards in BC

There are a variety of existing practice standards and guidelines depending on the assessor's profession and affiliations with a governing body or association. For example:

- Family justice counsellors must follow procedures established by the Ministry of Attorney General.
- Registered social workers have practice standards established by the BC College of Social Workers.
- Registered psychologists have a Family Parenting Assessments Checklist which references the Code of Conduct established by the College of Psychologists of BC.
- Registered clinical counsellors have practice standards established by the BC Association of Clinical Counsellors.

[27] Family Court of Australia, Federal Circuit Court of Australia & Family Court of Western Australia, *Australian Standards of Practice for Family Assessments and Reporting* (2015) ss 34—35.

- Members of the Association of Family and Conciliation Courts (AFCC) do not have practice standards, but the AFCC has comprehensive guidelines.

Social Workers

Some social workers are members of the BC College of Social Workers. The college has a *Code of Ethics* and general standards of practice that apply to all social workers in BC.[28] It has also established a specific *Child Custody and Access Assessments Standards of Practice*, which sets the minimum acceptable level of practice, provides a guideline for social workers to assess their own practice and establishes criteria for the assessment of complaints about the practices of social workers related to assessing the child's needs in a family law dispute.[29] However, there are many exemptions to required membership for practicing social workers under the Social Workers Regulation.[30]

Psychologists

Although many psychologists are members of the College of Psychologists of BC (CPBC), there are exemptions to required membership for psychologists under the Psychologists Regulation.[31] The College has established the *CPBC Code of Conduct* which includes principles related to but not specifically established for Section 211 reports.[32] Judges have stated an expectation that psychologists preparing s. 211 reports adhere to the College's *Code of Conduct*, including Chapter 11.[33]

In August 2021, the College developed a *Family Law Parenting Assessments Checklist*[34] as a tool for psychologists to use when completing Section 211 reports. The checklist is to be read in conjunction with the general *Practice Support Psychological Assessments Checklist* and includes the key clauses in the *Code of Conduct* that relate to Section 211 reports. The checklist also states that professionals should be guided by "the practice standards of the Association of Family and Conciliation Courts' (AFCC) *Model Standards of Practice for Child Custody Evaluation* (2006) and the AFCC *Guidelines for Examining Intimate Partner Violence* (2016) supplement, and the American Psychological Association's *Speciality Guidelines for Forensic Psychologists.*"[35] The checklist is not mandatory but is intended to make Section 211 report writing more accessible to psychologists new to this area. The College has a separate checklist for Indigenous clients that was developed by an Indigenous task force and approved by the Indigenous Health Authority.[36]

Clinical Counsellors

Any clinical counsellor using the title "Registered Clinical Counsellor" or "RCC" must be a member of the BC Association of Clinical Counsellors (BCACC). The BCACC has established a *Code of Ethical Conduct and*

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[28] British Columbia College of Social Workers, *Code of Ethics and Standards of Practice* (BCCSW, 2002, revised in 2009) [*BCCSW Code of Ethics*].
[29] British Columbia College of Social Workers, *Child Custody and Access Assessments Standards of Practice* (BCCSW, 2002, reprinted in 2010).
[30] Social Workers Regulation, BC Reg 323/2008, s 4.
[31] Psychologists Regulation, BC Reg 289/2008, s 3(2).
[32] See College of Psychologists of British Columbia, *CPBC Code of Conduct* (CPBC, 2014, revised in 2021) ch 11 – Assessment Procedures.
[33] For example, *Dowell v Hamper*, 2019 BCSC 1266 (CanLII) at paras 40—44; *Dimitrijevic v Pavlovich*, 2016 BCSC 1529 (CanLII) at paras 30—31.
[34] College of Psychologists of British Columbia, *PS Checklist #17: Family Law Parenting Assessments* (CPBC, 2021).
[35] *Ibid* at 1.
[36] College of Psychologists of British Columbia, *PS Checklist #12: Indigenous Cultural Safety Checklist* (CPBC, updated in 2023).

Standards of Clinical Practice for its members.[37] In January 2022, it published *Standard for Family Law: A Practice Standard for Registered Clinical Counsellors on the Preparation of Family Law Reports* ("*Standard for Family Law"*).[38] The *Standard for Family Law* includes discussions on provisions in the *FLA* and the *Divorce Act*, the role of a clinical counsellor as an assessor and expert witness, conducting assessments and preparing s. 211 reports, and the content of s. 211 reports. However, the *Standard for Family Law* does not provide clear competencies or specifically address topics like how to screen for family violence, or how to account for Indigeneity, multicultural families, or gender biases. Instead, it provides "Helpful areas of legal knowledge," "Helpful areas of psychological knowledge," and "Helpful skills," such as those related to family violence.[39] Also, clinical counsellors appear to be able to practice without being registered with the BCACC.

Association of Family and Conciliation Courts (AFCC)

The AFCC is an association of justice professionals from across many jurisdictions. Membership is voluntary and open to numerous types of professionals including lawyers, judges, psychologists, social workers. Report writers may choose to become members of the AFCC. The AFCC has guidelines for its members who conduct assessments and write reports (referred to as "evaluators") across various jurisdictions, similar to the reports permitted under sections 202 and 211 of the FLA. Unlike the Colleges and other professional governing bodies, the AFCC does not have any oversight or regulatory role.

In 2022, the AFCC published its *Guidelines for Parenting Plan Evaluations in Family Law Cases* ("AFCC Parenting Plan Guidelines"),[40] which revise and update the AFCC's 2006 *Model Standards of Practice for Child Custody Evaluation*.[41] The AFCC Parenting Plan Guidelines offer guidance, but not mandatory practice standards, for members on various aspects of conducting assessments and writing reports, including:

- Potential role conflicts,
- Communication,
- Record keeping and release of records,
- Data gathering,
- Interviewing children,
- Observational-interactional assessment,
- Collateral sources of information,
- Use of formal assessment instruments,
- Presentation and interpretation of data,
- Approaches involving multiple evaluators, and
- Virtual evaluations.

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[37] BC Association of Clinical Counsellors, *Code of Ethical Conduct and Practice Standards* (BCACC, 2008, amended in 2014).
[38] John-Paul E Boyd, *Standard for Family Law: A Practice Standard for Registered Clinical Counsellors on the Preparation of Family Law Reports* (BC Association of Clinical Counsellors, 2022).
[39] *Ibid* at 25—26.
[40] Association of Family and Conciliation Courts, *Guidelines for Parenting Plan Evaluations in Family Law Cases* (AFCC, 2022).
[41] Association of Family and Conciliation Courts, *Model Standards of Practice for Child Custody Evaluation* (AFCC, 2006).

As a supplement to the AFCC Parenting Plan Guidelines , the AFCC has also established *Guidelines for Examining Intimate Partner Violence*.[42] According to the AFCC, these guidelines are meant to be used when intimate partner violence may be an issue in child custody or access cases. Other AFCC guidelines related to writing reports under sections 202 and 211 of the FLA include:

- *Guidelines for the Use of Social Science Research in Family Law*,[43] and
- *Guidelines for Brief Focused Assessment*.[44]

Other Jurisdictions

Some jurisdictions have established mandatory practice standards for report writers in their legislation. For example, Ontario has established some practice standards for report writers in their *Family Law Rules*.[45] Also, California includes practice standards in their *Rules of Court*.[46]

Discussion Questions:

4-21. Should there be consistent practice standards for individuals who assess and write reports on the needs and views of a child and the willingness of a party to satisfy those needs?

4-22. Should separate practice standards be established for writers of non-evaluative reports and evaluative reports?

4-23. What types of practice standards should be made mandatory for report writers under the legislation? If so, what should those practice standards be?

(a) For example, what type of practice, if any, should be established for report writers on the following topics:

(i) Screening for family violence and interviewing, assessing and writing reports about individuals and children dealing with family violence

(ii) Cultural competence, including for Indigenous and other multi-cultural families

(iii) Interviewing and assessing children

(iv) Interviewing, assessing and writing reports about individuals dealing with mental health and substance abuse

(v) Psychological testing

4-24. Should it be mandatory for reports to include specific content? If so, what content should be included in reports?

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[42] Association of Family and Conciliation Courts, *Guidelines for Examining Intimate Partner Violence: A Supplement to the AFCC Model Standards of Practice for Child Custody Evaluation* (AFCC, 2016).

[43] Association of Family and Conciliation Courts, *Guidelines for the Use of Social Science Research in Family Law* (AFCC, 2018).

[44] Association of Family and Conciliation Courts, *Guidelines for Brief Focused Assessment* (AFCC, 2009).

[45] *Family Law Rules*, O Reg 114/99, rule 20.2—20.3.

[46] See *California Rules of Court,* rules 5.220, 5.225.

4-25. Would it be helpful to establish a template for reports? If so, should there be a separate template for non-evaluative and evaluative reports?

Accountability Mechanisms

A party with concerns about the preparation of a report under section 202 or 211 of the FLA, has limited options to address those concerns. A party's options are currently to raise their concerns during the court proceeding or through administrative processes outside the court proceeding. Both options have limitations.

Court Processes

Cross-examination

Rule 13-7(3) and (4) of the BC *Supreme Court Family Rules*[47] (SCFR) provides that a party may cross-examine an expert witness. A party who wishes to cross-examine a Section 211 report writer must serve the report writer and all parties a notice in prescribed form at least 28 days before a trial date.[48]

Under the BC *Provincial Court Family Rules* (PCFR), case management orders may be made related to Section 211 reports, including requiring the writer to attend a trial as a witness.[49] PCFR Rule 112 allows a judge to make orders or directions related to expert witnesses, including persons appointed under s. 211 at a trial preparation conference.[50] In an informal trial, the judge may allow a Section 211 report writer to be a witness to give evidence.[51]

Cross-examination of an expert witness may be a daunting task for self-represented litigants. Many family law disputes also resolve before trial without giving the parties an opportunity to cross-examine the s. 211 report writer.

Critique Report

Another option is for a party to obtain a second "critique" or "review" report to refute the conclusions in a Section 211 report. However, the cost and time required to obtain a second report is likely prohibitive for most parties in a family law dispute. Creating "warring" reports also adds to the adversarial nature of litigation.

It has been further suggested that the court ought to play a gate-keeper role in limiting the use of critique or review reports:[52]

> The British Columbia Supreme Court has addressed the issue of the admissibility of reports which critique/review s. 211 reports several times and generally has concluded that though they may be admissible, the circumstances under which they should be admitted are limited. Some emphasis is placed on the fact that the report being critiqued is a court ordered report, not a report submitted by another party to the proceedings. We support the application of the

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[47] *Supreme Court Family Rules*, BC Reg 169/2009.
[48] *Ibid*, rule 13-1(2).
[49] PCFR, *supra* note 11, s 62(n).
[50] *Ibid*, s 112(1)(e).
[51] *Ibid*, s 127(1)(d).
[52] Donna Martinson & Margaret Jackson, *Family Violence and Parenting Assessments: Law, Skills and Social Context: Report Highlights Report Brief* (Canadian Bar Association, 2019) at 20—21, online (pdf): *FREDA Centre*.

> principles of admissibility described by Justice Kent in *Dimitrijevic v. Pavlovich*. He identified how these reports could be relevant, concluding that questions of admissibility should be determined by the court in its discretionary gate-keeping role. Justice Kent then observed that for a number of reasons the use of such reports will be rarely necessary or appropriate [see our Report at pp. 51-52].

Admissibility Hearing

Other types of expert witness reports are usually subject to an admissibility hearing. In an admissibility hearing, the court must consider, among other things, the relevance and necessity of the report, the qualifications of the report writer, and then balance the potential risks and benefits of admitting the evidence.

Section 211 reports are ordered by the court to be prepared. This does not fit with an admissibility requirement that examines an already written report. Requiring an admissibility hearing for Section 211 reports may add to the complexity, costs, and delay of resolving family law disputes.

Administrative Processes

Professional Governing Body Complaint Mechanisms

Another option for parties who have concerns about a Section 211 report writer is to make a complaint to a professional governing body. Both the College of Psychologists of BC and the BC College of Social Workers have complaint mechanisms that can consider complaints about a Section 211 report writer. However, these processes are designed to deal with complaints about a registrant's professional conduct generally and are not specifically tailored to deal with complaints related to Section 211 reports or report writers.

The College of Psychologists of British Columbia's complaint mechanism is set out in the *Health Professions Act*.[53] The Psychologists Regulation,[54] College *Bylaws*,[55] and *Code of Conduct*[56] are also relevant to the complaint mechanism's process. The British Columbia College of Social Workers' complaint mechanism is set out in the *Social Workers Act*[57]. The *Social Workers Act*, *Code of Ethics and Standards of Practice*,[58] and the College *Bylaws*[59] are all relevant to the complaints process.

The Colleges' complaint mechanisms may not be a good fit for individuals with concerns about a Section 211 report or report writer as the remedies available for substantiated complaints may not address the complainants' real concern, which is often the decision made in a family law dispute. The colleges can suspend or fine a member but do not have authority to change a judge's decision that was based on the report.

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[53] *Health Professions Act*, RSBC 1996, c 183.
[54] Psychologists Regulation, *supra* note 31.
[55] College of Psychologists of British Columbia, *CPBC Bylaws* (CPBC, 2023).
[56] *CPBC Code of Conduct*, *supra* note 32.
[57] *Social Workers Act*, SBC 2008, c 31.
[58] *BCCSW Code of Ethics*, *supra* note 28.
[59] British Columbia College of Social Workers, *Bylaws* (BCCSW, 2022).

It is noteworthy that two recently approved Orders in Council[60] will amalgamate 11 health profession regulatory colleges, including the College of Psychologists of British Columbia, into two new multi-profession regulators on June 28, 2024.[61] This amalgamation along with proposed regulatory amendments could result in changes to the oversight of psychologists, including those who write section 211 reports, including the current professional complaint mechanisms.

Furthermore, the Ministry of Children and Family Development of BC conducted a public engagement on the oversight of social work in BC between spring 2022 and January 2023.[62] It is anticipated that a What We Heard report summarizing the engagement feedback will be released in winter 2024.

Family Justice Services Division

The Ministry of Attorney General's Family Justice Services Division (FJSD) has a feedback process and a *Complaints Management Policy* allowing parties to raise concerns about a family justice counsellor who has prepared a Section 211 report. Similar to the limitations of the Colleges' complaint mechanisms, FJSD's *Complaints Management Policy* cannot affect court decisions that have been made in relation to a Section 211 report.

Office of the Ombudsperson

If a party is not satisfied with the processes or outcomes of these complaint mechanisms, it may be possible for them to make a complaint with the BC Office of the Ombudsperson. However, the Ombudsperson may only investigate complaints about an "authority". In this case that means the Colleges or the Ministry of Attorney General (Family Justice Services Division), not necessarily the individual report writer. Given the time it takes for the Ombudsperson to complete an investigation, it is again unlikely that that any Ombudsperson recommendations would affect any court decisions that have already been made in relation to the Section 211 report.

Summary of Current Administrative Processes in BC

There are limitations to these complaint mechanisms. There is no requirement for all Section 211 report writers to be a member of either College or an employee of the Family Justice Services Division. Therefore, a complaint process may not always be available depending on the report writer's profession. Also, the complaint processes take time to complete, and a party will likely receive the outcome of the complaint process after the family law dispute has been decided or resolved. Further, there are limitations to the remedies of the complaint mechanisms. For example, a substantiated complaint may result in the discipline of a Section 211 report writer but may not affect an already concluded court proceeding in which the Section 211 report was admitted as evidence.

Some report writers have also indicated that because Section 211 reports are often prepared for families experiencing high levels of conflict, it is common for them to be the subject of complaints to their governing professional bodies. This is seen as a professional risk and may be deterring new professionals from doing assessments and Section 211 report work. In Alberta, parties are prohibited

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[60] OIC 421/2023, (2023) BC Gaz II No 12 (*Health Professions Act*); OIC 422/2023, (2023) BC Gaz II No 12 (*Health Professions Act*).
[61] Government of British Columbia, "Professional Regulation" (last visited 5 December 2023), online.
[62] Government of British Columbia, "Social Work Oversight" (last visited 5 December 2023), online.

from making a complaint about a report writer to a professional body until after the family law dispute is resolved or the court has made its decision.[63]

Other Jurisdictions

In New Zealand, parties are able to make complaints about a report or a report writer directly to the court.[64] The *Family Court Practice Note: Specialist Report Writers* states that the court should deal with most complaints as part of its jurisdiction to regulate its own process, including the following:

- Allegations of perceived bias;
- Allegations that the report writer has a sexist, racist or otherwise discriminatory approach;
- The methodology used;
- Allegations that one parent was treated differently from the other parent without sufficient reason given; and
- Any matter relating to the content of the report, such as failure to deal with any fact or issue, the length of the report or the style of the report.

In contrast to the court, the New Zealand Psychologists Board deals with complaints that go beyond court process, and that relate to professional competence, conduct, or ethics.

In New Zealand, if the court proceedings are pending or in progress, the complaint should be dealt with by the presiding judge. The presiding judge can deal with the complaint before the hearing or in the course of the hearing, for example, through cross-examination, submission, or evidence called on behalf of a party. If the court proceedings have concluded, the complaint should be referred to the Administrative Judge. Complaints must be made to the court within 6 months from the date the court proceedings concluded.

Discussion Questions:

4-26. If the FLA is amended to provide greater safeguards, including mandatory report writer qualifications, practice standards, and report content, would the existing accountability mechanisms in BC be sufficient to deal with complaints about section 202 or 211 reports and report writers?

4-27. If not, should the FLA or regulations establish additional accountability mechanisms for all section 202 and 211 report writers?

4-28. If so, what type of accountability mechanism should be established for section 211 and 202 report writers?

(a) Should the accountability mechanism apply to all non-evaluative and evaluative report writers?

(b) How would such an accountability mechanism interact with ongoing family justice dispute resolution or court proceedings (for example, should it be an in-court process or an out-of-court process)?

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[63] *Interventions, supra* note 5 at para 30; *Child Custody/Parenting Evaluation, supra* note 4 at para 14.

[64] New Zealand Ministry of Justice, *Family Court Practice Note: Specialist Report Writers* (2018) s 16.

(c) How would such an accountability mechanism interact with existing out-of-court complaint mechanisms?

(d) Should there be any limitations to the types of reviewable complaints or the timing of when the complaints are made to the accountability mechanism?

4-29. The discussion and questions posed in this chapter relate to issues that have been raised concerning children's views as well as parenting assessments and reports. Do you have any other concerns or suggestions for amendments to provisions in the FLA related to this topic?

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 A : List of Discussion Questions

Chapter 1: Guardianship, Parenting Arrangements & Contact

Guardianship

1-1. Should the FLA continue to require a person who is a parent of a child to meet residency or care requirements to be considered the child's guardian without an agreement or court order (i.e., by default)? Or,

(a) Should the requirement to have lived with or regularly cared for the child be changed to some other requirement?

(b) Should the requirements be removed so that a parent of a child is also a guardian under Part 4 unless there is an agreement or court order otherwise?

1-2. Should the FLA allow the use of written agreements to appoint someone other than a parent as a child's guardian in situations where all of the child's guardians are in agreement?

1-3. Are there any issues or concerns about the requirement that a child 12 years of age or older approve an order for guardianship of a person who is not their parent?

1-4. Are there any issues or concerns regarding the standby guardianship provisions?

1-5. Are there any issues or concerns regarding the testamentary guardianship provisions?

1-6. Are there any issues or concerns regarding the Appointment of Standby or Testamentary Guardian form?

1-7. Should there be an administrative court process to recognize standby guardians and/or testamentary guardians, i.e., to provide a declaration or formal recognition of guardianship?

Indigenous Considerations on Kinship Care and Customary Adoption – What We Heard

1-8. Is an authorization to exercise parental responsibilities under section 43(2) an effective way to recognize Indigenous kinship care arrangements, or is it too limited?

1-9. Are there any specific parental responsibilities that someone given care of an Indigenous child in a kinship care arrangement would not exercise (i.e., certain types of decisions that the child's parent would remain responsible for)?

1-10. Could a written agreement be used to reflect Indigenous customary adoptions, even if the written agreement had the effect of creating a guardian for the child rather than a legal parent?

1-11. Should section 43(2) (*temporary exercise of parental responsibilities*) more clearly explain the effect of authorizing a person to exercise parental responsibilities on a guardian's behalf? For example, should the FLA be clear that the guardian making the authorization

continues to be the child's guardian and the person authorized to exercise specific parental responsibilities on the guardian's behalf only does so until the guardian ends the authorization?

1-12. Should a form be developed that guardians can use to authorize someone to exercise specified parental responsibilities on their behalf?

1-13. Questions specific to the recognition of Indigenous kinship care and customary adoption within the FLA are included in the text box above. Should kinship care arrangements used in other cultures be recognized in the FLA? If so, how?

Parenting Arrangements

Indigenous Considerations on Parental Responsibilities – What We Heard

1-14. Is there anything further that should be added to the list of parental responsibilities with respect to Indigenous children?

1-15. Are the any issues or concerns with the current list of parental responsibilities?

1-16. Is the current model, which requires the allocation of parental responsibilities and parenting time be made based only on what is in the child's best interests in their particular circumstances, without making any presumptions about equal allocation or joint decision-making, effective?

1-17. Are there any issues in practice with the differences between how parental responsibilities are described and allocated in the FLA and how decision-making responsibilities are described and allocated in the Divorce Act? If so, how should these issues be addressed?

1-18. Are there any issues or concerns with the provisions for contact in the FLA?

1-19. Are there any issues in practice with the differences between the contact provisions in the FLA and the *Divorce Act*? If so, how should these issues be addressed?

1-20. The discussion and questions posed in this chapter relate to issues that have been raised concerning guardianship, parenting arrangements and contact. Do you have any other concerns or suggestions for amendments to provisions in the FLA related to this topic?

Chapter 2: Relocation of a Child

What is Relocation under the FLA?

2-1. Does the definition of "relocation" accurately capture the people, relationships and situations that need to be considered in relocation applications?

2-2. Should the differences between the relocation provisions and the changes to child's residence provisions be clarified or better distinguished in the FLA?

2-3. Should the FLA clarify if, when, and how the relocation provisions apply to interim orders, in addition to final orders and agreements?

Notice of and Objections to Relocation

Indigenous Considerations on Relocation – What We Heard

2-4. Should the FLA's relocation provisions allow for other family and community members in an Indigenous child's life to expressly be given notice or be able to object to the relocation of that child? If so, how?

2-5. Should the FLA require that a notice of relocation or a notice of objection of relocation include additional information or be in a prescribed form?

2-6. Are the two permissible exemptions to the requirement to provide notice of a proposed relocation under the FLA adequate?

(a) If not, should any exemptions be added, removed or amended? Or should the FLA remove the list and allow the court to determine when an exemption may be allowed?

2-7. Should the FLA establish additional consequences for failing to give notice of a relocation in cases where no exemption applies?

2-8. Does the requirement under section 67 for a child's guardians and persons having contact with a child to use their best efforts to cooperate to resolve any issues related to the relocation need to be updated? If so, how?

Presumptions and Burdens

2-9. Are the FLA's two presumptions for when the relocation is or is not in the best interests of the child adequate?

2-10. Should the FLA's "substantially equal parenting time" continue to be the line between when each presumption applies?

(a) If so, should the FLA provide more direction on what "substantially equal parenting time" means?

(b) If not, what should be the line between the presumptions?

2-11. Do the "good faith" and "reasonable and workable arrangements" requirements in section 69 (4)(a) place too much of a burden on the relocating guardian?

2-12. Is it still appropriate to prevent the court under section 69(7) from considering whether a guardian would still relocate alone, if the court denied their application to relocate with the child?

2-13. Should the fact that the vast majority of relocation applications are made by women or technological advancements in the way families can communicate be considered in modernizing the FLA's relocation provisions? If so, how?

Factors to Be Considered

Indigenous Considerations on Relocation – What We Heard

2-14. Do you think the FLA's relocation provisions should require consideration of specific best interests of the Indigenous child factors? If so, what should those factors be?

2-15. Do you think there should be a requirement for a relocating guardian to maintain an Indigenous child's connection to their Indigenous culture and community if they are being relocated out of their community?

2-16. Should the best interests of the child factors considered in relocation cases under the FLA be updated? If so, how?

2-17. Should the FLA require that an objection to a relocation application also be in the best interests of a child?

2-18. Should the FLA be amended to accommodate the framework outlined by the SCC in *Barendregt* for relocation applications under the FLA? If so, how?

2-19. The discussion and questions posed in this chapter relate to issues that have been raised concerning relocation of a child. Do you have any other concerns or suggestions for amendments to provisions in the FLA related to this topic?

Chapter 3: Child-Centred Decision Making

Best Interests of the Child

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

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

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

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

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

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

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

Children's Evidence

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

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

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

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

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

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

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

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

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

Children's Lawyer

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

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

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

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

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

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

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

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

Chapter 4: Children's Views & Parenting Assessments and Reports

Assessments and Reports

4-1. Would it be helpful if the FLA explicitly identified different types of reports the court can order?

4-2. What terms and definitions do you think would make it easier to understand the different types of reports that can be ordered under the FLA?

4-3. Should the FLA specify factors the court may or must consider when ordering a non-evaluative report? If so, what factors should the court consider?

4-4. Should a non-evaluative report be the default starting point for court-ordered reports?

- **(a)** If yes, should there be exceptions to requiring an initial non-evaluative report in certain circumstances?
- **(b)** If so, what are those circumstances (for example, high conflict, a history of family violence, substance abuse, mental health concerns, etc.)?

4-5. Should the FLA specify factors the court may or must consider when ordering an evaluative report? If so, what factors should the court consider?

4-6. Similar to New Zealand, should the FLA specify factors the court may or must consider when ordering that psychological testing be included in a report? If so, what should those factors be?

4-7. Would it be helpful if the FLA specified that the views of a child may or must be obtained through reports or in other ways earlier in the resolution process of a family law dispute?

(a) If so, are there circumstances where the views of a child should not be obtained earlier in the resolution process?

Report Writers

Indigenous Considerations on Report Writer Qualification Requirements – What We Heard

4-8. Should the FLA specifically allow Indigenous communities to decide which of their members are qualified to conduct assessments and write reports about parents and the views of children in their community?

(a) If so, should the FLA provide any guidance or parameters to assist Indigenous communities in determining which of their community members are qualified?

(b) Should the FLA provide any guidance or procedures to assist parties in obtaining a report writer from their Indigenous community if they cannot agree on the report writer or if the parties are members of different Indigenous communities?

4-9. Under section 211(2)(a) of the *Family Law Act*, a report writer must be a "family justice counsellor, a social worker or another person approved by the court." Section 202 does not specify who can write reports.

(a) Should the list of people who the court can appoint to write s. 211 reports be modified in any way? For example, should the list be expanded, contracted, or replaced with something else, such as mandatory qualifications for all report writers?

4-10. Should there be consistent qualification requirements for all individuals who assess and write reports on the needs and views of a child and willingness of a party to satisfy those needs?

4-11. Should the qualification requirements be the same or different for individuals who write evaluative and non-evaluative reports?

4-12. Should membership in good standing with a professional governing body or employment with the Family Justice Services Division be a qualification requirement for report writers?

4-13. Should the FLA or regulation provide for experience requirements for all report writers? If so, what should the experience requirement be?

Indigenous Considerations on Report Writer Training – What We Heard

4-14. Should the FLA specifically require all report writers to have training related to Indigenous families, laws, and culture? If so, what training should be required?

4-15. Should the FLA provide additional requirements for report writers to have specific training or experience working with the Indigenous Nation or community in which the assessment

will be conducted or about which the report will be written? If so, what should the additional requirements be?

4-16. Should the FLA or regulation establish training requirements for all report writers? If so, what should those requirements be?

- **(a)** For example, what type of training requirements, if any, should be established for report writers on the following topics:
  - **(i)** Family violence
  - **(ii)** Cultural competence, including for Indigenous and other multi-cultural families
  - **(iii)** Interviewing and assessing children
  - **(iv)** Mental health and substance abuse
  - **(v)** Psychological testing

4-17. Are there any other types of qualification requirements other than membership in a professional governing body, experience, and training requirements that should be established for report writers?

4-18. Would it be helpful to establish a roster of all qualified report writers? If so, how should such a roster be administered?

Indigenous Considerations on Practice Standards – What We Heard

4-19. Should report writers be required to follow the laws, customs and processes of the Indigenous Nation or community to which the family they are assessing belongs? If so, how could the requirement be reflected in the FLA?

4-20. Should the FLA require a report writer to meet with or work with an Indigenous community member, such as an Elder or a Matriarch when conducting an assessment or interview or writing a report about family within that Indigenous community?

4-21. Should there be consistent practice standards for individuals who assess and write reports on the needs and views of a child and the willingness of a party to satisfy those needs?

4-22. Should separate practice standards be established for writers of non-evaluative reports and evaluative reports?

4-23. What types of practice standards should be made mandatory for report writers under the legislation? If so, what should those practice standards be?

- **(a)** For example, what type of practice, if any, should be established for report writers on the following topics:
  - **(i)** Screening for family violence and interviewing, assessing and writing reports about individuals and children dealing with family violence

(ii) Cultural competence, including for Indigenous and other multi-cultural families

(iii) Interviewing and assessing children

(iv) Interviewing, assessing and writing reports about individuals dealing with mental health and substance abuse

(v) Psychological testing

4-24. Should it be mandatory for reports to include specific content? If so, what content should be included in reports?

4-25. Would it be helpful to establish a template for reports? If so, should there be a separate template for non-evaluative and evaluative reports?

Accountability Mechanisms

4-26. If the FLA is amended to provide greater safeguards, including mandatory report writer qualifications, practice standards, and report content, would the existing accountability mechanisms in BC be sufficient to deal with complaints about section 202 or 211 reports and report writers?

4-27. If not, should the FLA or regulations establish additional accountability mechanisms for all section 202 and 211 report writers?

4-28. If so, what type of accountability mechanism should be established for section 211 and 202 report writers?

(a) Should the accountability mechanism apply to all non-evaluative and evaluative report writers?

(b) How would such an accountability mechanism interact with ongoing family justice dispute resolution or court proceedings (for example, should it be an in-court process or an out-of-court process)?

(c) How would such an accountability mechanism interact with existing out-of-court complaint mechanisms?

(d) Should there be any limitations to the types of reviewable complaints or the timing of when the complaints are made to the accountability mechanism?

4-29. The discussion and questions posed in this chapter relate to issues that have been raised concerning children's views as well as parenting assessments and reports. Do you have any other concerns or suggestions for amendments to provisions in the FLA related to this topic?

Chapter 5: Family Violence & Protection Orders

Definitions

Indigenous Considerations on Family Members – What We Heard

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?

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?

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

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

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?

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?

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?

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

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?

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

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

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 B : Parenting Arrangements and Contact 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.))
Parenting Arrangements/ Parenting Orders	*Sections 1, 44 - 45, 47 - 49* **Part 1 — Interpretation** **Definitions** **1** In this Act: … **"guardian"** means a guardian under section 39 [*parents are generally guardians*] and Division 3 [*Guardianship*] of Part 4; **"parenting arrangements"** means arrangements respecting the allocation of parental responsibilities or parenting time, or both; **Part 4, Division 2 — Parenting Arrangements** **Agreements respecting parenting arrangements** **44** (1) Two or more of a child's guardians may make an agreement respecting one or more of the following: (a) the allocation of parental responsibilities; (b) parenting time;	*Sections 2 (1), 16.1* **Interpretation** **Definitions** **2 (1)** In this Act, … ***parenting order*** means an order made under subsection 16.1(1); (*ordonnance parentale*) ***spouse*** includes, in subsection 6(1) and sections 15.1 to 16.96, 21.1, 25.01 and 25.1, a former spouse; (*époux*) **Parenting Orders** **Parenting order** **16.1 (1)** A court of competent jurisdiction may make an order providing for the exercise of parenting time or decision-making responsibility in respect of any child of the marriage, on application by **(a)** either or both spouses; or **(b)** a person, other than a spouse, who is a parent of the child, stands in the place of a parent or intends to stand in the place of a parent.

	(c) the implementation of an agreement made under this section; (d) the means for resolving disputes respecting an agreement made under this section. (2) An agreement respecting parenting arrangements is binding only if the agreement is made (a) after separation, or (b) when the parties are about to separate, for the purpose of being effective on separation. (3) A written agreement respecting parenting arrangements that is filed in the court is enforceable under this Act as if it were an order of the court. (4) On application by a party, the court must set aside or replace with an order made under this Division all or part of an agreement respecting parenting arrangements if satisfied that the agreement is not in the best interests of the child. **Orders respecting parenting arrangements** **45** (1) On application by a guardian, a court may make an order respecting one or more of the following: (a) the allocation of parental responsibilities; (b) parenting time;	**Interim order** **(2)** The court may, on application by a person described in subsection (1), make an interim parenting order in respect of the child, pending the determination of an application made under that subsection. **Application by person other than spouse** **(3)** A person described in paragraph (1)(b) may make an application under subsection (1) or (2) only with leave of the court. **Contents of parenting order** **(4)** The court may, in the order, **(a)** allocate parenting time in accordance with section 16.2; **(b)** allocate decision-making responsibility in accordance with section 16.3; **(c)** include requirements with respect to any means of communication, that is to occur during the parenting time allocated to a person, between a child and another person to whom parenting time or decision-making responsibility is allocated; and **(d)** provide for any other matter that the court considers appropriate. **Terms and conditions**

	(c) the implementation of an order made under this Division; (d) the means for resolving disputes respecting an order made under this Division. (2) An order under subsection (1) must not be made if the child's guardians are the child's parents and are not separated. (3) The court may make an order to require that the transfer of a child from one party to another, or that parenting time with a child, be supervised by another person named in the order if the court is satisfied that supervision is in the best interests of the child. (4) Despite subsection (1), a person applying for guardianship may apply, at the same time, for an order under this section. **Changing, suspending or terminating orders respecting parenting arrangements** **47** On application, a court may change, suspend or terminate an order respecting parenting arrangements if satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person. **Informal parenting arrangements** **48** (1) If	**(5)** The court may make an order for a definite or indefinite period or until a specified event occurs, and may impose any terms, conditions and restrictions that it considers appropriate. **Family dispute resolution process** **(6)** Subject to provincial law, the order may direct the parties to attend a family dispute resolution process. **Relocation** **(7)** The order may authorize or prohibit the relocation of the child. **Supervision** **(8)** The order may require that parenting time or the transfer of the child from one person to another be supervised. **Prohibition on removal of child** **(9)** The order may prohibit the removal of a child from a specified geographic area without the written consent of any specified person or without a court order authorizing the removal.

	(a) no agreement or order respecting parenting arrangements applies in respect of a child, and (b) the child's guardians have had in place informal parenting arrangements for a period of time sufficient for those parenting arrangements to have been established as a normal part of that child's routine, a child's guardian must not change the informal parenting arrangements without consulting the other guardians who are parties to those arrangements, unless consultation would be unreasonable or inappropriate in the circumstances. (2) Nothing in subsection (1) prevents a child's guardian from seeking (a) an agreement respecting parenting arrangements, or (b) an order under section 45 [*orders respecting parenting arrangements*]. **Referral of questions to court** **49** A child's guardian may apply to a court for directions respecting an issue affecting the child, and the court may make an order giving the directions it considers appropriate.	
Allocation of Parental/ Decision-	*Section 40* **Part 4, Division 2 — Parenting Arrangements**	*Sections 16 (6), 16.3* **Best Interests of the Child** **Best interests of child**

Making Responsibilities	*Parenting arrangements* **40** (1) Only a guardian may have parental responsibilities and parenting time with respect to a child. (2) Unless an agreement or order allocates parental responsibilities differently, each child's guardian may exercise all parental responsibilities with respect to the child in consultation with the child's other guardians, unless consultation would be unreasonable or inappropriate in the circumstances. (3) Parental responsibilities may be allocated under an agreement or order such that they may be exercised by (a) one or more guardians only, or (b) each guardian acting separately or all guardians acting together. (4) In the making of parenting arrangements, no particular arrangement is presumed to be in the best interests of the child and without limiting that, the following must not be presumed: (a) that parental responsibilities should be allocated equally among guardians; (b) that parenting time should be shared equally among guardians; (c) that decisions among guardians should be made separately or together.	**16** … **Parenting time consistent with best interests of child** **(6)** In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child. **Parenting Orders** **Allocation of decision-making responsibility** **16.3** Decision-making responsibility in respect of a child, or any aspect of that responsibility, may be allocated to either spouse, to both spouses, to a person described in paragraph 16.1(1)(b), or to any combination of those persons.

List of Parental/ Decision-Making Responsibilities	*Sections 1, 41* **Part 1 — Interpretation** **Definitions** **1** In this Act: … **"parental responsibilities"** means one or more of the parental responsibilities listed in section 41 [*parental responsibilities*]; **Part 4, Division 2 — Parenting Arrangements** *Parental responsibilities* **41** For the purposes of this Part, parental responsibilities with respect to a child are as follows: (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child; (b) making decisions respecting where the child will reside; (c) making decisions respecting with whom the child will live and associate; (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location; (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the	*Sections 2 (1), 16.4* **Interpretation** **Definitions** **2** (1) In this Act, … ***decision-making responsibility*** means the responsibility for making significant decisions about a child's well-being, including in respect of **(a)** health; **(b)** education; **(c)** culture, language, religion and spirituality; and **(d)** significant extra-curricular activities; (*responsabilités décisionnelles*) **Parenting Orders** **Entitlement to information** **16.4** Unless the court orders otherwise, any person to whom parenting time or decision-making responsibility has been allocated is entitled to request from another person to whom parenting time or decision-making responsibility has been allocated information about the child's well-being, including in respect of their health and education, or from any other person who is likely to have such information, and to be given such information by those persons subject to any applicable laws.

	child is an Indigenous child, the child's Indigenous identity; (f) subject to section 17 of the *Infants Act*, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child; (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child; (h) giving, refusing or withdrawing consent for the child, if consent is required; (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive; (j) requesting and receiving from third parties health, education or other information respecting the child; (k) subject to any applicable provincial legislation, (i) starting, defending, compromising or settling any proceeding relating to the child, and (ii) identifying, advancing and protecting the child's legal and financial interests; (l) exercising any other responsibilities reasonably necessary to nurture the child's development.	

Exercising Parenting Time & Parental/ Decision-Making Responsibilities	*Sections 1, 42, 43 (1)* **Part 1 — Interpretation** **Definitions** **1** In this Act: … **"parenting time"** means parenting time as described in section 42 *[parenting time]*; **Part 4, Division 2 — Parenting Arrangements** **Parenting time** ***42*** *(1) For the purposes of this Part, parenting time is the time that a child is with a guardian, as allocated under an agreement or order.* *(2) During parenting time, a guardian may exercise, subject to an agreement or order that provides otherwise, the parental responsibility of making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child.* *Exercise of parental responsibilities* ***43*** *(1) A child's guardian must exercise parental responsibilities in the best interests of the child.*	*Sections 2 (1), 16.2* **Interpretation** **Definitions** **2 (1)** In this Act, … ***parenting time*** means the time that a child of the marriage spends in the care of a person referred to in subsection 16.1(1), whether or not the child is physically with that person during that entire time; (*temps parental*) **Parenting Orders** **Parenting time — schedule** **16.2** (1) Parenting time may be allocated by way of a schedule. **Day-to-day decisions** (2) Unless the court orders otherwise, a person to whom parenting time is allocated under paragraph 16.1(4)(a) has exclusive authority to make, during that time, day-to-day decisions affecting the child.
Contact with a Child	*Sections 1, 58 - 60* **Part 1 — Interpretation** **Definitions** **1** In this Act:	*Sections 2 (1), 16.5* **Interpretation** **Definitions** **2 (1)** In this Act,

	…	…
	"contact with a child" or **"contact with the child"** means contact between a child and a person, other than the child's guardian, the terms of which are set out in an agreement or order;	***contact order*** means an order made under subsection 16.5(1); (*ordonnance de contact*)
	Part 4, Division 4 — Contact with a Child	**Contact Orders**
	Agreements respecting contact	**Contact order**
	58 (1) A child's guardian and a person who is not a child's guardian may make an agreement respecting contact with a child, including describing the terms and form of contact.	**16.5** (1) A court of competent jurisdiction may, on application by a person other than a spouse, make an order providing for contact between that person and a child of the marriage.
	(2) An agreement respecting contact with a child is binding only if the agreement is made between all of a child's guardians having parental responsibility for making decisions respecting with whom the child may associate.	**Interim order** (2) The court may, on application by a person referred to in subsection (1), make an interim order providing for contact between that person and the child, pending the determination of the application made under that subsection.
	(3) A written agreement respecting contact with a child that is filed in the court is enforceable under this Act as if it were an order of the court.	**Leave of the court** (3) A person may make an application under subsection (1) or (2) only with leave of the court, unless they obtained leave of the court to make an application under section 16.1 [*Parenting Order*].
	(4) On application by a party, the court must set aside or replace with an order made under this Division all or part of an agreement respecting contact with a child if satisfied that the agreement is not in the best interests of the child.	**Factors in determining whether to make order** (4) In determining whether to make a contact order under this section, the court shall consider all relevant factors, including whether contact between the applicant and the child
	Orders respecting contact	
	59 (1) On application, a court may make an order respecting contact with a child, including describing the terms and form of contact.	

	(2) A court may grant contact to any person who is not a guardian, including, without limiting the meaning of "person" in any other provision of this Act or a regulation made under it, to a parent or grandparent. (3) The court may make an order to require the parties to transfer the child under the supervision of, or require contact with the child to be supervised by, another person named in the order if the court is satisfied that supervision is in the best interests of the child. (4) An access order referred to in section 54.2 (2.1) or (3) of the *Child, Family and Community Service Act* is deemed, for the purposes of this Act, to be an order made under subsection (1) of this section for contact with a child. *Changing, suspending or terminating orders respecting contact* **60** On application, a court may change, suspend or terminate an order respecting contact with a child if satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person.	could otherwise occur, for example during the parenting time of another person. **Contents of contact order** (5) The court may, in the contact order, (a) provide for contact between the applicant and the child in the form of visits or by any means of communication; and (b) provide for any other matter that the court considers appropriate. **Terms and conditions** (6) The court may make a contact order for a definite or indefinite period or until a specified event occurs, and may impose any terms, conditions and restrictions that it considers appropriate. **Supervision** (7) The order may require that the contact or transfer of the child from one person to another be supervised. **Prohibition on removal of child** (8) The order may provide that a child shall not be removed from a specified geographic area without the written consent of any specified person or without a court order authorizing the removal. **Variation of parenting order**

		(9) If a parenting order in respect of the child has already been made, the court may make an order varying the parenting order to take into account a contact order it makes under this section, and subsections 17(3) and (11) apply as a consequence with any necessary modifications.

Appendix C : Relocation 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.))
Relocation Definition / When Relocation Provisions Apply	*Section 65* **Part 4, Division 6 — Relocation** *Definition and application* **65** (1) In this Division, **"relocation"** means a change in the location of the residence of a child or child's guardian that can reasonably be expected to have a significant impact on the child's relationship with (a) a guardian, or (b) one or more other persons having a significant role in the child's life. (2) This Division applies if (a) a child's guardian plans to relocate himself or herself or the child, or both, and (b) a written agreement or an order respecting parenting arrangements or contact with the child applies to the child.	*Section 2 (1)* **Interpretation** **Definitions** **2 (1)** In this Act, … ***relocation*** means a change in the place of residence of a child of the marriage or a person who has parenting time or decision-making responsibility — or who has a pending application for a parenting order — that is likely to have a significant impact on the child's relationship with **(a)** a person who has parenting time, decision-making responsibility or an application for a parenting order in respect of that child pending; or **(b)** a person who has contact with the child under a contact order; (*déménagement important*) … ***decision-making responsibility*** means the responsibility for making significant decisions about a child's well-being, including in respect of **(a)** health; **(b)** education;

		(c) culture, language, religion and spirituality; and **(d)** significant extra-curricular activities; (*responsabilités décisionnelles*) ***parenting order*** means an order made under subsection 16.1(1); (*ordonnance parentale*) ***parenting time*** means the time that a child of the marriage spends in the care of a person referred to in subsection 16.1(1), whether or not the child is physically with that person during that entire time; (*temps parental*)
Notice	*Guardian*	*Person with Parenting Time or Decision-making Responsibility*
	Section 66 (1) *Notice of relocation* **66** (1) Subject to subsection (2), a child's guardian who plans to relocate himself or herself or a child, or both, must give to all other guardians and persons having contact with the child at least 60 days' written notice of (a) the date of the relocation, and (b) the name of the proposed location.	*Section 16.9 (1) - (2)* **Relocation** **Notice** **16.9 (1)** A person who has parenting time or decision-making responsibility in respect of a child of the marriage and who intends to undertake a relocation shall notify, at least 60 days before the expected date of the proposed relocation and in the form prescribed by the regulations, any other person who has parenting time, decision-making responsibility or contact under a contact order in respect of that child of their intention. **Content of notice** **(2)** The notice must set out **(a)** the expected date of the relocation;

		(b) the address of the new place of residence and contact information of the person or child, as the case may be; **(c)** a proposal as to how parenting time, decision-making responsibility or contact, as the case may be, could be exercised; and **(d)** any other information prescribed by the regulations. **NOTICE OF RELOCATION REGULATIONS,** SOR/2020-249 *Sections 2 - 4* **Prescribed information — paragraph 16.9(2)(d) of Act** **2** For the purposes of paragraph 16.9(2)(d) of the Act, the following information is prescribed: **(a)** the name of the person who intends to undertake a relocation and the name of any child of the marriage who is relocating, if applicable; **(b)** the name of any other child of the marriage in respect of whom the person has parenting time or decision-making responsibility; **(c)** the address of the person's current place of residence and their current contact information; and **(d)** the name of any person who has parenting time, decision-making responsibility or contact under a contact order in respect of any child of the marriage referred to in paragraph (a) or (b). **Notice of relocation**

		3 For the purposes of section 16.9 of the Act, a person who intends to undertake a relocation must give notice of their intention by providing the information set out in Form 1 of the schedule. **Prescribed information — paragraph 16.91(2)(d) of Act** **4** For the purposes of paragraph 16.91(2)(d) of the Act, the following information is prescribed: **(a)** the name of the person who has received the notice under section 16.9 of the Act; and **(b)** the address of the person's current place of residence and their current contact information.
		Person with Contact
		Section 16.96 (1) – (2) **Relocation** **Notice — persons with contact** **16.96 (1)** A person who has contact with a child of the marriage under a contact order shall notify, in writing, any person with parenting time or decision-making responsibility in respect of that child of their intention to change their place of residence, the date on which the change is expected to occur, the address of their new place of residence and their contact information. **Notice — significant impact** **(2)** If the change is likely to have a significant impact on the child's relationship with the person, the notice shall be given at least 60 days before the change in

		place of residence, in the form prescribed by the regulations, and shall set out, in addition to the information required in subsection (1), a proposal as to how contact could be exercised in light of the change and any other information prescribed by the regulations. **NOTICE OF RELOCATION REGULATIONS,** SOR/2020-249 *Sections 6 - 7* **Prescribed information — subsection 16.96(2) of Act** **6** For the purposes of subsection 16.96(2) of the Act, the following information is prescribed: **(a)** the name of the person who has contact with a child of the marriage under a contact order; **(b)** the address of the person's current place of residence and their current contact information; **(c)** the name of any child of the marriage specified in the contact order; and **(d)** the name of any person who has parenting time or decision-making responsibility in respect of any child of the marriage specified in the contact order. **Notice — persons with contact** **7** For the purposes of subsection 16.96(2) of the Act, a person who has contact with a child of the marriage under a contact order and who intends to change their place of residence must give notice of their intention by providing the information set out in Form 3 of the schedule.

<table>
<tr><td rowspan="3">Notice Exceptions</td><td>Guardian</td><td>Person with Parenting Time or Decision-making Responsibility</td></tr>
<tr><td>Section 66 (2) - (3)

<u>Part 4, Division 6 — Relocation</u>

Notice of relocation

66 …

(2) The court may grant an exemption from all or part of the requirement to give notice under subsection (1) if satisfied that

(a) notice cannot be given without incurring a risk of family violence by another guardian or a person having contact with the child, or

(b) there is no ongoing relationship between the child and the other guardian or the person having contact with the child.

(3) An application for an exemption under subsection (2) may be made <u>in the absence of any other party</u>.</td><td>Section 16.9 (3) – (4)

<u>Relocation</u>

16.9 …

Exception

(3) Despite subsections (1) and (2), the court may, on application, provide that the requirements in those subsections, or in the regulations made for the purposes of those subsections, do not apply or may modify them, including where there is a risk of family violence.

Application without notice

(4) An application referred to in subsection (3) may be made <u>without notice to any other party</u>.</td></tr>
<tr><td>Person with Contact</td><td>Section 16.96 (3) – (4)

16.96 …

Exception

(3) Despite subsections (1) and (2), the court may, on application, order that the requirements in those subsections, or in the regulations made for the purposes of those subsections, do not apply or modify them, if the court is of the opinion that it is appropriate to do so, including where there is a risk of family violence.</td></tr>
</table>

		Application without notice **(4)** An application referred to in subsection (3) may be made without notice to any other party.
Resolving Issues – Requirement to Cooperate	*Section 67* **Part 4, Division 6 — Relocation** *Resolving issues arising from relocation* **67** (1) If notice is required under section 66 *[notice of relocation]*, after the notice is given and before the date of the relocation, the child's guardians and the persons having contact with the child must use their best efforts to cooperate with one another for the purpose of resolving any issues relating to the proposed relocation. (2) Nothing in subsection (1) prevents (a) a guardian from making an application under section 69 *[orders respecting relocation]*, or (b) a person having contact with the child from making an application under section 59 *[orders respecting contact]* or 60 *[changing, suspending or terminating orders respecting contact]*, as applicable, for the purpose of maintaining the relationship between the child and a person having contact with the child if relocation occurs.	N/A
Objections	*Section 68* **Part 4, Division 6 — Relocation**	*Section 16.91* **Relocation** **Relocation authorized**

	Child may be relocated unless guardian objects **68** If a child's guardian gives notice under section 66 *[notice of relocation]* that the guardian plans to relocate the child, the relocation may occur on or after the date set out in the notice unless another guardian of the child, within 30 days after receiving the notice, files an application for an order to prohibit the relocation.	**16.91 (1)** A person who has given notice under section 16.9 and who intends to relocate a child may do so as of the date referred to in the notice if **(a)** the relocation is authorized by a court; or **(b)** the following conditions are satisfied: **(i)** the person with parenting time or decision-making responsibility in respect of the child who has received a notice under subsection 16.9(1) does not object to the relocation within 30 days after the day on which the notice is received, by setting out their objection in **(A)** a form prescribed by the regulations, or **(B)** an application made under subsection 16.1(1) or paragraph 17(1)(b), and **(ii)** there is no order prohibiting the relocation. **Content of form** **(2)** The form must set out **(a)** a statement that the person objects to the proposed relocation; **(b)** the reasons for the objection; **(c)** the person's views on the proposal for the exercise of parenting time, decision-making

<table>
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<td>responsibility or contact, as the case may be, that is set out in the notice referred to in subsection 16.9(1); and

(d) any other information prescribed by the regulations.

NOTICE OF RELOCATION REGULATIONS,
SOR/2020-249

Objection to relocation

5 For the purposes of clause 16.91(1)(b)(i)(A) of the Act, a person who intends to object to a relocation must do so by providing the information set out in Form 2 of the schedule.</td>
</tr>
<tr>
<td>Not Substantially Equal Parenting Time</td>
<td>Section 69 (4)
[initial burden on relocating guardian, then switches to objecting guardian to prove relocation not in BIOC]

Part 4, Division 6 — Relocation

Orders respecting relocation

69 …

(4) If an application is made under this section and the relocating guardian and another guardian do not have substantially equal parenting time with the child,

(a) the relocating guardian must satisfy the court that

(i) the proposed relocation is made in good faith, and

(ii) the relocating guardian has proposed reasonable and workable arrangements to preserve the relationship between</td>
<td>Vast Majority of Time with Relocating Parent

Section 16.93 (2) [burden on objecting parent]

Relocation

16.93 …

Burden of proof — person who objects to relocation

(2) If the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child of the marriage spends the vast majority of their time in the care of the party who intends to relocate the child, the party opposing the relocation has the burden of proving that the relocation would not be in the best interests of the child.

Other

Section 16.93 (3) [burden on both parties]</td>
</tr>
</table>

	the child and the child's other guardians, persons who are entitled to contact with the child, and other persons who have a significant role in the child's life, and (b) on the court being satisfied of the factors referred to in paragraph (a), the relocation must be considered to be in the best interests of the child unless another guardian satisfies the court otherwise. … (6) For the purposes of determining if the proposed relocation is made in good faith, the court must consider all relevant factors, including the following: (a) the reasons for the proposed relocation; (b) whether the proposed relocation is likely to enhance the general quality of life of the child and, if applicable, of the relocating guardian, including increasing emotional well-being or financial or educational opportunities; (c) whether notice was given under section 66 *[notice of relocation]*; (d) any restrictions on relocation contained in a written agreement or an order.	**Burden of proof — other cases** **(3)** In any other case, the parties to the proceeding have the burden of proving whether the relocation is in the best interests of the child.
Substantially Equal Parenting Time	*Section 69 (5) [burden on relocating guardian]* **Part 4, Division 6 — Relocation** **Orders respecting relocation** **69** …	*Section 16.93 (1) [burden on relocating guardian]* **Relocation** **Burden of proof — person who intends to relocate child** **16.93 (1)** If the parties to the proceeding substantially comply with an order, arbitral award, or agreement that

	(5) If an application is made under this section and the relocating guardian and another guardian have substantially equal parenting time with the child, the relocating guardian must satisfy the court (a) of the factors described in subsection (4) (a), and (b) that the relocation is in the best interests of the child.	provides that a child of the marriage spend substantially equal time in the care of each party, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child.
Best Interests of the Child Factors	*Section 37* **Part 4, Division 1 — Best Interests of Child** *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;	*Section 16 (1) – (4), (6)* **Best Interests of the Child** **Best interests of child** **16 (1)** The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order. **Primary consideration** **(2)** When considering the factors referred to in subsection (3), the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being. **Factors to be considered** **(3)** In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including **(a)** the child's needs, given the child's age and stage of development, such as the child's need for stability;

	(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; (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	**(b)** the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life; **(c)** each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse; **(d)** the history of care of the child; **(e)** the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained; **(f)** the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage; **(g)** any plans for the child's care; **(h)** the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child; **(i)** the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child; **(j)** any family violence and its impact on, among other things, **(i)** the ability and willingness of any person who engaged in the family

	set out in subsection (2), and only to the extent that it affects that factor.	violence to care for and meet the needs of the child, and **(ii)** the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and **(k)** any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child. **…** **Past conduct** **(5)** In determining what is in the best interests of the child, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order. **Parenting time consistent with best interests of child** **(6)** In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.
	Family Violence	
	Section 38 **Assessing family violence**	*Section 16 (4)* **16** … **Factors relating to 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.	**(4)** In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account: **(a)** the nature, seriousness and frequency of the family violence and when it occurred; **(b)** whether there is a pattern of coercive and controlling behaviour in relation to a family member; **(c)** whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence; **(d)** the physical, emotional and psychological harm or risk of harm to the child; **(e)** any compromise to the safety of the child or other family member; **(f)** whether the family violence causes the child or other family member to fear for their own safety or for that of another person; **(g)** any steps taken by the person engaging in the 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.
Additional Factors	*Section 69 (6)* **Part 4, Division 6 – Relocation**	*Section 16.92 (1)* **Best Interests of the Child**

	Orders respecting relocation **69** … (6) For the purposes of determining if the proposed relocation is made in good faith, the court must consider all relevant factors, including the following: (a) the reasons for the proposed relocation; (b) whether the proposed relocation is likely to enhance the general quality of life of the child and, if applicable, of the relocating guardian, including increasing emotional well-being or financial or educational opportunities; (c) whether notice was given under section 66 *[notice of relocation]*; (d) any restrictions on relocation contained in a written agreement or an order.	**Best interests of child – additional factors to be considered** **16.92 (1)** In deciding whether to authorize a relocation of a child of the marriage, the court shall, in order to determine what is in the best interests of the child, take into consideration, in addition to the factors referred to in section 16, **(a)** the reasons for the relocation; **(b)** the impact of the relocation on the child; **(c)** the amount of time spent with the child by each person who has parenting time or a pending application for a parenting order and the level of involvement in the child's life of each of those persons; **(d)** whether the person who intends to relocate the child complied with any applicable notice requirement under section 16.9, provincial family law legislation, an order, arbitral award, or agreement; **(e)** the existence of an order, arbitral award, or agreement that specifies the geographic area in which the child is to reside; **(f)** the reasonableness of the proposal of the person who intends to relocate the child to vary the exercise of parenting time, decision-making responsibility or contact, taking into consideration, among other things, the location of the new place of residence and the travel expenses; and

		(g) whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has complied with their obligations under family law legislation, an order, arbitral award, or agreement, and the likelihood of future compliance.
Factors NOT to be considered -- Double Bind	*Section 69 (7)* **Part 4, Division 6 – Relocation** **Orders respecting relocation** **69** … (7) In determining whether to make an order under this section, the court must not consider whether a guardian would still relocate if the child's relocation were not permitted.	*Section 16.92 (2)* **Relocation** **16.92** … **Factor not to be considered** **(2)** In deciding whether to authorize a relocation of the child, the court shall not consider, if the child's relocation was prohibited, whether the person who intends to relocate the child would relocate without the child or not relocate.

Appendix D : Best Interests of the Child Legislative Comparison Table

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

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

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

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

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

Assessing family violence **38** For the purposes of section 37 (2) (g) and (h) *[best interests of child]*, a court must consider all of the following: **(a)** the nature and seriousness of the family violence; **(b)** how recently the family violence occurred; **(c)** the frequency of the family violence; **(d)** whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member; **(e)** whether the family violence was directed toward the child; **(f)** whether the child was exposed to family violence that was not directed toward the child; **(g)** the harm to the child's physical, psychological and emotional safety, security	**Factors relating to family violence** **(4)** In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account: **(a)** the nature, seriousness and frequency of the family violence and when it occurred; **(b)** whether there is a pattern of coercive and controlling behaviour in relation to a family member; **(c)** whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence; **(d)** the physical, emotional and psychological harm or risk of harm to the child; **(e)** any compromise to the safety of the child or other family member; **(f)** whether the family violence causes the child or other family member to fear for their own safety or for that of another person; **(g)** any steps taken by the person engaging in the			

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

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

FLA	DA	AFNIMCYF	CFCSA	Adoption Act
"child", except in Parts 3 *[Parentage]* and 7 *[Child and Spousal Support]* and section 247 *[regulations respecting child support]*, means a person who is under 19 years of age; "family member", with respect to a person, means **(a)** the person's spouse or former spouse, **(b)** a person with whom the person is living, or has lived, in a marriage-like relationship, **(c)** a parent or guardian of the person's child, **(d)** a person who lives with, and is related to, **(i)** the person, or **(ii)** a person referred to in any of paragraphs (a) to (c), or **(e)** the person's child, and includes a child who is living with, or whose parent or guardian is, a person referred to in any of paragraphs (a) to (e);	***family justice services*** means public or private services intended to help persons deal with issues arising from separation or divorce; ***family member*** includes a member of the household of a child of the marriage or of a spouse or former spouse as well as a dating partner of a spouse or former spouse who participates in the activities of the household; ***family violence*** means any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person — and in the case of a child, the direct or indirect exposure to such conduct — and includes **(a)** physical abuse, including forced confinement but excluding the use of reasonable force to protect themselves or another person; **(b)** sexual abuse;	***child and family services*** means services to support children and families, including prevention services, early intervention services and child protection services. ***family*** includes a person whom a child considers to be a close relative or whom the Indigenous group, community or people to which the child belongs considers, in accordance with the customs, traditions or customary adoption practices of that Indigenous group, community or people, to be a close relative of the child.	***"care",*** *when used in relation to the care of a child by a director or another person, means physical care and control of the child;* ***"Indigenous child"*** *means a child* ***(a)*** *who is a First Nation child,* ***(b)*** *who is a Nisg̲a'a child,* ***(c)*** *who is a Treaty First Nation child,* ***(d)*** *who is under 12 years of age and has a biological parent who* **(i)** *is of Indigenous ancestry, including Métis and Inuit, and* ***(ii)*** *considers himself or herself to be an Indigenous person,* ***(e)*** *who is 12 years of age or over, of Indigenous ancestry, including Métis and Inuit, and considers himself or herself to be an Indigenous person, or* ***(f)*** *who an Indigenous authority confirms, by advising a director,*	"child" means an unmarried person under 19 years of age; "First Nation child" means a child (a) who is a member or entitled to be a member of a First Nation, or (b) who a First Nation confirms, by advising a director or an adoption agency, is a child belonging to a First Nation; "Indigenous child" means a child (a) who is a First Nation child, (b) who is a Nisg̲a'a child, (c) who is a Treaty First Nation child, (d) who is under 12 years of age and has a biological parent who **(i)** is of Indigenous ancestry, including Métis and Inuit, and (ii) considers himself or herself to be an Indigenous person, (e) who is 12 years of age or over, of Indigenous ancestry, including Métis and Inuit, and considers

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

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

Appendix E : FLA Regulation Requirements for Family Dispute Resolution Professionals

Membership with a Professional Governing Body

COMPARISON

Family Law Act Regulation

Part 3 – Family Dispute Resolution Professionals
Each of the three family dispute resolution professionals have some membership requirement under the FLA Regulation.

Family law mediators must be a member in good standing of the Law Society of BC, the Mediate BC Family Roster, Family Mediation Canada or are required to have specified experience, training and insurance.

Family law arbitrators must be a member in good standing with the Law Society of BC, or a member in good standing with the College of Psychologists of BC or the BC College of Social Workers, as well as have specified experience, training and insurance.

Parenting coordinators must be a member of the Law Society of BC or a member of one of six other listed organizations (including the College of Psychologists of BC, the BC College of Social Workers, and the BC Association of Clinical Counsellors) and have the required experience, training and insurance.

Experience of Report Writers

COMPARISON

Family Law Act Regulation

Part 3 – Family Dispute Resolution Professionals
Each of the three family dispute resolution professionals have experience requirements under the FLA Regulation.

Family law mediators who are members in good standing with the Law Society of BC must meet the Law Society's training and practice requirements (i.e., sufficient knowledge, skills and experience relevant to family law to carry out the mediatory function in a fair and competent manner).[1]

Although the FLA Regulation does not specifically provide for experience or training of Mediate BC Family Roster members, the Roster does set criteria for admission including at least 2 years experience

[1] Law Society of BC Webpage: Family law alternate dispute resolution accreditation | The Law Society of British Columbia.

in family-related practice and at least 40 hours of mediation work in at least 10 family mediations in the past 5 years.[2]

The FLA Regulation stipulates that a family law mediator who is not a member of any of the above organizations must have at least 2 years experience in family-related practice, including in law, psychology, social work, clinical counselling, teaching or nursing.

Family law arbitrators who are members in good standing with the Law Society of BC must meet the Law Society's training and practice requirements (i.e., at least 10 years of full-time or equivalent in part-time practice or as a judge or master).[3]

The FLA Regulation stipulates that an arbitrator who is not a member of the Law Society of BC must have at least 10 years experience in family-related practice in addition to training requirements.[4]

Parenting coordinators who are members in good standing with the Law Society of BC must meet the Law Society's training and practice requirements (i.e., at least 10 years of full-time or equivalent in part-time practice or as a judge or master).[5]

The FLA Regulation stipulates that a parenting coordinator who is not a member of the Law Society of BC must meet the requirements for the MediateBC Family Roster or Family Mediation Canada, as outlined above, and have at least 10 years experience in family-related practice.[6]

Training Requirements for Report Writers

COMPARISON

Family Law Act Regulation

Part 3 – Family Dispute Resolution Professionals
Each of the three family dispute resolution professionals have training requirements under the FLA Regulation.

Family law mediators who are members in good standing with the Law Society of BC must meet the Law Society's training and practice requirements (i.e., sufficient knowledge, skills and experience relevant to family law to carry out the mediatory function in a fair and competent manner).[7]

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[2] Family Roster Admission, MediateBC webpage: Applying to the Mediate BC Rosters | Mediate BC Home | Effective Conflict Resolution.
[3] Law Society of BC Webpage: Family law alternate dispute resolution accreditation | The Law Society of British Columbia
[4]Family Law Act Regulation, s. 5(2)(b)(ii).
[5] Law Society of BC Webpage: Family law alternate dispute resolution accreditation | The Law Society of British Columbia
[6]Family Law Act Regulation, s. 6(1)(b)(ii)(A) and (B).
[7] Law Society of BC Webpage: Family law alternate dispute resolution accreditation | The Law Society of British Columbia.

Although the FLA Regulation does not specifically provide for experience or training of **Mediate BC Family Roster** members, the Roster does set criteria for admission including specified number of hours in various training:[8]

- at least 40 hours of core education in mediation theory and skills training, including 10 hours of simulated role play mediation
- at least 40 hours of conflict resolution training, including 7 hours on ethical issues relating to the mediation process;
- at least 21 hours focusing on issues related to family dynamics in separation and divorce (may be part of general CR hours if course info can clearly identify);
- at least 14 hours of family violence training;
- at least 40 hours of training in family law and procedures (including a minimum of 7 hours each in: parenting and guardianship, child and spousal supports, division of property, jurisdiction, and drafting memoranda of understanding); and
- at least 14 hours of BC civil procedures training.

Family law mediators who are certified with **Family Mediation Canada** must meet that organization's training and practice requirements including 180 hours of training and education, an approved mediation practicum or two peer evaluations, a video-taped role-play assessment, and a written final examination.[9]

The FLA Regulation stipulates that family law mediators who are **not** members of any of the above organizations, must meet the training requirements set out in section 4(2)(d):

- the individual has completed at least 21 hours of family law training provided by the Justice Institute of British Columbia or by the Continuing Legal Education Society of British Columbia or equivalent training provided by any other training provider that is recognized as providing high quality training in that field;

- the individual has completed at least 80 hours of mediation theory and skills training, provided by the Justice Institute of British Columbia, by the Continuing Legal Education Society of British Columbia or by any other training provider that is recognized as providing high quality training in that field, that includes at least:

  (a) 21 hours of training focusing on issues relating to family dynamics in separation and divorce,
  (a) 7 hours of training focusing on financial issues relating to separation, divorce and family reorganization,
  (c) 7 hours of training focusing on ethical issues relating to the mediation process, and
  (d) 7 hours of training focusing on drafting memoranda of understanding;

- the individual has completed at least 14 hours of family violence training, including training on identifying, assessing and managing family violence and power dynamics in relation to dispute resolution process design, provided by the Justice Institute of British Columbia, the Continuing Legal Education Society of British Columbia or any other training provider that is recognized as

[8] Family Roster Admission, MediateBC webpage: Applying to the Mediate BC Rosters | Mediate BC Home | Effective Conflict Resolution.
[9] Family Mediation Canada Certification webpage: National FMC Certification | FMC | Family Mediation Canada

providing high quality training in that field;

-each year the individual completes at least 10 hours of continuing professional development applicable to family dispute resolution practice, at least 7 hours of which must be in the form of a course provided by the Justice Institute of British Columbia, the Continuing Legal Education Society of British Columbia or any other training provider that is recognized as providing high quality training in that field.

Family law arbitrators have specific training requirements set out in section 5(2) of the Regulation.

Parenting coordinators have specific training requirements set out in section 6(1) of the Regulation.

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.