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Family Policy, Legislation, and Transformation Division
Justice Services Branch
Ministry of Attorney General
PO Box 9222, Stn Prov Govt
Victoria, BC V8W 9J1

Via email: JSB.FPLT@gov.bc.ca

Re: West Coast LEAF and Rise Women's Legal Centre Response to the BC Ministry of Attorney General's Discussion Paper on Care of and Time with Children & Protection from Family Violence

Introduction

Rise Women's Legal Centre ("Rise") and West Coast LEAF Association ("West Coast LEAF") jointly make this submission in response to the Ministry of Attorney General's ("the Ministry") call for public input on Phase 2 of the *Family Law Act (FLA)* Modernization Project ("the Modernization Project"). The Modernization Project aims to update the *Family Law Act* ("*FLA*")[1] to make it "clearer and more responsive to families' needs."[2] Its second phase focuses on issues related to the care of children, time with children, and protection against family violence.[3] This submission answers several of the questions from the Ministry's discussion paper, titled "*Family Law Act* Modernization Project: Care of and Time with Children & Protection from Family Violence Discussion Paper" (the "Discussion Paper").

Rise Women's Legal Centre ("Rise") is a *pro bono* community legal centre providing accessible legal services that are responsive to the unique needs of self-identifying women and gender diverse clients. Rise provides limited legal services to clients, who are often self-representing, in their family law matters in BC. Rise clients include people who are economically disadvantaged, members of marginalized groups, and people seeking protection from family violence. In addition to providing direct service to clients, Rise conducts original research into family violence and the legal system and provides support and training to provincial advocacy programs.

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[1] *Family Law Act*, S.B.C. 2011, c. 25 [*FLA*].
[2] See the Ministry of Attorney General's overview of the *FLA* Modernization Project on its engagement webpage.
[3] Ministry of Attorney General, "*Family Law Act* Modernization Project: Care of and Time with Children & Protection from Family Violence Discussion Paper" (January 2024) Executive Summary at p. i. [Discussion Paper].

West Coast LEAF is a BC-based advocacy organization that uses legally rooted strategies (litigation, law reform and public legal education) to dismantle gender-based discrimination and move toward gender justice. West Coast LEAF aims to transform society in collaboration with those most affected and most marginalized by overlapping systems of oppression, including colonialism, patriarchy, racism, white supremacy, ableism, and capitalism. It has a long history of engaging in systemic advocacy around access to justice for single mothers and survivors of gender-based violence.

Rise and West Coast LEAF respectfully acknowledge that our offices are located on traditional, ancestral, and unceded Coast Salish homelands, including the territories of the xwməθkwəy̓əm (Musqueam), Skwxwú7mesh (Squamish), and səl̓ílwətaʔɬ/Selilwitulh (Tsleil-Waututh) Nations. As organizations that primarily work within the colonial legal system, we are committed to centering decolonial practices, supporting Indigenous self-determination, and using colonial legal strategies to advance the rights and interests of Indigenous people and communities.[4]

Background

The *FLA* is BC's primary legislation on issues related to family relationships. It applies to all people in a family relationship in BC, and it addresses topics including parentage, guardianship, parenting arrangements after separation, child and spousal support after separation, division of property and debt after separation, protection against family violence, and dispute resolution processes and tools. It thus affects nearly all areas of family justice in BC's colonial legal system.

The *FLA* was brought into force in 2013 with the primary objective of modernizing BC's family laws. Replacing its predecessor *Family Relations Act*, which had been in force since 1979, many aspects of family law in BC shifted with the new law, including the law concerning the best interests of the child analysis, encouraging cooperation and out-of-court dispute resolution, and expanding the legal framework for addressing family violence and safety in interpersonal relationships.[5] The *FLA* is now itself over 10 years in force. The Modernization Project thus aims to update the law to address legislative gaps and provide clarification, with the overall objective of making the *FLA* more responsive to diverse family needs.[6]

It is axiomatic that family law issues are gendered. In *Michel v Graydon*,[7] a 2020 decision about the *FLA*'s rules on retroactive child support, the Supreme Court of Canada observed:

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[4] West Coast LEAF, "Changing Tides: An Action Plan to Dismantle White Supremacy, Settler Supremacy, and Anti-Indigenous Racism at West Coast LEAF 2022-2025"; Myrna McCallum and Haley Hrymak, "Decolonizing Family Law Through Trauma-Informed Practices" (2022) Rise Women's Legal Centre [McCallum & Hrymak].
[5] Ministry of Attorney General Justice Services Branch Civil Policy and Legislation Office "White Paper on Family Relations Act Reform: Proposals for a New Family Law Act" (July 2010).
[6] Discussion Paper, *supra* note 3, Executive Summary at i.
[7] *Michel v Graydon*, 2020 SCC 24 [*Michel v Graydon*].

> [94] This case too illustrates how children's wellbeing and that of their custodian are intertwined parts of the same whole. Today, women still bear the bulk of child care and custody obligations *and* earn less money than men, so women's poverty remains inextricably linked to child poverty…Among the Canadian population of children aged 14 years and under in 2016, 81.29 percent of children living in a lone-parent family lived with their mother … Children in lone-parent families live in low-income households at a rate more than three times higher than children in a two-parent household. Among these lone-parent families, the low income-rate for such children living with a mother (42 percent) is much higher than those living with a father (25.5 percent) …. In 2018, Attorney General Wilson-Raybould announced that approximately 96 percent of cases registered for enforcement involved female recipients …
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> [95] Women in relationships are more likely to suffer intimate partner violence than their male counterparts … As a result, they are more likely to leave their home and belongings — and their financial security — behind and to seek shelter or become homeless. A 2014 Statistics Canada analysis reported most women in shelters for abused women in Canada identified their abuser as a current or former partner; just over half of these were admitted with their children …. The impact of unstable housing and the lack of legal or financial resources on a person's ability to bring any kind of legal claim is evident. The impact of a history of violence on a person's emotional health and their consequent potential fear, unwillingness to engage with their past abuser, or inability to do so are just as apparent. In addition to this, "some abusive fathers may use the child support process as a way to continue to exercise dominance and control over their ex-wives" …
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> [96] Given these circumstances, women will often face financial, occupational, temporal, and emotional disadvantages. Moreover, access to justice in family law is not always possible due to the high costs of litigation.... Yet, as this Court stated in *Hryniak v. Mauldin* …: "Without an effective and accessible means of enforcing rights, the rule of law is threatened."

Gendered experiences of family law do not exist in a silo. Gender intersects with other axes of marginalization and oppression, including Indigeneity, race, immigration status, disability, class, sexual orientation, and gender identity, to create additional and compounding barriers to family justice.[8]

Rise and West Coast LEAF welcome reforms to the *FLA* that will better support families affected by overlapping systems of marginalization and oppression, including Indigenous families, poor families, single mother-led families, families seeking protection against family violence, and 2SLGBTQIA+ families. We emphasize that the *FLA* is a colonial legal regime that is grounded in a Eurocentric and heteronormative

[8] Department of Justice Canada, "Experiences of Indigenous families in the family justice system: A literature review and perspectives from legal and frontline family justice professionals" (2023) [Experiences of Indigenous Families in the Family Justice System] at p. 7; Haley Hrymak & Kim Hawkins, "Why Can't Everyone Just Get Along: How BC's Family Law System Puts Survivors in Danger" (2021) at p. 14-15 [Hrymak & Hawkins].

conception of family.[9] In our joint response to the BCLI's Consultation Paper on Parentage, Rise and West Coast LEAF agreed with recommended reforms to Part 3 of the *FLA* that would expand the legal recognition and protection of parent-child relationships in diverse family structures.[10] We also view the Modernization Project as a critical opportunity for the Ministry to cooperate with Indigenous peoples in BC on bringing the *FLA* into alignment with the *United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP")*.[11]

On these lands, Indigenous legal systems have always existed to resolve disputes, protect children, and support the well-being of families.[12] While Indigenous laws and dispute resolution processes remain available, many Indigenous families are forced to resolve their family law problems through the colonial *FLA* regime.[13] In this context, updating the *FLA* to make it consistent with *UNDRIP* will require two changes. First, the *FLA* must be responsive to the material and cultural needs of Indigenous families from distinct communities and groups, including through integrating Indigenous perspectives, laws, and dispute resolution processes.[14] Second, the *FLA* must remove barriers to Indigenous communities exercising their jurisdiction over family law problems.

Rise and West Coast LEAF were grateful to learn from the early feedback of First Nations and Indigenous organizations, which was summarized in the Ministry's "What We Heard Report."[15] In this submission, we share observations from our experiences of working with Indigenous families in the colonial family law and family policing (i.e., "child welfare") systems. We make these observations with the understanding that the Ministry will continue to centre Indigenous perspectives when assessing the impacts of potential reforms on Indigenous families and communities.

Our submission focuses on reforms to the *FLA* that will better serve families seeking protection from family violence.[16] Family violence is widely recognized as a highly gendered, and notoriously underreported, epidemic in Canada.[17] Indigenous women, women with disabilities, and 2SLGBTQIA+ people experience disproportionately high

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[9] McCallum & Hrymak, *supra* note 4 at p. 8-10.
[10] West Coast LEAF and Rise, "Joint Submission of West Coast LEAF and Rise in Response to the BC Law Institute's Consultation Paper on Parentage" (April 15, 2024).
[11] United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007. In BC, the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c. 44 requires laws to be brought in line with *UNDRIP.*
[12] McCallum & Hrymak, *supra* note 4, at p. 8-9.
[13] McCallum & Hrymak, *supra* note 4, at p. 9-11.
[14] Experiences of Indigenous Families in the Family Justice System, supra note 8, at p. 5.
[15] Ministry of Attorney General, "Family Law Act Modernization Dialogue Sessions: What We Heard" (2023) [What We Heard].
[16] Rise and West Coast LEAF have long advocated on behalf of family violence survivors in the family law system, many of whom are single mothers. Please see Rise's report "Why Can't Everyone Just Get Along?" *supra* note 8, for a comprehensive discussion of the ways in which family violence is considered by the courts.
[17] Tracey Lindeman, "Canada calls gender violence an epidemic after triple femicide inquest," *The Guardian* (16 August 2023).

rates of family violence and have less access to community resources.[18] Despite amendments to the *FLA* to address family violence*,* survivors continue to face significant barriers to obtaining safety within the family law system. These barriers range from difficulties navigating court processes to the continuing, pervasive presence of myths and stereotypes about family violence.[19] Given this context, careful attention to the lived realities of family violence survivors is essential to modernizing the *FLA*.

Moreover, the Modernization Project must be situated within the ongoing access to justice crisis in BC. The *FLA*'s rights, entitlements, and protections are only meaningful to the extent that families can access them. While reforms that close gaps and create clarity within the *FLA* will help to make the legislation more accessible, especially to self-represented litigants, meaningful access to justice will ultimately require multi-system reforms. These reforms include wrap-around supports for families (including specialized supports for family violence), increased access to legal aid services, more accessible court systems, and improved training for judges, lawyers, and other family law professionals on topics including family violence and Indigenous cultural competency.

Should the definition of the best interests of the child under s. 37(2) be amended to add or clarify relevant factors? (Discussion Questions 3-1 and 3-2)

An assessment of the "best interests of the child" is foundational to decision-making under the *FLA*. Section 37(1) calls on parties and courts to only consider the best interests of the child (as defined under s. 37(2)) when making decisions about guardianship, parenting arrangements, or contact with a child. Consequently, any difficulties in the assessment of a child's best interests will have significant downstream impacts. Bias and a lack of cultural humility remain significant barriers to assessing the best interests of a child.[20] All too often, the *FLA*'s definition of the best interests of the child, and its application to specific facts, arises from a Eurocentric and heteronormative conception of family that does not include Indigenous (or other non-European) worldviews.[21]

Courts struggle to meaningfully assess the best interests of Indigenous children, and often overlook or minimize the importance of Indigenous children's cultural and community connections. While this problem has complex underpinnings, it may be connected in part to the *FLA's* definition of the best interests of the child under s. 37(2). The factors under s. 37(2) are not necessarily inconsistent with the best interests of an Indigenous child. However, they are general in nature and neither address the distinct interests of Indigenous children nor the general relevance of a child's cultural upbringing and heritage to their sense of self and safety. In the face of a general definition, the

[18] Adam Cotter, "Intimate partner violence in Canada, 2018: An Overview" (Canadian Centre for Justice and Community Safety Statistics, 2021) at 5-2.
[19] Jennifer Koshan, "Challenging Myths and Stereotypes in Domestic Violence Cases" (2023) Can Jou Fam Law 35:1 33 [Koshan].
[20] McCallum & Hrymak, *supra* note 4, at p. 8-10.
[21] *Ibid.*

parties and the court must understand the legal relevance of an Indigenous child's cultural and community connections. In other words, the parties, including many people who are self-represented, need to understand the importance of presenting evidence related to these factors. Similarly, the court, a colonial institution, must understand how to consider and weigh such evidence.

Where courts have considered an Indigenous child's cultural and community connections, they have done so in relation to a variety of general factors or as an additional factor. In *LP and DP v CC*, a BC Provincial Court case which addressed the best interests of an Indigenous child in relation to contact with his Indigenous grandparents, the hearing judge also relied upon the specific definitions of the best interests of an Indigenous child from the *Child, Family and Community Services Act* ("*CFCSA*") and *An Act respecting First Nations, Inuit, and Metis Children, Youth, and Families* (the "Federal Act").[22]

While the lack of specificity in the definition of s. 37(2) does not prevent consideration of the best interests of an Indigenous child, it does present a barrier. Canada has a long history of genocidal laws and policies aimed at erasing Indigenous peoples as "distinct legal, social, cultural, religious and racial entities."[23] In this context, the Ministry has an obligation to remove any barriers to Indigenous children's substantive equality under the *FLA*. Amending s. 37(2) to include factors specific to Indigenous children, such as those outlined in s. 10 of the Federal Act, would promote substantive equality by providing clear directions to courts on how to assess those factors. It would also signal to Indigenous families, and the lawyers and other professionals who work with them, that an Indigenous child's community and cultural connections should be raised in dispute resolution processes within and outside of the court system.

Rise and West Coast LEAF do not agree that the *FLA*'s definition of the best interests of the child should be updated to include factors that reflect ss. 16(3)(c) or 16(6) of the *Divorce Act*.[24] Under s.16(3)(c), factors relevant to the best interests of a child include "each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse." Section 16(6) further directs the court to "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." These provisions arise from a long-standing assumption that children need a relationship with both of their parents, and more specifically, their fathers, to thrive.[25] Such an assumption often has the effect of minimizing the harms arising from a child's relationship with an abusive parent.[26] To the extent that it factors into a court's analysis, it can be used to discourage or punish a parent who seeks to protect their child from family violence.

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[22] *LP and DP v CC*, 2022 BCPC 34, at paras. 55-56.
[23] Truth and Reconciliation Commission of Canada, "Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada" (2015) at p. 1.
[24] *Divorce Act*, RSC 1985, c. 3 (2nd Supp.), s. 2 [*Divorce Act*].
[25] FREDA Centre, "Myths and Stereotypes in Family Law: Exploring the Realities and Impacts of Custody and Access/Shared Parenting"(2014) [Freda Centre Report on Myths and Stereotypes] at p. 3-5.
[26] *Ibid*.

Australia has recently enacted reforms to its family law legislation that include an updated definition of the best interests of the child.[27] The new definition's considerations include the safety of the child and each person who has care of the child.[28] Rise and West Coast LEAF recommend a similar amendment to s. 37(2) of the *FLA* that would explicitly require courts to consider the safety of a parent who is experiencing family violence. This change would be responsive to the reality that the safety, security and well-being of children and their caregivers are intertwined.[29] Moreover, it would operate to further protect children from indirect exposure to family violence against a caregiver.[30]

Should there be a presumption of equal or shared parenting? (Discussion Question 1-16)

Rise and West Coast LEAF oppose a legislative presumption of equal or shared parenting, as well as any alteration to s. 40(4) of the *FLA* (which confirms that no parenting arrangements is presumed to be in the best interests of the child). The presumption of shared or equal parenting time has been considered numerous times and was recently analyzed by the federal government when it amended the *Divorce Act*. The "Legislative background" paper on the *Divorce* Act's amendments summarized the concerns about such a presumption:

> Over the years, several private member's bills have proposed changes to the *Divorce Act* that would have created a legal presumption of equal shared parenting meaning equal time and joint decision-making responsibility. This presumption would apply unless a parent could prove that such an arrangement is not in the best interests of the child. While in most cases parents can and should share responsibilities for their children, a presumptive equal shared parenting arrangement does not work for all families. For example, if one parent travels frequently with work, or does shift work, it may be very difficult to share time with a child equally. If there has been family violence, sharing responsibilities may be dangerous to the child and other family members. An imbalance in power between spouses—as well as the high cost of legal representation—may make it difficult for a party to present evidence to convince a court not to apply the presumption.
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> Several stakeholders, including the Canadian Bar Association, have argued that a presumption could increase litigation by forcing parents to lead evidence showing that the other parent is less fit, thus fueling conflict. The Special Joint

[27] Family Law Act Amendment Bill 2023.
[28] Bills Digest No. 76, 2022-2023: Family Law Act Amendment Bill 2023, at p. 12.
[29] Simon Lapierre, Isabelle Côté & Geneviève Lessard, "'He was he King of the House' Children's Perspectives on the Men who Abused their Mothers" (2022) 19:3–4 Journal of Family Trauma, Child Custody & Child Development 244–260; Cindy A Sousa, Manahil Siddiqi & Briana Bogue, "What Do We Know After Decades of Research About Parenting and IPV? A Systematic Scoping Review Integrating Findings" (2022) 23:5 Trauma, Violence, & Abuse 1629–1642.
[30] Jane E M Callaghan et al, "Beyond 'Witnessing': Children's Experiences of Coercive Control in Domestic Violence and Abuse" (2018) 33:10 J Interpers Violence 1551–1581; Stephanie Holt, Helen Buckley & Sadhbh Whelan, "The Impact of Exposure to Domestic Violence on Children and Young People: A review of the Literature" (2008) 32:8 Child Abuse & Neglect 797–810.

> Committee on Child Custody and Access noted that a parenting presumption would shift the focus of the inquiry in parenting matters away from the best interests of the child. A presumption would be inconsistent with the emphasis on children's best interests brought in by the 2019 changes to [the *Divorce Act*]. [31]

We do not see a reason to revisit the federal government's recent analysis of this issue. However, we do wish to emphasize the disproportionate harm that a presumption of equal or shared parenting poses to survivors of family violence. Such a presumption prioritizes the rights of the parents over the rights of the child within a legal context where family violence is systemically overlooked or minimized.[32] This would significantly add to the existing fear survivors have towards the family law system, amplifying the necessity for safety planning as they weigh the decision of whether it is safer to stay with or leave an abuser.[33]

Adding a presumption of equal or shared parenting would also be a regressive amendment, as the *Divorce Act* and family law acts in international jurisdictions are moving toward increasingly child-centric decision-making. Australia recently *removed* its presumption of equal or shared parental responsibilities after a large body of research showed that this presumption was resulting in unjust outcomes and compromising the safety of children.[34]

Should s. 39 of the *FLA* be amended to change the presumptions regarding when a parent is a guardian? (Discussion Question 1-1)

Rise and West Coast LEAF do not support changes to s. 39 of the *FLA* in relation to when a parent is presumed to be a guardian. Under the *FLA*, only a guardian may exercise parental responsibilities and have parenting time with a child. In other words, guardianship is a legal status that permits parents and other people in a parental role to take care of and make decisions about a child. It is very rare for a court to terminate a parent's guardianship status, even in cases of family violence.[35]

Section 39 of the *FLA* sets out presumptions about guardianship for a child's parent or parents. Pursuant to s. 39(1) of the *FLA*, a parent of a child who resided with the child at birth is the child's guardian by default. This means that in cases where the parents were living together when the child was born, both parents will be the child's default

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[31] 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)" (2019).
[32] The Honourable 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) Family Violence & Family Law Brief, The FREDA Centre for Research on Violence Against Women and Children.
[33] Hrymak & Hawkins, *supra* note 8 at 50 citing Lori Chambers, Deb Zweep & Nadia Verrelli, "Paternal Filicide and Coercive Control: Reviewing The Evidence in Cotton v Berry" UBC Law Review 51, no. 3 (2018): at 674.
[34] Zoe Rathus, "Family law has been overhauled. With the new changes about to kick in, how will they affect children?" The Conversation (21 April 2024).
[35] Discussion Paper, *supra* note 3 at 1-2, citing *RF v TM*, 2022 BCPC 215 at para. 24.

guardians. Pursuant to s. 39(3) of the *FLA*, a parent who was not living with the child at birth will not be deemed to be the child's guardian unless they have "regularly cared for" the child. This means that in casual or dating relationships, the birth parent will be a guardian by default whereas the other parent may have to meet a threshold of regular care to become a guardian. A parent who is not a guardian may become a guardian by agreement or apply for guardianship under s. 51 of the *FLA*. While the presumptions under s. 39(1) and (3) operate without consideration of the child's best interests, a court must *only* consider the child's best interests when deciding a s. 51 guardianship application.

The presumptions under s. 39 cannot be considered in a contextual vacuum. Birth parents, most of whom are women, will be guardians by default. On the other hand, non-residential parents, who are often men, will only become a guardian through regularly caring for the child or through an agreement or court order. Where the parents of a child do not agree about whether the non-residential parent has regularly cared for the child, courts have taken a liberal approach to recognizing the non-residential parent as a guardian under s. 39(3). The requirement of "regular care" has been defined as a "relatively low threshold of ordinary care."[36] Moreover, in *AAAM v British Columbia (Children and Family Development)*, the BC Court of Appeal held that a father's *intention* to regularly care for their child was sufficient to cause a presumption of guardianship where the mother prevented the father from exercising his intention.[37]

While many non-residential parents will become guardians through regularly caring for the child or through an agreement or court order, others will not seek a parenting role in their child's life. In these cases, s. 39 has important practical benefits because birth parents will not need to obtain an order or agreement to remove the other parent as a guardian. This is especially important in cases involving family violence, where engaging the other parent in court proceedings could potentially escalate further family violence, including by encouraging the other parent to pursue a parenting arrangement as a method of perpetuating patterns of coercive control.[38] Rise is aware of many women who feel safer and can exercise more self-determination because the presumptions under s. 39 have enabled them to be their child's sole guardian.

Even where a non-residential parent is motivated to become a guardian, the presumptions under s. 39 can offer additional protection in cases involving family violence. For example, where a non-residential parent has perpetrated family violence leading to an order prohibiting or limiting their contact with a child, they may not be able to fulfill the requirement of regular care to become the child's guardian. In this case, the non-residential parent will be required to apply for guardianship under s. 51 before seeking parental responsibilities and parenting time. As discussed above, courts must only consider the child's best interests when deciding an application for guardianship. Rise has observed that courts are more inclined to dismiss an abusive parent's

[36] *LP v AE*, 2021 BCPC 281, at para. 92 [*LP v AE*].
[37] *AAAM v British Columbia (Children and Family Development),* 2015 BCCA 220.
[38] *LDB v ANH*, 2023 BCCA 480, at paras. 113-114.

guardianship application than remove guardianship from an abusive parent. In *LP v AE*, the BC Provincial Court found:

> When I weigh the s. 37 factors and despite L.P.'s willingness and desire to have a meaningful role in E.E.'s care and up-bringing, the acts of family violence, the instability he has caused and is likely to continue to cause, the fact that E.E.'s presence will determine L.P.'s well-being and L.P.'s unwillingness to sacrifice his own needs for those of his child, I have concluded it is not in E.E.'s best interests that L.P. be appointed a guardian of E.E. L.P.'s application to be appointed a guardian pursuant to s. 51 of the Family Law Act is dismissed.[39]

Currently, the presumptions under s. 39 prevent many perpetrators of sexual assault from being deemed a guardian of a child who was born as a result of that assault. However, if non-residential parents became guardians by default, this would capture sexual assault perpetrators, thus shifting the onus onto survivors to apply for the removal of the perpetrator as a guardian. The BC Law Institute ("BCLI") has not recommended the creation of a pathway to deny parentage to perpetrators of sexual assault under Part 3 in part based on the assumption that Part 4's provisions on guardianship, parental responsibilities, and parenting time will be more effective at protecting survivors.[40] This assumption will be less valid if amendments were made to the presumptions under s. 39.

The presumptions under s. 39 also have specific impacts in the family policing context. It has long been recognized that the state disproportionately intervenes in the lives of single mothers affected by overlapping forms of marginalization and oppression, including, overwhelmingly, Indigenous single mothers.[41] Some of these single mothers are the sole guardians of their child(ren) because of the operation of the presumptions under s. 39. The implication of their sole guardianship is that they are the only parent who is "apparently entitled to custody" and thus the only parent to which a child can be returned under the *CFCSA*.[42] While a child's other parent could apply for guardianship and the return of the child, it is settled law that such an application cannot proceed at an interim stage of a *CFCSA* proceeding.[43] If s. 39 is amended to recognize non-residential parents as guardians by default, courts and social workers would have an expanded ability under the *CFCSA* to return a child to their other parent, even if that parent has had little involvement in the child's life. At this point, the child welfare agency could withdraw their involvement and the onus would be on the mother to seek to change the parenting arrangement under the *FLA*.

We recognize that the presumptions under s. 39 do not operate perfectly in every case, and that they privilege fathers who are in spousal relationships over those in casual or

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[39] *LP v AE*, *supra* note 36 at 104.
[40] BCLI, "Consultation Paper on Parentage: A Review of Part 3 of the Family Law Act" (2024), at p. 105-113.
[41] Judith Mosoff, Isabel Grant, Susan B Boyd & Ruben Lindy, "Intersecting Challenges: Mothers and Child Protection Law in BC" (2017) 50:2 UBC L Rev 435.
[42] *Director v S*, 2012 BCPC 168 at paras. 22-25.
[43] *Director v MGN and MDJ, JMS, and MJ*, 2023 BCPC 154, at paras. 56-57.

dating relationships. However, the lived reality of this provision is that motivated fathers will often become guardians through meeting the "relatively low" threshold of regular care or through proving an intention to regularly care for the child. On the other hand, and as outlined above, the automatic recognition of non-residential parents as guardians will cause significant harms to single mothers, including survivors of family violence, sexual assault survivors, and single mothers who are engaged with the family policing system.

Should the *FLA* enable non-parents to become guardians by written agreement? (Discussion Question 1-2)

Updating the *FLA* to enable non-parents to become guardians by written agreement raises important policy tensions. The current requirement that non-parents apply for guardianship under s. 51 is onerous and highly invasive, requiring numerous background checks, a court hearing, and scrutiny of the applicant. This process creates many barriers to access, particularly for those unable to afford legal assistance, and others who experience overlapping forms of marginalization, such as newcomers to Canada.

Permitting the addition of non-parent guardians by agreement would simplify the process of extending guardianship, and in turn parental responsibilities and parenting time, to people who have parental roles in diverse family structures. It thus aligns with Rise and West Coast LEAF's joint submission in response to the BCLI's Consultation Paper on Parentage, which advocated for an expansive legal recognition of parent-child relationships.[44] This change would also better reflect Indigenous peoples' conceptions of family, which tend to distribute responsibility for the care of children across extended family networks.[45] In the "What We Heard Report," Indigenous participants spoke of both the symbolic and practical benefits of reducing the barriers for kinship caregivers to become guardians.[46]

Despite the above benefits, allowing non-parents to become guardians by written agreement also carries risks. Through West Coast LEAF's work with kinship caregivers in the family policing system, we have seen that social workers often encourage kinship caregivers to become guardians under the *FLA*. Once a kinship caregiver becomes a guardian, the child welfare agency will treat them as a legal parent and thus withdraw the services and financial support that are available under the *CFCSA*. This can have devastating impacts on kinship care families, many of whom are affected by economic insecurity. As we noted in a 2021 letter to the BC Government about the denial of the BC Recovery Benefit to Kinship Caregivers:

> Many kinship caregivers are grandparents living on a fixed income or in poverty who are faced with the financial burden of raising a child they did not financially plan for. Kinship care families, particularly those headed by grandparents and

[44] West Coast LEAF and Rise, Joint Submissions, *supra* note 10.
[45] McCallum & Hrymak, *supra* note 4, at p. 8-9 and 13-14.
[46] What We Heard Report, *supra* note 13.

> older single women, face significant financial hardship and higher rates of poverty. Despite their vulnerable status, kinship caregivers experience systemic barriers in attempting to access financial and other supports, including not being advised of the existence of programs by social workers, being denied access to programs and services, and facing greater hurdles in demonstrating their financial status. [47]

After a kinship caregiver becomes a guardian and the child welfare agency has withdrawn its involvement, the kinship caregiver will be forced to resolve any disputes with the child's parent(s) through the family law system, including on matters concerning whether and when the child should be reunited with their parent(s). This can put kinship caregivers in the complex position of being in direct litigation with their loved ones.

Permitting kinship caregivers to become guardians by written agreement could open the door to more kinship care families experiencing the consequences described above. For some kinship care families, the withdrawal of a child welfare agency's involvement will be welcomed. However, for others, the concomitant loss of services and financial support will exacerbate their vulnerable status and harm the children in their care. This would take place in a larger context where BC continues to grapple with child poverty and does not provide adequate supports to marginalized families and children.[48] To address these concerns, and explore possible solutions, we recommend that the Ministry of Attorney General engage in further consultations with kinship caregivers and the organizations that represent them.

Rise and West Coast LEAF are also concerned about the risk of a guardian being pressured or coerced into signing a guardianship agreement in situations involving family violence. For example, an abusive parent could force the other parent to agree to adding a member of his extended family as a guardian, which could in turn exacerbate existing power imbalances. We were not able to locate any case law on terminating a non-parent's guardianship status. If the Ministry of Attorney General chooses to permit the addition of non-parent guardians by written agreement, it should carefully consider meaningful options for relief in circumstances where the agreement was unfair or where the non-parent guardian has directly or indirectly perpetrated family violence. This should be done in consultation with both kinship caregivers and members of the anti-violence community.

Should the *FLA* be amended to specifically require courts to consider gender-related factors in relocation applications? (Discussion Question 2-1 and 2-13)

Relocation is a particularly gendered issue, with research showing that between 90 to 95% of relocation applications are made by women.[49] To fairly assess relocation

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[47] West Coast LEAF, "Letter on the denial of the BC Recovery Benefit to kinship caregivers" (20 May 2021).
[48] First Call Child and Youth Advocacy Society, "2023 BC Child Poverty Report Card" (February 2024).
[49]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 and 4 [Huberman]; Nicholas Bala et al, "A Study on Post-Separation/Divorce Parental Relocation" (2012)

applications, courts must therefore understand and be responsive to applicants' gender-related needs. As summarized by the Discussion Paper, women often seek to relocate for improved economic security and the need to live closer to support networks.[50] Other reasons for relocation include efforts to flee family violence or to access better or more affordable housing.[51]

The gendered nature of relocation is in part due to the gender pay gap,[52] the unequal division of labour,[53] and the ways in which women's poverty and children's poverty are "inextricably linked".[54] Upon separation, mothers continue to do more of the work relating to childcare and management, which coincides with earning less income and having less opportunity for career growth.[55] As a result of these factors, women's financial security is often negatively impacted when relationships end, while men's financial situation improves.[56] The economic insecurity many single mothers face is one of the main reasons women seek to relocate, given that a relocation may improve their access to employment opportunities, affordable housing, and family support.[57]

Women who experience family violence face complex decisions when it comes to relocation.[58] Leaving a relationship is often believed to bring safety to victims of family violence, but separation and the period that follows is the most dangerous time for

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presented to Family, Children, and Youth Section, Department of Justice Canada at 26 [Bala]; Rollie Thompson, "Legislating About Relocating: Bill C-78, NS and BC" (2019) 38:2 Canadian Family Law Quarterly 219 at 222, and Discussion Paper, *supra* note 3 at 2-2.

[50] Discussion Paper, *supra* note 3 at 2-2.

[51] Discussion Paper, *supra* note 3 at 2-2 citing 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 [Shaw].

[52] Melissa Moyser, "Measuring and Analyzing the Gender Pay Gap: A Conceptual and Methodological Overview" August 30, 2019 *Studies on Gender and Intersecting Identities*. Statistics Canada Catalogue no. 45-20-0002 [Moyser]. See also, Melissa Moyser, "Women and Paid Work" in Women in Canada: A Gender-based Statistical Report (March 8, 2017) Statistics Canada.

[53] Paula England, Ivan Privalko & Andrew Levine, "Has the Gender Revolution Stalled?" (2020) 51:4 Economic and Social Review 463; Susan B Boyd and Debra Parkes, "Looking Back, Looking Forward: Feminist Legal Scholarship in SLS" (2017) 26:6 Social & Legal Studies 735 at 742.

[54] Huberman, *supra* note 49 at 4; *Michel v Graydon supra* note 7 at 94 and Moyser, *supra* note 52.

[55] Mark Henaghan, "Relocation Cases - The Rhetoric and the Reality of a Child's Best Interests - A View from the Bottom of the World" (2011) 23:2 Child & Fam L Q 226 at 233 See also: Dan Fox & Melissa Moyser, "Women in Canada: A Gender-based Statistical Report – The Economic Well-Being of Women in Canada" (May 16, 2018), online: Statistics Canada.

[56] Tahany Gadalla, "Impact of Marital Dissolution on Men's and Women's Incomes: A Longitudinal Study" (2008) 50:1 Journal of Divorce and Remarriage 55. See also *Moge v Moge*, 1992 SCC 25 at 849. In BC, most lone-parent families are led by women on a median annual income of $46,990, compared to a median annual income of $66,830 for a male lone-parent family FirstCall Child and Youth Advocacy Society, "2021 BC Child Poverty Report Card: 25th Annual Report Card on Canada's Commitment to End Child Poverty by 2000" 2021at 13 [Child Poverty].

[57] Huberman found family support and economic reasons were the most common reason for relocation, *supra* note 49 at 29. Shaw similarly found "financial opportunity" as the most often cited motivation for relocation amongst mothers and fathers, *supra* note 51 at 130.

[58] Shaw, *supra* note 51; Huberman, *supra* note 49.

survivors.[59] The risk of family violence during this period is compounded by the housing crisis in BC, which has resulted in a scarcity of housing overall and very limited affordable housing options throughout BC.[60] Research from the BC Society of Transition Houses highlights how the housing crisis has compelled women "to make the difficult choice to return to a violent situation or face homelessness - both of which may put her safety and her children's safety at risk."[61] One woman interviewed for Rise's research described enduring an abusive relationship for an additional two and a half years because she could not afford housing in her community.[62] In addition to the housing crisis, inflation in recent years has led to high costs for essentials, such as food, gas, and other necessities, while the minimum wage has failed to keep pace.[63]

Survivors with children who are unable to afford housing costs in their current community frequently find themselves unable to relocate to a more affordable city due to the complexities and rigidity of the relocation application process. They are trapped in a precarious position, and many cannot afford a lawyer and do not meet the eligibility criteria for legal aid. These systemic issues, where the law, economic factors, and the challenges of escaping violence intersect, create significant barriers on survivors' ability to seek safety.

Should the *FLA* require that notice of relocation include additional information, and are the exemptions to the requirement to provide notice adequate? (Discussion Questions 2-5 and 2-6)

The current notice requirement under the *FLA* can be onerous to survivors of violence. Section 66(1) requires a guardian with an existing order or written agreement, who is planning to relocate with the child, to provide notice of the relocation, and the proposed new address, 60 days in advance. When the court determines if the relocation application is being made in good faith, they weigh several factors, including whether the appropriate notice was provided under s. 66. Under s. 66(2), the court may grant an exemption from the requirement of notice if they are satisfied that notice cannot be given without incurring a risk of family violence or if there is no ongoing relationship between the child and the other guardian or person having contact with the child.

Rise and West Coast LEAF support the recommendation that s. 66(2) of the *FLA* be amended to provide more guidance to the courts on when the above notice exemptions should be granted. With respect to relocation cases involving family violence, we recommend that the *FLA* mirror the *Divorce Act* and allow an exemption whenever

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[59] Peter Jaffe et al, Department of Justice Canada, "Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce" (Ottawa: Department of Justice Canada, 2014).
[60] Sarah Marsden, "BC's Eviction Crisis: Evidence, Impacts and Solutions for Justice" (2023) First United; Royal Bank of Canada, "Housing Affordability" April 2, 2024.
[61] Tanyss Knowles et al, "Getting Home Project: Overcoming Barriers to Housing After Violence" (2019) at 13, 14.
[62] Hrymak & Hawkins, *supra* note 8 at 78.
[63] Iglika Ivanova, Anastasia French & Tania Oliveira, "Working for a Living Wage: Making Paid Work Meet Basic Family Needs in Metro Vancouver" (November 2023) Canadian Centre for Policy Alternatives BC Office.

"there is a risk of family violence." The provision in the *FLA* imposes too high of a burden on the survivor because it requires them to not only demonstrate the presence of family violence, but also to prove that notice cannot be given without incurring family violence. We also recommend that the *FLA* be adapted to consider the perpetrator's ability to parent due to family violence, as well as the survivor's ability to parent or keep child(ren) safe when there is a risk of family violence as set out in *Barendregt.*[64]

We also recommend that the notice requirements under s. 66 be amended to create more flexibility in the relocation application process. Requiring the address of relocation to be provided 60 days in advance is onerous and frequently causes individuals to lose housing placements. BC Housing, for example, has a time window for accepting housing that does not align with the requirements for notice under the *FLA*, and this is similar in other low-income housing programs. If housing becomes available, BC Housing requires the individual to move in less than 60 days, meaning that, to comply with notice requirements, individuals would have to forego housing made available on BC Housing's terms. We have seen people become so desperate to relocate to a new community that they move without an agreement or court order, only to be compelled by the courts to return.

Should the *FLA* Establish Consequences of Failing to Give Notice? (Discussion Question 2-5)

Given the gendered experiences of relocation, especially in cases involving family violence, implementing a presumption against allowing relocation when a party has moved without providing notice would be harmful. The consequences of not complying with the notice requirements should be dealt with on a case-by-case basis. While we understand that this presumption has been recommended to deter child abduction, we have concerns that it will primarily affect survivors of violence who flee violence.[65]

Through our experiences of supporting survivors of violence within the legal system, we have witnessed responses from legal professionals that are rooted in myths and stereotypes about a survivor's credibility and the nature of family violence.[66] The exception to the notice requirement for family violence will only be effective in cases where the family violence is believed and assessed in accordance with the definition of "family violence" in the *FLA.* Unfortunately, family violence is "notoriously difficult to prove".[67] Statistics reveal that family violence is largely unreported, and even when victims do provide evidence of family violence, it is often minimized, particularly instances of psychological or emotional abuse.[68] Without family law judges who have

[64] *Barendregt v Grebliunas,* 2022 SCC 22 at para 138- 147.
[65] Rollie Thompson, "The New Relocation Laws: Questions and Some Early Answers" (Paper delivered ahead of the 14th Biennial Family Law Conference, May 2023) at 14, as cited in Discussion Paper, *supra* note 3 at 2-6 - 2-7.
[66] Koshan, *supra* note 17 at 36 and Deanne Sowter, "Intimate Partner Violence and Ethical Lawyering: Not Just Special Rules for Family Law" (2024) Can Bar Rev (forthcoming).
[67] *Barendregt*, *supra* note 64 at 144.
[68] Donna Martinson & Margaret Jackson, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases" (2017) 30 Can J Fam L 11; Hrymak & Hawkins, *supra* note 8.

specialized training on the dynamics of family violence, presumptions against allowing relocation will hurt the very parents and children who most need to relocate without providing notice.

Further, we are concerned that this proposed presumption would encourage decision–making based on factors other than the best interests of the child. Given this is one of the most complex areas of family law, additional presumptions would further complicate the issue, and be confusing to people who are unrepresented.

Do the "good faith" and "Reasonable and Workable Arrangements" requirements in s. 69(4)(a) place too high of a burden on relocating parents? (Discussion Question 2-11)

Should technological advancements be considered when modernizing the *FLA*'s relocation provisions? (Discussion Question 2-13)

When courts are assessing relocation applications, s. 69 of the *FLA* requires them to consider whether the proposed relocation is made in "good faith" and whether the relocating parent has proposed "reasonable and workable arrangements" to preserve the relationship between the child and the other parent. As described above, relocation is frequently a choice driven by economic circumstances.[69] We thus share the concerns highlighted in the Discussion Paper that the *FLA* requirements with respect to "good faith" put a significant burden on applicants and may reduce the number of mothers who seek to relocate, rather than encourage the resolution of relocation.

To incorporate the gendered realities of relocation, we endorse several of the recommendations set out by Meredith Shaw.[70] Shaw's recommendations include amending s. 69(6) to include specific factors for the court to consider when determining if the proposed relocation is in good faith. Shaw recommends the court consider the applicant's right to be free from family violence, the socio-economic realities of the applicant, including housing affordability and availability, and employment or educational opportunities, as well as their proximity to social and emotional supports.[71] Technological advancements, including FaceTime and Zoom, should also be considered by the court when determining workable arrangements to preserve a child's relationships in the community from where the child would be relocating.

Should the *FLA* being amended to accommodate the framework in *Barendregt?* (Discussion Question 2-18)

We recommend amending the *FLA* within s.s 46 and 69 to be brought in line with the factors set out in the *Divorce Act* in s.16.92(1), the additional best interests of the child factors to be considered in cases of relocation. This amendment would also bring consistency to the approach used within the Supreme Court of Canada's decision in

[69] Huberman, *supra* note 49 at 29 and Shaw, *supra* note 51 at 123.
[70] Shaw, *supra* note 51 at 123.
[71] Shaw, *supra* note 51 as cited in the Discussion Paper, *supra* note 3 at 2-3.

Barengredt and the *FLA*.[72] This recommendation reflects our goal of having the law be clearer and more accessible to everyone in the interests of access to justice.

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

Section 69 (7) prohibits the court from considering whether a guardian would still relocate if their application was not permitted.[73] We agree that courts should not take into account the potential consequences if relocation is not permitted. Such consideration would often place survivors in an untenable and unfair double-bind scenario when asked whether they would still relocate if the child was not permitted to move. However, this section has led to some procedural impracticalities that present significant concerns around access to justice. When courts deny relocation applications, they may proceed to establish a new parenting time schedule as if the applicant will still relocate without their child.[74] This may result in parenting arrangements being changed so that the non-relocating parent now has the majority of the parenting time, which is often a substantial departure from the parenting arrangements prior to the application. The reality is that many women will not choose to relocate if their application to relocate with their child was unsuccessful. Therefore, the new orders around the parenting arrangements are impractical and not reflective of the family's reality. These parenting orders will require many individuals to invest significant resources, which many do not have, to vary the parenting orders to reflect the decision of the parent to not relocate.

It is important to highlight the barriers that survivors of violence may encounter in initially having their relocation application heard by the courts, and subsequently proceeding to court with a second application to vary or change the parenting order made at the initial hearing. Considering the gendered aspect of relocation and motivations for relocating, often driven by economic necessity, many survivors lack the financial resources to initiate a relocation application, let alone pursue a second application to vary an order. Commencing a family law proceeding is very cost prohibitive, and it can also be dangerous given the tendency for perpetrators to exploit litigation and other family court processes as avenues for abuse.[75] The recent decision of the Saskatchewan Court of Appeal in *Friesen v Friesen* may provide guidance on how the courts may adopt a conditional approach when considering the implications if the relocation application is not allowed.[76] We see some of the benefits of the conditional approach employed in *Friesen* if the relocation is not allowed, however, this requires further consideration and research. Relocation cases are frequently understood to be the most difficult cases to

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[72] *Barendregt, supra* note 64.
[73] *Divorce Act, supra* note 24 at 69 (7). As also set out in s. 16.92 of the *Divorce Act* and reiterated in *Barendregt, supra* note 64 at para 138-140.
[74] We recognize that many judges are attentive to this issue and respond in ways to ensure parenting orders are not automatically changed when parenting itself may not change.
[75] Jaffe, *supra* note 59; Myrna Dawson & Anthony Piscitelli, "Risk Factors in Domestic Homicides: Identifying Common Clusters in the Canadian Context" (2021) 36:1–2 J Interpers Violence 781; Shaw, *supra* note 51 at 133.
[76] *Friesen v Friesen,* 2023 SKCA 60 at para 94.

resolve in family courts, with less chance of out of court resolution.[77] The competing factors and issues survivors face when dealing with s. 69(7) are too complex to succinctly describe here.[78] Further consultations with survivors who have relocated or made attempts to relocate are necessary to address the procedural implications and consequences stemming from s. 69(7).

What recommendations are necessary to improve access to justice of parenting assessments? (Discussion Questions 4-1 – 4-29)

Rise and West Coast LEAF have long raised concerns about s. 211 reports, which are intended to assist the court in better understanding what parenting arrangement may be in the best interests of the child.[79] A "full" s. 211 report involves a third-party meeting with and interviewing the parties and the children separately. These third-party assessments and their recommendations play a large role in impacting the ultimate decisions made by the judge. In many respects, s. 211 reports are treated akin to "expert reports", but without many of the procedural safeguards required for the reception of expert evidence. Section 211 assessments are extremely complex and are conducted with no oversight, and frequently contain problematic biases and assumptions about survivors of violence, which can result in minimizing the prevalence or impact of family violence and thus undermining safety. The *FLA* lacks the safeguards necessary for parties to address problems within the reports. This results in people with problematic reports having little recourse, including for example, where their reports fail to address family violence or use inappropriate psychometric assessments with significant potential to bias Indigenous parents.[80]

In February 2024, Rise published a report "Improving Access to Justice through Safeguards in Parenting Assessments," with one of the objectives being to consolidate recommendations regarding s. 211 reports for the Ministry, in consideration of this Modernization Project.[81] These recommendations are based on a review of the literature surrounding s. 211 reports and similar reports, as well as the legislation and case law. Further, Rise interviewed 24 professionals and held focus groups with women across BC. The recommendations from this project fall into four themes: evaluators' training and experience, practice standards, financial barriers, and judicial gatekeeping and oversight. These recommendations include:

1. Mandatory, evaluation-specific training and experience requirements for all evaluators of any professional designation. This includes education on all aspects of family violence.

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[77] Huberman, *supra* note 49 at 1 citing Bala, *supra* note 49; Susan B Boyd, "Relocation, Indeterminacy, and Burden of Proof: Lessons from Canada" (2011) 23:2 Child & Family L Q 155.
[78] *Friesen, supra* note 76 at 94.
[79] Haley Hrymak & Kim Hawkins, "Section 211 Toolkit", (Rise Women's Legal Centre, 2021) at 14—18, Shahnaz Rahman & Laura Track, "Troubling Assessments: Custody and Access Reports and their Equality Implications for BC Women" (West Coast Leaf, 2012).
[80] *Ibid.*
[81] Gina Addario-Berry & Magal Huberman, "Improving Access to Justice through Safeguards in Parenting Assessments" (February 2024) Rise Women's Legal Centre.

2. Implementing mandatory practice standards to enhance the quality of section 211 reports, reduce disagreements following their release, and help parties understand what to expect during the evaluation. This includes the recommendation for routine screening for family violence and the requirement for limitations to be acknowledged within the report.

3. Enhancing the availability of publicly funded reports, or partially funded reports, and implementing safeguards to avoid having reports ordered when parties cannot afford the cost of the report and the potential costs of challenging the report.

4. Enacting provisions that specify when the court may order a report and the factors the court should consider in its decisions.

5. Creating mechanisms to ensure the court selects an evaluator who has fulfilled all the training and experience requirements, and who has the experience necessary to address the issues specific to the case before them.

6. Improve avenues to challenge section 211 reports, including through review reports.

7. Create mechanisms that allow assessors to bring safety concerns to the attention of the court before releasing the report given that disclosing abuse to the assessor may put parents and children at risk.

Please find attached to these submissions Appendix A which is the Executive Summary of this report.

The *FLA* currently permits three kinds of reports that courts can order in attempting to understand the perspectives of a child: a "full" section 211 report, a Views of the Child report, and a Hear the Child Report. However, each type of report is different in terms of content, methodology, types of assessor, and cost, causing a lack of clarity in the law about which report will best serve the court's interests and needs. The *FLA* and/or its Regulations should clarify the purpose and process for obtaining each of these kinds of reports, including defining each type of report. Many family law practitioners and judges may be able to ask their colleagues about the different types of reports available under the *FLA*, if they are not familiar with them.[82] However, unrepresented litigants are largely left in the dark about what these reports mean, how they can be used and for what purpose. Without a clear definition of these reports and accompanying public legal education and information (PLEI) materials to help litigants understand what these reports are and how they will be used, people navigating the *FLA* without the benefit of counsel are at a distinct disadvantage and be denied meaningful access to justice, especially given the outsized role these reports can play in adjudication.

[82] Discussion Paper, *supra* note 3 at 4-3.

Apart from the recommendations in the Rise report referred to above, we agree that the *FLA* should include guidance concerning affidavit evidence and letters to the court from children, as well as judicial interviews with children. As highlighted by the Honourable Donna Martinson, it is an entrenched right of the child to have their views heard in court as set out within Article 12 of the UN *Convention on the Rights of the Child*.[83] Having the views of children present in court and communicated to the judge is an essential part of a family court process, and therefore our overall recommendation is to err on the side of having children's views heard.[84]

Should the *FLA* be amended to change the test for appointing a children's lawyer in a family law dispute and/or clarify the factors that are relevant to the appointment of a children's lawyer? (Discussion Questions 3-15, 3-16, and 3-17)

Section 203 of the *Family Law Act* allows the court to appoint a lawyer to act for the child in family law proceedings where "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." Rise and West Coast LEAF agree that this test is problematic for two reasons. First, the conditions set too high of a bar and are difficult to meet in many cases where a child wants and would benefit from access to their own lawyer. Second, the test requires a finding that the child's parents are not acting in the child's best interests. This requirement is unnecessarily stigmatizing and implies moral blameworthiness with respect to the parties' "severe conflict," a concept which often masks family violence and safety concerns. It thus puts parents who support their child(ren) having access to their own counsel in a complex position, and it is especially concerning for survivors of violence who are seeking a children's lawyer to advocate for their child(ren)'s safety.

We submit that there are a range of circumstances where a child would benefit from their own counsel, including in family violence cases involving a protective parent. We thus support the suggestions in the Discussion Paper that the test under s. 203 be amended to focus on the child's best interests and whether their views are adequately before the court.[85] To the extent that the test considers conflict between the parties, it should also consider the presence of family violence and safety concerns.

In suggesting reforms that would relax the test under s. 203, we are also mindful of their access to justice implications. Not all children will qualify for or be able to access a lawyer at no cost to the parties. In these cases, the appointment of a children's lawyer will result in a significant expense to the parties. This expense cannot be ignored when

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[83] *BJG v DLG,* 2010 YKSC 44 at para 47; See also: The Honourable Donna Martinson & The Honourable Judge Rose Raven, "Part one" and "Part Two- Practical Guide/Checklist: Implementing Children's Participation Rights in all Family Court Proceedings" Family Violence & Family Law Brief (9). Vancouver, BC: The FREDA Centre for Research on Violence Against Women and Children; and The Honourable Donna Martinson "Treating Children as Full Rights Bearers: Independent Legal Representation for Children in Family Violence and/or Resist-Refuse Contact Cases" (2023) Family Violence & Family Law Brief 20. Vancouver, BC: The FREDA Centre for Research on Violence Against Women & Children.
[84] *Ibid*.
[85] *Supra,* note 83.

deciding whether to appoint a children's lawyer. In some cases, parents will not have the means to share the cost for a lawyer for their child, particularly when this is an unexpected expense. Therefore, we also recommend that any reforms be accompanied by additional funding for free children's lawyer services through the Child and Youth Legal Centre. Without funding to support the accessibility of children's lawyers, a relaxed test under s. 203 may either have no practical effect on children's right to be heard or have the unintended consequence of making family law matters even more unaffordable and detrimental to parents' financial security.

What concerns do we share about the ways family violence is considered in family court? (Discussion Questions 5-18 and 5-22)

The courts still face challenges in adequately considering family violence when determining parenting arrangements and protection orders. The struggles are reflected in recent decisions by the Supreme Court of Canada and the British Columbia Court of Appeal which highlight the problematic ways judges in BC have decided cases while relying on myths and stereotypes about family violence.[86] Overall, we do not view the systemic problems survivors of violence face as a problem with the *FLA* in and of itself.

Rise and West Coast LEAF strongly agree with the comment from the discussion paper, that:

> "(t)here are likely significant discrepancies amongst the judiciary with respect to the level of training and sensitivity to the nuances and complexities of family violence."[87]

We can attest to the significant discrepancies among the judiciary and members of the bar, and the impacts this has on survivors of violence and their children.[88] Survivors are frequently disbelieved when they discuss family violence in family court, and further, they may face repercussions for raising concerns about violence, including being accused of alienating the other parent, or having their parenting time reduced by the courts.[89] As a result, survivors are frequently advised by their lawyers to not bring up issues of family violence, in part because of the potential negative impacts it may have on their credibility or their legal position.[90] Lawyers may feel compelled to provide such legal advice based on the treatment of family violence by the courts. Therefore, survivors of violence are unable to request necessary safety measures from the courts.

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[86] *KMN v SZM*, 2024 BCCA 70 at paras. 180-188, which found the BCCA erred in minimizing harms of violence. [KMN].
[87] Discussion Paper, *supra* note 3 at 5-12.
[88] Hrymak & Hawkins, *supra* note 8.
[89] Deborah Epstein & Lisa A Goodman, "Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences" (2019) 167:2 U Pa L Rev 399 at 431; Joan S Meier, "A Historical Perspective on Parental Alienation Syndrome and Parental Alienation" (2009) 6:3-4 Journal of Child Custody 232- 257 at 239; Elizabeth Sheehy & Susan B Boyd, "Penalizing Women's Fear: Intimate Partner Violence and Parental Alienation in Canadian Child Custody Cases" (2020) 42:1 Journal of Social Welfare and Family Law 80-91.
[90] Hrymak & Hawkins, *supra* note 8.

Instead, they adopt positions they anticipate the court will likely approve of, in the hopes of not exacerbating the situation.[91]

When survivors do raise concerns about violence, and their experiences are believed, the impact of the violence on the survivor is frequently minimized.[92] In addition, unless the violence is directed against the child, the indirect impact to the child is often disregarded. Despite defining family violence as including direct or indirect harm to the child, there is often a perception that the courts consider prohibiting parenting time with a potentially abusive parent as more harmful than allowing the parenting time to proceed. Survivors of violence are frequently ordered to facilitate generous access with their abuser, often despite the wishes of the child. This occurs in all contexts, including orders made regarding parenting time and parenting responsibilities, and protection orders.

Protection orders serve as a helpful example of the disconnect between the letter of the law, and the courts' practice. Preliminary results from a protection order research project being carried out by Rise shows that the lack of specialized knowledge surrounding family violence creates significant barriers to obtaining protection orders. Rise has found that there is a strong discriminatory belief that women who seek protection orders are fabricating their claims about family violence to gain an upper hand in their family law matter, the myth and stereotype that was recently acknowledged by the BC Court of Appeal.[93] This myth seems particularly prominent in conversations about *ex parte* protection orders, made without notice to the other party. The pervasive belief that survivors of violence might lie or exaggerate about their experience of violence to obtain a protection order has resulted in significant procedural failures within the protection order regime. These procedural failures include protection orders being issued for a short period, including a period of only two weeks, and requiring the survivors to re-apply for orders multiple times on substantially the same facts. Further, we have heard accounts of courts dismissing *ex parte* applications sometimes before even hearing the evidence, because they take issue with the hearings being brought without notice.

Research conducted by Rise reveals that countless survivors across the province felt their lawyers did not understand their experiences and ultimately put them in dangerous positions.[94] The past 11 years have shown that a non-mandatory training scheme for family lawyers is insufficient to ensure that the *FLA* requirements are being met. As a result, between 2021-2022 Rise collaborated with the Trial Lawyer Association of BC on advocating for mandatory family violence education for family law lawyers. We recommended that every lawyer in the province who takes on one or more family law files be required to undergo family violence education. The proposed mandatory

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[91] Hrymak & Hawkins, *supra* note 8.
[92] Donna Martinson and Margaret Jackson, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases" (2017) 30:1 Canadian Journal of Family Law 19, citing Peter Jaffe, "Assessment of Parenting Arrangements after Separation in the Context of Domestic Violence: Emerging Issues in Promoting Safety, Accountability & Healing" unpublished workshop delivered at the College of Psychologists of British Columbia, November 21, 2013.
[93] *KMN v SZM*, *supra* note 86.
[94] Hrymak & Hawkins, *supra* note 8 at 51.

education would cover the prevalence and dynamics of family violence, screening for family violence, and working with clients to promote safety and navigate legal processes in a way to limit opportunities for an abusive ex-partner to inflict further violence. We see mandatory family violence education as both essential to a lawyer's competency, particularly to meet their obligations to screen for violence under s. 8 of the *FLA*, and a necessary access to justice measure. We highlight this advocacy to reiterate that requirements for education for legal system actors should be integral to law reform, given the potential risks to survivor's safety.

Should the definition of family violence be expanded? (Discussion Questions 5-4 and 5-5)

We recommend that the definition of family violence should be updated to explicitly include the concept of coercive control.[95] Coercive control has many definitions, but it is regarded as sharing three common characteristics:

(1) The intention or motivation of the perpetrator to control the target;
(2) The perception of the perpetrator's behaviour as negative by the target; and
(3) The perpetrator's ability to make credible threats against the target.[96]

Our view is that the term "coercive control" describes how one person seeks to regulate, control, and instill fear in another through various tactics, including "isolation, manipulation, humiliation, surveillance, economic abuse, intimidation, and threats."[97] Tactics used by perpetrators are not always a form of violence on their own, and perpetrators' tactics are always evolving. For example, Rise observed during the COVID-19 pandemic a variety of specific tactics used by abusers including "withholding of necessary safety items, such as hand sanitizer and disinfectants; forbidding handwashing; denying access to communication methods... etc."[98] Further, research has only just begun on the ways that perpetrators use coercive control to abuse their children.[99] The *Divorce Act* defines family violence as including, "any conduct ... that constitutes a pattern of coercive and controlling behaviour". We recommend that, for greater clarity, the *FLA* definition of family violence explicitly include coercive control, recognizing that language about coercive control is already present in *FLA* sections regarding the best interest of the child and protection orders. This clarification will also reinforce that non-physical forms of abuse are serious manifestations of violence. Despite an expansive definition of family violence in the *FLA*, non-physical forms of abuse are frequently regarded as less serious, which has led to an unspoken narrowing of the definition of family violence in practice.

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[95] Discussion Paper, *supra* note 3 at 5-11.
[96] L Hamberger et al, "Coercive Control in Intimate Partner Violence" (2017) 37 Aggression and Violent Behaviour 1, as cited in Janet Mosher, et al, "Submission to Justice Canada on the Criminalization of Coercive Control" (October 30, 2023) at 5 [Mosher].
[97] Mosher, *ibid* at 5.
[98] Jennifer Koshan, Janet Mosher & Wanda Wiegers, "COVID-19, the Shadow Pandemic, and Access to Justice for Survivors of Domestic Violence" (2020) 57:3 Osgoode Hall L J 739 at 751.
[99] Emma Katz, *Coercive Control in Children's and Mothers' Lives* (Oxford University Press, 2022).

In addition to adding coercive control, we also recommend that the definition of family violence be updated to include technology-based violence.

Should the definition of family member be expanded to include other family relationships? (Discussion Questions 5-1, 5-2, 5-4, 5-5)

The definition of "at-risk family member" as applied to Part 9 should be expanded to include persons in dating relationships, adult children who do not live with the parent, people in care-giving relationships, and other relatives who do not live with the person. We make this recommendation because we know many people at risk of family violence are currently excluded from being able to apply for a protection order, and there should be no barriers to safety. Moreover, this change would better reflect Indigenous cultures' and other cultures' more expansive view of extended family.

Our position on expanding the definition of family member stems in part by the inefficacy of the peace bond regime in BC.[100] Section 810 of the *Criminal Code* is intended to allow individuals to seek a protective order (in the form of a peace bond) against any person directly from the court. The *FLA* included the option of obtaining protection orders as an alternative to peace bonds for family members who do not want to be involved in a criminal process. However, the provincial Crown policy and recent case law has essentially removed an individual's ability to apply for a peace bond unless they have the support of the Crown and the police.[101] While ideally no survivor of violence would have to seek a protective order without the help of police or Crown, s. 810 is drafted as a recognition that in some cases a person will need the opportunity to personally seek an order directly from the court.

The definition of intimate partners from the BC Prosecution Policy Manual may assist in expanding the definition of family member with respect to intimate partner relationships. The BC Prosecution Service definition goes beyond spousal relationships, to include protection for "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."[102]

Have you Experienced Difficulty in Enforcing a Protection Order from Another Jurisdiction? (Discussion Question 5-13)

Survivors of violence face significant challenges in having protection orders enforced regardless of whether the order was made outside the province, or by a court in BC.

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[100] Youna Lee & Haley Hrymak "Seeking a Peace Bond: A Guide" (January 2023) Rise Women's Legal Centre at 8.

[101] Prosecution Service, "Private Prosecutions" (1 March 2018) online: *Crown Policy Manual.* See also *British Columbia (Attorney General) v British Columbia (Provincial Court)*, 2019 BCSC 2003; *T. Anthony*, 2019 BCPC 141. For more information see "Seeking a Peace Bond", *supra* note 100.

[102] Prosecution Service, "Crown Counsel Policy Manual – IPV 1 – Intimate Partner Violence" (20 May 2022) *Crown Policy Manual* at 3, as cited in Discussion Paper, *supra* note 3 at 5-4.

As highlighted in our joint submissions to the federal Department of Justice on criminalizing coercive control:

> Breaches of protection orders reported to the police do not always result in action or charges being recommended to the provincial Crown. When deciding not to prosecute breaches of protection orders, clients report that police tell them that the behaviour is just 'part of a relationship breakdown' and that 'he just wanted to say goodbye'. If charges are recommended to Crown, their explicit written policy is to only pursue charges where 'the circumstances of the non-compliance are safety related."[103] Our experience is that breaches of protection orders are often not enforced where the breaches relate to prohibited communications and other forms of non-physical violence. Many Rise clients share the view that a protection order is "just a piece of paper" and will not do anything to provide protection. Their perception is justified when breaches are not taken seriously by law enforcement and Crown. While we have recently tried to research the issue of how many breaches of protection orders actually result in criminal charges by making freedom of information requests, the failure to maintain relevant statistics means that it is impossible to obtain a clear picture of how many breaches are ignored; however, clients and partnering organizations report this consistently.[104]

The Attorney General may find it valuable to explore the frequency of protection order breaches reported to the police since 2013, and how many of these reports were forwarded to Crown Counsel, resulting in criminal charges being laid and prosecuted. Rise's research revealed that significant issues still remain with police agencies having access to the protection orders on their systems, and there was a great deal of uncertainty regarding the protection order registry and its efficacy.

Should there be separate legislation to address relationship violence? (Discussion Question 5-3)

We recommend that improvements be made to the current legal processes necessary for peace bonds and protection orders to function as intended within the *Criminal Code* and *FLA.* The problems that exist are about the ways protection orders and peace bonds are dealt with by police, Crown, family law lawyers, and judges, and it has created a systemic problem that has diminished the efficacy of these provisions. In our view, the legislation is clear, and it is not the true source of the problem. We are concerned that adding a new piece of legislation to deal with protective orders would be redundant and only further weaken the existing processes for protective orders. At a minimum, new legislation will pose confusion and potential challenges surrounding implementation as all changes do.

Instead of the resources and investments required to draft and implement new legislation, we recommend those resources be put to addressing the problems relating

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[103] *Ibid* at 3.
[104] West Coast LEAF and Rise, "Joint Submissions to the Department of Justice on the Criminalisation of Coercive Control" (October 20, 2023).

to the enforcement of protection orders and the processes involved in seeking a peace bond. It is also important to note that protection orders are not free. People frequently spend thousands of dollars to get a protection order, which are often only in place for a few weeks before they expire or are set aside. In our view, working to improve the existing *FLA* protection order section, and working with police and Crown to create a process people can access for peace bonds, would resolve many issues that exist and be a more streamlined response than implementing new legislation.

Should Additional Risk Factors or other Additional Circumstances be Included to Support Justices to Make Decisions Surrounding Family Violence? (Discussion Questions 5-7, 5-8, and 5-9)

We do not recommend becoming too granular when describing risk factors or inappropriate assumptions. We also do not recommend creating a hierarchy of risk factors. With every proposal aimed at assisting survivors of violence, we are conscientious of the ways it can also be used against them. A "high-risk" section, and the use of the *Summary of Intimate Partner Violence Risk Factors* (SIPVR), have the potential to be a helpful tool to judges. At the same time, given that family violence is so frequently minimized and disbelieved, becoming too specific about what is and is not "high risk" could have adverse implications. A better solution is ensuring applicants have adequate legal representation and providing enhanced training for judges and lawyers to screen for and understand the manifestations and dynamics of family violence.

Given that myths and stereotypes about family violence can influence judges' perceptions of violence, we endorse the recommendations below, made by Luke's Place and the National Association of Women and the Law, in their submissions on reforms to the *Divorce Act*. The inclusion of the language below would safeguard against some of the myths and stereotypes that remain prevalent in family law decision-making.

- 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.[105]

On issues of family violence, do you have any other concerns or suggestions for amendments to the provisions in the *FLA*? (Discussion Question 5-12)

We have significant concerns with the use of short-term protection orders, including for as little as seven days or two weeks. Parties should only return to court prior to the expiry of a protection order if the respondent to the protection order application applies to vary the order.

Requiring everyone to appear within such a short period poses potential challenges to both parties. It is of course possible that the opposing party will not want to vary or set aside the protection order. It is also possible that if they wish to terminate or vary the protection order, there are other factors they may want to consider before appearing in court within seven days. Not only is this a significant stress on applicants to have to appear in court with their abuser, but we have observed that it often leads to inefficient use of court time. When the respondent to the protection order application wishes to vary or set aside the protection order, the short orders do not allow them sufficient time to hire a lawyer or prepare their materials. Rather than having short term protection orders that require parties to appear in court before they are ready, often for no purpose, we recommend that the courts order the respondent to the protection order application to provide at least 7 business days' notice to the applicant if they seek to vary or set aside the order.

In addition, the application to vary or terminate the protection order should not be a *de novo* hearing. The court has already relied on the applicant's evidence and decided that a protection order should be ordered. Though credibility will often be an issue and further evidence may be required from the applicant, survivors should not be required to provide the same evidence already submitted to the court in their initial application. We view this as an unnecessary, cumbersome, and often traumatic process for survivors of violence. The onus should not be on the survivor to prove *again* that violence occurred as they already presented evidence to the court at the initial application.

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 Question 5-6)

People living in rural and remote communities need to be able to access protection orders readily.[106] The enhanced risk to survivors in rural areas cannot simply be reduced to a risk factor to be considered by a circuit court at the time of the hearing, which may only be offered two times a year.[107] While this may be one helpful step, it

[105] Luke's Place Support and Resource Centre & National Association of Women and the Law, "Joint Brief on Bill C-78" (2018) at 6, as cited in Discussion Paper, *supra* note 3 at 5-13.
[106] Discussion Paper, supra note 3 at 5-14.
[107] Discussion Paper, supra note 3 at 5-14.

does little to increase safety. One recommendation is for the creation of a protection order duty counsel who serves clients remotely throughout the province. The duty counsel could be located anywhere in BC and have permission to appear either within the jurisdiction closest to the applicant or, in exceptional circumstances, before an available judge anywhere in BC. Just as there is the opportunity within the rules to have an application heard by a judge after hours, this section should be expanded to allow protection order applications from rural and remote communities to be heard easily and in a timely manner.[108] We recognize that this recommendation is outside the scope of legislative reforms, however, we hope this can be a focus of the work undertaken in the future.

Concluding Thoughts on Family Violence

The family court system's existing problems largely result from a lack of specialized knowledge of the realities of family violence. The need for judges with specialized knowledge in family law and family violence to hear family law matters is of the utmost concern. Increasing safety to survivors in BC will also require further support to survivors of violence, including access to counsel and having a way of freely and efficiently seeking a protection order. More resources need to be allocated for safer parenting arrangements. When judges do find there is a risk of family violence, there are almost no options for supervised parenting arrangements, particularly those that are low-cost and exist in rural settings. The positive changes to the *FLA* that we hope come from this consultation will thus be dependent on the individual actors within the legal system understanding the nuances, risks, and impacts of violence.

Sincerely,

Raji Mangat
Executive Director
West Coast LEAF

Vicky Law
Acting Executive Director
Rise Women's Legal Centre

[108] Provincial Court of British Columbia, "Practice Direction: After-Hours Emergency Family Applications" FAM 06; The Supreme Court of British Columbia, "Administrative Notice: Emergency After-Hours Applications in Vancouver- Civil and Family" January 7, 2020, AN-15.

Appendix A

Executive Summary

Parenting reports in BC are often ordered under section 211 of the *Family Law Act* when there are court proceedings about parenting issues. The purpose of these reports—commonly referred to as section 211 reports—is to provide evidence to the court about the views and needs of the children, and the ability and willingness of each parent to meet these needs.

Section 211 reports are profoundly influential in the lives of children and families, because of their potential impact on both court decisions and out-of-court settlement of parenting arrangements. However, there is only limited empirical research about fundamental issues such as case outcomes, report quality, and evaluation practices. Accordingly, robust safeguards are essential to protect the children and parties whose lives may be deeply affected by them, by ensuring that reports are of consistently high quality. Essential safeguards include training and experience requirements for evaluators, practice standards for conducting the evaluation and preparing the report, and judicial gatekeeping and oversight.

This project sought to identify potential options for creating these safeguards, and to make recommendations to the Ministry of the Attorney General, which is currently undertaking the Family Law Act Modernization Project. To that end, this project consisted of:

- A review of the literature about section 211 reports and similar reports in other jurisdictions.
- A review of legislation and case law on section 211 reports in BC and legislation pertaining to similar reports in other jurisdictions.
- Interviews with 24 professionals in the family justice system (lawyers and others) in BC, Ontario, and outside of Canada.
- Focus groups with women in BC who have experienced intimate partner violence, some of whom had undergone a section 211 report process.

Section 211 reports are profoundly influential in the lives of children and families, because of their potential impact on both court decisions and out-of-court settlement of parenting arrangements.

Key Issues Identified in Our Research

- Education, training, experience, and practice standards vary among authors of section 211 reports, which undermines quality and consistency.
- Social science keeps evolving, both in general and about reports in particular (whether section 211 reports or similar reports in other jurisdictions). Evaluators therefore require ongoing training and professional development.
- Biases — including cognitive, personal, and professional biases — may be among the greatest threats to the integrity and value of the reports. General knowledge about biases is insufficient to mitigate them; rather, evaluators need training about effective strategies to counter the effects of biases and implement these strategies in their work.
- Although the *Divorce Act* (Canada) and the *Family Law Act* mandate consideration of family violence when determining parenting arrangements, section 211 reports and the evaluation process itself do not consistently address family violence adequately.
- The cost of reports by private-practice authors is a significant financial barrier. Further, the cost of the report is disproportionate to its utility in some cases.
- Parties seeking to challenge the conclusions and recommendations of section 211 reports face significant financial barriers, since the main avenue for challenging a report is cross-examination of the author at trial. Challenges to reports are often limited by financial resources rather than being based on the merits of the challenge or the quality of the report.
- Although the legislation does not prohibit or limit the use of "review" expert evidence (commonly referred to as "critique reports"), BC's case law has established a very high threshold for its admissibility, which constitutes another hurdle for challenging section 211 reports.

> Robust safeguards are essential to protect the children and parties whose lives may be deeply affected by section 211 reports, by ensuring that reports are of consistently high quality.

Summary of Recommendations

Our recommendations fall under four main themes: evaluators' training and experience, practice standards, financial barriers, and judicial gatekeeping and oversight. Since the recommendations are interrelated and complementary, they would ideally form part of a coherent framework of requirements and oversight. Unless indicated otherwise, we recommend implementing these measures through regulations to the *Family Law Act*, so that they apply to all section 211 reports regardless of court level or the professional designation of the evaluator.

Assessors' Training and Experience

We recommend mandatory, evaluation-specific training and experience requirements that would apply to all evaluators, of any professional designation. Training requirements would include the following:

- Foundational/initial training and ongoing (annual) training, to be approved by a single body (such as the Attorney General).
- Education on (but not limited to) the following topics:
  - All aspects and forms of family violence, including coercive control, the impact of family violence on children and on parenting, and appropriate, evidence-based services for survivors and perpetrators of family violence;
  - Child development and capacity;
  - Skills for interviewing children; and
  - Fundamentals of family law and the rules of evidence.
- Exploring possibilities for new evaluators to shadow and co-work with more experienced and qualified evaluators before undertaking evaluations on their own, and for ongoing mentorship and peer review.
- Relevant work experience.
- Judicial oversight to ensure that prospective evaluators meet the training and experience requirements, including exploring the possibility of creating a publicly available list of evaluators who have the required training and experience (including completion of annual training requirements). This list could be created and kept current by the courts or the Attorney General.

Practice Standards for Both the Evaluation Process and Report Content

We recommend implementing mandatory practice standards to enhance the quality of section 211 reports, reduce disagreements following their release, and help parties understand what to expect during the evaluation. These practice standards include:

- Routine screening for family violence and a fulsome analysis of family violence and its impact, ranging from risk assessment and the safety of children and parties to the parenting capacity of each parent.
- Limitation on scope of recommendations to topics that fall within the evaluator's areas of expertise.
- Effective strategies for mitigating and guarding against biases.
- Acknowledging any limitations and including in the report any information and research that does not support the evaluator's findings and recommendations.
- Guarding against disclosure of sensitive information and balancing the potential utility of disclosure against the potential harm.
- Regarding psychometric testing:
  - Standards on when testing is appropriate or inappropriate, and how test results may or may not be used; and
  - Mandatory disclosure about the population that the test was standardized on; limitations of the test (e.g., related to trauma, family violence, and Indigeneity); and the purpose of using the test and how it relates to the issues under consideration.

We recommend implementing mandatory practice standards to enhance the quality of section 211 reports, reduce disagreements following their release, and help parties understand what to expect during the evaluation.

Further, we recommend consideration of two additional issues:

- Requirements for routine peer review of reports by another qualified evaluator prior to the release of the report; and
- Whether and when conducting some or all of the evaluation by remote communications is appropriate.

Financial Barriers

To reduce the significant financial barriers associated with section 211 reports, we recommend the following:

- Enhance the availability of publicly funded reports.
- If the current model of privately-paid assessors continues:
  - Explore the possibility of regulating costs.
  - Refrain from ordering section 211 reports unless the court is satisfied that the party or parties is/are able to pay for them, on consideration of each party's income, assets, liabilities, and financial circumstances. The inquiry would focus not only on the assessor's fees to prepare the report but also on the potential costs of challenging the report.
  - Additionally or alternatively, explore the possibility of a hybrid payment model (part public funding and part payment by the parties).

Judicial Gatekeeping and Court Oversight

Our recommendations under this theme include when to order a report, selection of the evaluator, the ability to challenge the report, and addressing safety concerns.

- **When to order a report:** enacting provisions that specify when the court may order a report and the factors the court should consider in its decision, to promote consistency and a robust inquiry into the need for a report.
- **Selecting an evaluator:**
  - Before appointing any evaluator, the court would ascertain that the evaluator has fulfilled all training and experience requirements for evaluators in general.
  - When a report is expected to address specific issues (e.g., children who have special needs, addictions, and substance misuse, etc.), the court would inquire into the evaluator's training and experience in those issues, including their currency and breadth, and refrain from assuming that a degree, professional designation, or limited coursework is sufficient.

- **Avenues to challenge the report:** the ability to challenge a section 211 report is an important safeguard but also among the most difficult to structure in a way that is timely, accessible (financially and to self-represented parties), and fair to everyone involved. Although no jurisdiction we are aware of offers perfect process for challenging reports (and arguably, no single measure would suffice), we recommend:
  - Review reports be more readily admissible and parties be able to obtain them without taking the risk of incurring the expense only to have the review report excluded at trial.
  - Considering alternatives to cross-examination, at least with respect to disputed facts, such as a joint meeting with the evaluator (safety permitting) and/or a case management conference.
- **Addressing safety concerns:** disclosing abuse to the assessor may put a child, a party, or a collateral at risk. This may discourage disclosure and defeat the very purpose of the report. We therefore recommend consideration of mechanisms that allow assessors to bring safety concerns to the attention of the court before releasing the report (while taking into account procedural fairness issues).

Additional Recommendations (Not Intended for Legislation)

Robust research of outcomes: we recommend funding and support for longitudinal studies that look into the outcomes for children and families over time and compare how children and families fared when section 211 report recommendations were implemented, not implemented, or when no report had been prepared. When recommendations were implemented, studies should explore whether any training, experience, or practices of the evaluator resulted in recommendations that led to positive or negative outcomes for children and families.

Training for judges and lawyers: we recommend that judges and family lawyers receive foundational training in social science. The purpose of this training would not be to replace expert evidence when needed, but to assist judges and family lawyers to understand both the uses and the limitations of social science and be better-informed recipients of expert evidence.