SECTION 211 TOOLKIT

Rise
WOMEN'S LEGAL CENTRE

WITH GENEROUS SUPPORT FROM WOMEN AND GENDER EQUALITY CANADA

Canada

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Section 211 Toolkit

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Rise Women's Legal Centre
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Canada

DEDICATION

This report is dedicated to all the women who courageously shared their experiences with us in hopes of making the legal system safer for survivors.

This document does not contain legal advice. If you or someone you care about requires legal advice, please consult with a lawyer.

The views expressed by project participants are their own. Any errors or omissions, however, are the responsibility of Rise Women's Legal Centre.

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Rise
WOMEN'S LEGAL CENTRE

Our office is located on unceded territory of the **Skwxwu7mesh** (Squamish), **Tsleil-Waututh** (Burrard), and **xʷməθkʷəy̓əm** (Musqueam) Nations.

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Foreword

By the Honourable Donna J. Martinson, QC, LLM

This report by Rise Women's Legal Centre makes a significant contribution to the realization of the principle of equality for women as an aspect of the pursuit of justice for all British Columbians in family law cases. The report's focus is allegations of family violence where a parenting assessment is being considered based on s. 211 of B.C.'s *Family Law Act*. It takes a multifaceted approach which includes the creation of an invaluable, detailed, practical, step-by-step toolkit to assist lawyers in these cases.

Rise obtained information from women living throughout BC, each of whom was involved in a parenting assessment. They engaged two experts to study the methodology and conclusions in the assessments involved and comment on them. The experts raised significant concerns about the fairness of the processes used and the outcomes reached. When the assessments were compared to highly regarded international standards and guidelines for parenting assessment in family violence cases, breaches of these standards and guidelines were identified.

The report connects this research with earlier research in BC and research in other parts of Canada and internationally, all of which reach similar conclusions. It reviews the international standards and guidelines (summarized in the appendix), recommends that similar provincial standards be created in BC, and makes concrete content suggestions. I too strongly support their creation and their application to all parenting assessments prepared in the province. There are of course also valuable assessments prepared by competent assessors that enhance the ability of the justice system to achieve fair, just, equality-based outcomes. Provincial standards would provide a consistent framework for achieving such outcomes in every case, rooted in fundamental legal principles, and supported by well-founded social science.

The report's focus is allegations of family violence where a parenting assessment is being considered based on s. 211 of B.C.'s *Family Law Act*. It takes a multifaceted approach which includes the creation of an invaluable, detailed, practical, step-by-step toolkit to assist lawyers in these cases.

The women's equality concerns raised in the report include: (1) the minimization or disappearance of family violence generally, and in particular when there are allegations of parental alienation; (2) an absence of family violence expertise; (3) a lack of screening for family violence; (4) an absence of knowledge about trauma and its implications; (5) a lack of assessor impartiality, particularly when the credibility of women's allegations of violence are being considered; (6) a lack of cultural competence; and (7) a legally unfounded bias in favour of joint custody. Also concerning are the suggestions, first, that some women do not report violence out of fear that they will be unfairly accused of alienation, and second, that some lawyers have advised women not to raise the question of violence in court proceedings for the same reason.

The international standards and guidelines referred to in the report address many of these concerns and include the need for: (a) a systematic approach when family violence may be at issue; (b) in-depth knowledge about family violence and its impact; (c) initial and ongoing screening for violence in all cases, not just those in which family violence has been identified as an issue; (d) impartial information gathering; (e) knowledge about the use of and limitations of psychological testing; and (f) impartial analytical processes. They also suggest specific steps that should be taken to avoid assessor bias.

This report enhances the ability of the justice system to ensure equality for and prevention of discrimination against women in family violence cases.

The Rise report is about women's equality, prepared by an organization designed to support women and their substantive equality rights. The views of groups supporting women's equality (whose membership often includes lawyers and other professionals) have not always been fully valued in our justice system, sometimes being unfairly minimized or dismissed as being the views of a special interest group. Justice Rosalee Abella, in a Globe and Mail tribute to Justice Ruth Bader Ginsburg after her death, described the discriminatory views Justice Ginsberg faced when she began her legal career and how they could be dismissed in this way: "They called women and minorities seeking the right to be free from discrimination special interest groups seeking to jump the queue."

Happily, as a society we have arrived at the point where, as law professor Rosemary Cairns Way (University of Ottawa) has stated so well, we recognize that including the views of women-serving organizations is not about giving problematic access to special interest groups. Such a suggestion assumes that ensuring equality and preventing discrimination are ideological positions rather than legal obligations. This report enhances the ability of the justice system to ensure equality for and prevention of discrimination against women in family violence cases.

Introduction

This toolkit provides an overview of some of the major issues that lawyers may encounter when requesting or responding to psychological reports ordered under s. 211 of the *Family Law Act*. Section 211 reports (sometimes called "custody and access reports" in other jurisdictions) are frequently ordered in difficult family law cases involving parenting disputes and are intended to provide judges with independent information about the views and needs of children. They are a common feature of BC family law cases and can have important consequences for the participants.

This toolkit was developed primarily for lawyers working with women who have experienced family violence, but it may also be useful for lawyers who would like to learn more about s. 211 reports generally.

Part 1 of this toolkit provides an overview of the legal framework that governs s. 211 reports and includes a discussion of how s. 211 reports are entered as evidence.

Part 2 discusses some specific issues that may impact clients who have experienced family violence, with particular reference to a case study of BC s. 211 reports completed as part of this project.

Part 3 provides practice tips and considerations for lawyers before, during, and after s. 211 reports are ordered.

Appendix A includes our recommendations for standards and guidelines for assessors in BC. We have also included an in-depth discussion of some of the international standards and guidelines that inform our recommendations, in the hope that this information will be useful to practitioners in crafting s. 211 orders that better serve their clients.

This toolkit was developed primarily for lawyers working with women who have experienced family violence, but it may also be useful for lawyers who would like to learn more about s. 211 reports generally.

ABOUT OUR CASE STUDY

Between 2018 and 2020, Linda Coates, PhD and Ellen Faulkner, PhD analysed 27 s. 211 reports that were shared by 21 B.C. women who alleged family violence within their relationship (several participants shared multiple reports). Four of the reports were prepared by family justice counsellors, one by a marriage and family therapist, and the remaining 22 were prepared by registered psychologists. Two of the reports were ordered under s. 211, but also included a parenting capacity (child protection) component. Twenty of the 21 women who shared reports also participated in interviews to provide additional contextual information.

We acknowledge and appreciate that the reports analysed for our project are not a random or representative sample of s. 211 reports, as it is difficult to ensure randomization and representation given the restrictions on accessing s. 211 reports. However, despite that limitation, this case study does provide a useful snapshot of how s. 211 reports are being prepared in BC in cases where family violence is alleged and uncovers issues to which lawyers must be attentive.

We refer to quotes and statistics from this case study throughout this report. Unless otherwise attributed, all quotes in this report are from women who were interviewed as part of this case study; every effort was made to preserve their anonymity. Where quotes from the s. 211 reports could have identified the women, their answers were paraphrased, indicated by << >>. Every attempt was made to preserve the participants' original meaning and to accurately record their reflections and experience.

Further information on our case study is set out on page 26 to 28.

Where quotes from the s. 211 reports could have identified the women, their answers were paraphrased, indicated by << >>.

PART 1

Legal Framework & Evidentiary Considerations

History

The *Family Law Act (FLA)* came into force in March 2013, replacing the *Family Relations Act (FRA)*. Section 211 of the *FLA* "carries over former s. 15 of the *Family Relations Act* with minor changes to promote clarity,"[1] and the jurisprudence that developed under s. 15 of the prior legislation continues to guide how courts interpret and apply s. 211 of the new regime.

Notwithstanding this continuity, it is worth noting that under s. 15, courts were granted the authority to direct an "investigation" into a family proceeding, a characterization which arguably underlies the fact-finding role that continues to be granted to s. 211 assessors, and which is discussed in more detail below. Additionally, s. 15 required that the reports be provided to the parties at least 30 days before the report was given to the court, unless an exemption was granted. This timeframe was removed from the *FLA*; however, family court rules provide that reports be filed with the court and served on all parties at least 42 days before the scheduled trial date in Supreme Court[2] and at least 30 days before the trial date in Provincial Court.[3]

Ordering a Section 211 Report

Section 211(1) of the *FLA* reads:

> *211(1) A court may appoint a person to assess… one or more of the following:*
>
> *(a) the needs of a child in relation to a family law dispute;*
>
> *(b) the views of a child in relation to a family law dispute;*
>
> *(c) the ability and willingness of a party to a family law dispute to satisfy the needs of the child.*

In practice, despite the sections' tripartite structure, s. 211 reports tend to fall into two categories: Views of the Child reports (sometimes called "views only" reports) ordered under subsection (b), and full s. 211 reports (sometimes called "views and needs" reports) which include an assessment of all three factors set out in s. 211(a) through (c).

Views of the Child reports typically record what the children say about spending time with both parents and where they would like to live. Depending on the author, and the judge's order, they may also include interviews with the parents and an assessment about what the child(ren) said, such as whether they seemed coached, influenced, or ambivalent; the child's maturity; the child's ability to form views on their own; and the child's ability to understand the circumstances.[4] Views of the Child reports are typically fewer than 10 pages long.

Section 211 reports tend to fall into two categories: Views of the Child reports ordered under subsection (b), and full s. 211 reports, which include an assessment of all three factors set out in s. 211(a) through (c).

Full-length s. 211 reports may be prepared by family justice counsellors but are also frequently prepared by registered psychologists, who may include psychometric testing or other more in-depth forms of assessments. In our case study, the average length of a full s. 211 report was 61 pages, and the longest report in our case study was 191 pages.

Either party may request that a judge order a report, or a report may be ordered by the court on its own initiative. While the onus rests on the party requesting the s. 211 report to demonstrate why it is necessary, the threshold is very low. Pursuant to s. 211(3), the application may also be made without notice.

Where there are costs involved in preparing a report, the court has discretion to allocate the costs between the parties pursuant to s. 211(5).

Who Can Prepare a Section 211 Report

In accordance with s. 211(2) of the *FLA,* reports may be prepared by a family justice counsellor, a social worker, or another person approved by the court. Unless each party consents, the assessor must not have had a previous relationship with either party.

As of the time of writing, there are no universal regulations, guidelines, standards, or practice directives that govern the preparation of s. 211 reports in BC. Rather, each category of assessor is governed by their own professional ethics and/or employment requirements. According to the

Supreme Court of BC, assessors are "free to use their education, experience and expertise to conduct the assessments with an eye to the objective of assisting the courts in determining what is in the children's best interests."[5] Some other jurisdictions have developed guidelines and standards for assessors and information about these standards can be found in Appendix A.

Family Justice Counsellors

Family justice counsellors are provincial employees who work in Family Justice Centres around BC. In addition to completing court-ordered reports under s. 211 of the *FLA*, family justice counsellors provide a range of free services including short-term counselling, legal education and mediation.[6]

Family justice counsellors are included in the definition of "family dispute resolution professional" in s. 1 of the *FLA.* Consequently, they are also captured by s. 8 of the *FLA* which requires family dispute resolution professionals to assess whether family violence is present and the extent to which family violence may adversely affect the safety of that party and their ability to negotiate a fair agreement.

Family justice counsellors complete mandatory training on many topics, including family violence. Family justice counsellors use a standardized tool to screen all clients for family violence and follow internal guidelines that govern what they include in Views of the Child and full s. 211 reports. They do not administer psychometric tests.

Views of the Child s. 211 reports prepared by family justice counsellors are free of charge. At the time of writing, the wait time for a Views of the Child report was approximately two to four months.

Full s. 211 reports may also be prepared by family justice counsellors at no charge. At the time of writing, the wait time for a full s. 211 report was approximately nine to 14 months.

Note, however, that time to prepare reports can also vary significantly between communities. Changing public health directives may also impact the availability of a report writer and/or their ability to travel. We therefore recommend that you contact your local Family Justice Centre to determine current wait times for reports.

Views of the Child reports are typically fewer than 10 pages long.

In our case study, the average length of a full s. 211 report was 61 pages, and the longest report in our case study was 191 pages.

Social Workers

While social workers are permitted to prepare s. 211 reports under the *FLA*, case law suggests that in practice relatively few reports seem to be prepared by members of this profession. Social workers are not included in the s. 1 definition of "family dispute resolution professional."

The BC College of Social Workers has developed Standards of Practise for reports written by social workers, which include some specific provisions relating to domestic violence.[7] Social workers may also be members of the Association of Family and Conciliation Courts, which provides a set of guidelines addressing assessments where family violence is present. These standards are not regulatory, however. Further information about these standards can be found in Appendix A.

Social workers can administer psychometric tests if they have the necessary training.

We have not had the opportunity to review any reports prepared by social workers and therefore cannot provide any indication of the average length or cost.

Clinical Counsellors

The *FLA* does not specifically identify clinical counsellors as professionals who can conduct s. 211 assessments, but there is general agreement that clinical counsellors would be qualified to write assessments. As with social workers, our research suggests that a relatively small number of s. 211 reports are written by this group of assessors.

Clinical counsellors are not included in the s. 1 definition of "family dispute resolution professional." They are required to adhere to a Code of Ethical Conduct and Standards of Clinical Practice established by the BC Association of Clinical Counsellors. These do not include any provisions specifically relating to family violence. Clinical counsellors may belong to the Association of Family and Conciliation Courts which provides a set of non-regulatory guidelines that address family violence.

Clinical counsellors can administer psychometric tests if they have the necessary training.

We have not been able to review any reports prepared by clinical counsellors and therefore cannot provide any indication of the average length or cost.

Registered Psychologists

Although the *FLA* does not specifically identify psychologists as a profession who can conduct s. 211 assessments, they are commonly appointed by judges, and members of this profession write a significant number of the s. 211 reports prepared in BC.

The College of Psychologists of BC is responsible for regulating the practice of psychology in accordance with the *Health Professions Act.* The College sets standards for competent and ethical practice and adjudicates complaints against psychologists by members of the public. The College has established a Code of Conduct for registered psychologists which sets out general standards for competency, including the qualifications that are necessary to administer psychometric tests and the requirements for providing opinions generally, but does not provide specific guidance on the preparation of s. 211 reports or require that assessors have any mandatory training regarding family violence. Like the other professionals listed here, psychologists may belong to the Association of Family and Conciliation Courts, which provides a set of non-regulatory guidelines for addressing family violence in assessments.

In our case study, the average cost for s. 211 report prepared by a psychologist was $16,296. Note that the results of many psychometrics tests can only be reviewed by another assessor, so the cost may increase significantly if counsel needs to obtain the original assessor's notes (approximately $200 to $300), hire a second assessor to review test results and advise on cross-examination (approximately $2,000 to $3,000), prepare a critique report, (approximately $5,000 to $7,000), or pay the original assessor to be present in court for cross-examination (approximately $10,000).

Hear the Child Society and Child and Youth Legal Centre (Children's Lawyer)

The BC Hear the Child Society and Child and Youth Legal Centre can both assist with placing a child's evidence before the court, but they do not write s. 211 reports. The BC Hear the Child Society maintains a roster of trained neutral individuals, including many lawyers and mediators, who can provide the court with a non-evaluative report pursuant to s. 202 of the *FLA.* The Child and Youth Legal Centre is also able to represent a young person in court pursuant to s. 203(1) of the *FLA,* by order of the court or by consent of the parents or guardians.

Views of the Child s. 211 reports prepared by family justice counsellors are free of charge. Full s. 211 reports may also be prepared by family justice counsellors at no charge.

In our case study, the average cost for s. 211 report prepared by a psychologist was $16,296. Note that the results of many psychometrics tests can only be reviewed by another assessor, so the cost may increase significantly.

Admissibility: Expert Evidence or Something Else?[8]

Court-appointed assessors, under first s. 15, and now s. 211, occupy a unique role in family law proceedings involving children. They are permitted to engage in fact-finding and provide expert opinions on issues outside the general knowledge of lay witnesses but are exempt from at least some of the vigorous scrutiny and procedural safeguards that normally accompany expert opinion evidence.

According to the ordinary rules of evidence, witnesses are confined to testifying only to facts within their knowledge, observation and experience. Witnesses are generally precluded from giving their opinions to the court. An exception is made for expert witnesses, who may be permitted to provide the court with opinions based on specialized knowledge and experience in order to assist the trier of fact to understand complicated evidence and the conclusions that can be drawn from such evidence.

Canadian courts have developed strict evidentiary procedures with respect to the admissibility of expert evidence due to concerns that such evidence will "be misused and will distort the fact-finding process" and be given "more weight than it deserves."[9] The key test for expert evidence was laid out by the Supreme Court of Canada in *R v Mohan (Mohan)* and requires that an expert opinion be 1) necessary to assist the trier of fact; 2) logically relevant; 3) presented by a properly qualified expert; and 4) not subject to any other exclusionary rule.[10]

In *White Burgess Langille Inman v AB*[11] (*White Burgess)* the Supreme Court of Canada reiterated that while expert evidence can "be a key element in the search for truth, it can also pose special dangers" and accordingly the Court has "progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role… to ensure that expert opinion evidence meets certain basic standards before it is admitted."[12] The Supreme Court of Canada confirmed that application of the *Mohan* factors is required as a threshold step to the admission of expert evidence. However, even where expert evidence meets the preconditions set out in *Mohan*, *White Burgess* held that the trial judge must still exercise their role as gatekeeper to ensure the benefits of admitting the evidence outweigh the potential harm.

In *R v Abbey,* Justice Doherty articulated the reasons behind the presumptive inadmissibility of expert evidence, holding that judges ought to be wary of the expert usurping the role of the finder of fact given the potential unreliability of expert evidence.[13] As judges are the gatekeepers of the justice system, they must carefully weigh the risks inherent in the admissibility of expert evidence because of the complexity of the material underlying expert opinion, the high status of the expert, the technical nature of the opinion, and the limited ability of the cross-examiner to test the evidence.[14]

As expert evidence is normally presumptively inadmissible, expert reports are generally entered into evidence following admissibility hearings which subject the expert witness to a process of

qualification. The witness's expertise is demonstrated, any limitations on the scope of their expertise can be established, and biases they hold may be identified, in addition to ensuring that their evidence meets all of the requirements established by the Supreme Court of Canada in *Mohan* and *White Burgess*.

The strict evidentiary rules governing expert opinion evidence apply to experts in family law cases as they do in any other civil or criminal proceeding, with one significant exception: s. 211 assessors.

Unlike other expert reports which are presumptively inadmissible, s. 211 reports appear to generally be treated as if they are presumptively admissible although this presumption is not explicitly stated in the *FLA* or in either the Provincial or Supreme Court rules.[15] While this may be less of a concern in cases where the report is largely confined to the factual observations of the author, for example in non-evaluative Views of the Child reports prepared by family justice counsellors, it is less clear why reports containing expert opinions that rely on specialised knowledge and testing should be exempted from the safeguards deemed necessary for all other expert evidence. This issue requires careful consideration by counsel whenever they are working on a case involving a s. 211 report.

The strict evidentiary rules governing expert opinion evidence apply to experts in family law cases as they do in any other civil or criminal proceeding, with one significant exception: s. 211 assessors.

The idea that court-appointed assessors occupy an exceptional role in family proceedings appears to trace back to the 1983 case of *Hamilton v Hamilton.*[16] Counsel in *Hamilton* questioned whether or not a s. 15 assessor under the *FRA*, who was a family justice counsellor, was properly an "expert witness in a family matter," and if not, whether facts in the report based on hearsay were required to be proven according to the normal rules of evidence. Counsel also sought clarity as to the status of the counsellor's recommendations.

Judge Collings opined that s. 15 created a new category of witness who gave "opinion evidence" based on "investigations carried on outside the Court" but who were not expert witnesses on the basis that they were "not dealing with matters outside the skills and perceptions of ordinary reasonable people."[17] It was not so much the assessors' professional expertise that the court sought out, as their "knowledge of and dealings with the people concerned in this case." Judge Collings maintained that the special training of a family justice counsellor, while helpful, was not fundamental to a s. 15 assessment in the same way that "a pathologist's [training is] in doing an autopsy." Since opinions as to family matters can be formed by ordinary people, Judge Collings found it doubtful that a s. 15 author would qualify as an expert witness, and the basis for admitting their evidence was completely dependent on the special status conferred by the statute.[18]

Judge Collings also found assessors to be somewhat analogous to probation officers, as their role was to assist the court as its "eyes and ears during their investigation and by advising the court as to future planning" — an analogy that continues to be drawn to this day.[19] The continuity of the case law between s. 15 of the *FRA* and s. 211 of the *FLA* means that the fact-finding role given to the original "investigators" has been carried over to our current "assessors."

The reasoning in *Hamilton* was adopted in its entirety by Justice Parrett of the BC Supreme Court in *Goudie v Goudie*[20] (*Goudie*), although in subsequent years BC courts have taken apparently conflicting positions on this issue.[21]

In *Goudie,* Justice Parrett also expanded on the rationale for treating assessors differently than an expert witness tendered by one or other of the parties, as the court was able to order an "independent person with specialized training"[22] to complete the investigation. Parrett J stated that the "safeguards built into the process include the early delivery of the investigation reports, the opportunity to call the investigator to the witness stand, and the opportunity to respond to the report generally by other evidence."[23]

These cases have continued to underlie and inform the current law with respect to the special status of s. 211 reports.[24]

Importantly, both *Hamilton* and *Goudie* concerned s. 15 reports produced by publicly funded family justice counselors who were preparing their reports without recourse to the battery of psychometric testing that may be administered by a private assessor in a s. 211 report ordered today. Moreover, the approach in both *Hamilton* and *Goudie* was endorsed in BC before *Mohan* and *White Burgess* set out the modern rules for expert evidence and "progressively tightened the rules of admissibility."[25] Judge Collings' assertion that an assessors' expertise is not essential to their reports "given that opinions about family matters can be formed by ordinary people" does not ring true where private assessors are relying on testing that requires specialised training to administer, whose underlying data cannot be reviewed by lawyers or the court because they do not have the expertise to interpret them, and where assessors give opinions and recommendations that are grounded in specialised knowledge.

While the analogy between s. 211 reports and Pre-Sentence Reports (PSRs) prepared by probation officers may make sense in the context of reports that essentially record the facts of an investigation, as in Views of the Child reports prepared by family justice counsellors, the comparison is far less compelling when it comes to full s. 211 reports or other reports requiring more detailed evaluations.

PSRs are governed by s. 721 of the Criminal Code, and they include information to assist the court in determining an appropriate sentence. PSRs are ordered only after an accused has been convicted at trial or entered a guilty plea, which is to say, after the ultimate issues at trial have already been determined. The expertise of probation officers is not at play in the same manner as that of an assessor because they are not required to provide an expert opinion; indeed, probation

officers do not make recommendations as to the specific sentence that should be imposed. Moreover, where aggravating information in a PSR is challenged by defence counsel, the judge cannot consider it unless the Crown calls evidence to prove it; the cost of this is born by the state. In contrast, full s. 211 reports regularly include opinions and recommendations based on specialised training and qualifications and there are entered into evidence during the trial proper to aid the court in deciding the ultimate issues. If private s. 211 authors do have to be available for cross-examination, they typically charge a significant fee which is frequently borne by the individual requesting cross-examination, and which can act as a significant deterrent.

Justice Donegan stated the distinction succinctly in *Golanka v Golanka,*[26] although this case did not deal with admissibility. Justice Donegan rejected the argument that a s. 211 report author was an "officer of the court" (unlike a probation officer) and stated in *obiter* that "an officer of the court is not a witness, but a person from whom the court accepts statements without qualification" whereas a s. 211 assessor is a "compellable witness subject to cross-examination."[27]

More recent case law from the BC Supreme Court and Court of Appeal have tended to suggest that assessors *are* experts after all, or something akin to, such that admission of s. 211 reports *may* be challenged for failing to meet the test in *White Burgess* — although these latter judicial pronouncements have been far from clear and explicit.[28] For example, the BC Court of Appeal held in *Williamson v Williamson*[29] that parental alienation and any proposed responses to it should be supported with admissible expert evidence following the steps outlined in *White Burgess*; since this evidence will generally be entered through a s. 211 report, this would require that reports including evidence of alienation pass an admissibility hearing.

Arguably, while fact-finding reports may be presumptively admissible following the rationale that in these circumstances the assessor is truly acting as the eyes and ears of the court, a more nuanced reading of *Mohan, White Burgess* as well as recent BC case law suggests that where reports contained specialised knowledge and opinions, counsel is well-advised to consider whether reports meet the regular criteria for admission of expert evidence and to contest admissibility if they do not.

While it may be the rare case that entirely fails the *Mohan* test, counsel should carefully consider whether an expert has acted outside the

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scope of their expertise or otherwise provided opinions without proper foundation and, where appropriate, challenge admissibility. After all, as Justice Dougherty observed in *Abbey*, [a] dmissibility is not an all or nothing proposition... [t]he trial judge may admit part of the proffered testimony, modify the nature or scope of the proposed opinion, or edit the language used to frame that opinion."[30] Where s. 211 reports offer both factual evidence and opinion evidence it should be open to the court to admit some aspects of the evidence while barring other aspects.

Ultimately, while the case law confirms that counsel may in some circumstances challenge the admissibility of s. 211 reports in accordance with *White Burgess*, the operation of s. 211(4), in which reports are delivered directly to the court after they have been ordered, coupled with the general tendency to treat reports as admissible, means that it is up to counsel to give special consideration to admissibility and raise any concerns with both the court and the opposing party as early as possible, and in compliance with Rule 11 of the Provincial Court (Family) Rules and Rule 13 of the Supreme Court Family Rules.

For a further exploration of the fact-finding role attributed to s. 211 assessors, please refer to *Family Violence and Parenting Assessments: Law, Skills and Social Context* by The Honourable Donna Martinson and Professor Emerita Margaret Jackson.[31]

Objectivity

Section 211 reports are generally presumed to be objective, and this is one of the primary justifications for the special status afforded these reports. Unlike experts who are hired by one of the parties, s. 211 assessors are appointed by the court, and this is supposed to ensure their impartiality.

However, it is important to distinguish impartiality from objectivity. Impartiality does not prevent an assessor from holding personal or professional biases, either towards particular groups of people or towards certain theories that an assessor favours over others. In her dissenting opinion in *Young v Young*,[32] Supreme Court of Canada Justice L'Heureux-Dubé stated that the role of experts in family law proceedings should be limited.[33] The majority agreed with her analysis regarding expert evidence, wherein she stated that the over-use of expert evidence can be costly, cause delays, and impede the judiciary's role as a gatekeeper. Specifically, she cautioned that judicial reliance on expert opinions may result in an over-use of these reports because of the belief that the expert opinion is objective.[34]

The type of expertise an expert has developed matters: a number of studies suggest that assessors who do not have expertise in family violence place too little weight on safety.[35]

Some of the theories and psychometric tests applied by assessors in s. 211 reports are controversial, at least when it comes to using them in the context of parenting assessments.[36] With only a single

expert giving evidence, the opportunity to meaningfully challenge their choice of methodology may be lost, even if the assessor remains impartial with respect to the two parties.

Assessors may also bring their own personal biases to bear in their reports due to the wide discretion permitted by the *FLA*, including their own biases about parenting schedules, gender roles, and cultural norms. There are significant concerns that some assessors appear to lack understanding of and sensitivity to the cultures of immigrant and newcomer clients. Many of the tests that private assessors commonly use are not appropriate for Indigenous clients or clients who approach relationships and caregiving from diverse cultural backgrounds.[37]

In some cases, despite the fact of being court-appointed, an assessor has been found to be biased in favour of one party by the presiding judge. For example, in *KW v LH*,[38] the court found after cross-examination that the assessor had indulged in advocacy for one party and the report was only marginally useful. However, the apparent bias was only revealed on cross-examination; if the assessor had not been examined, as is so often the case, the facts set out in the report would have been held to be *prima facie* true.

There are significant concerns that some assessors appear to lack understanding of and sensitivity to the cultures of immigrant and newcomer clients. Many of the tests that private assessors commonly use are not appropriate for Indigenous clients or clients who approach relationships and caregiving from diverse cultural backgrounds.

Finally, it is again worth noting the distinction in this regard between state-funded family justice counsellors and private assessors. When a court orders that a report be prepared by a family justice counsellor, the court and the parties do not need to give input into the specific identity of the assessor, nor does either party have to pay the assessor. However, when it comes to private assessors the person appointed is frequently proposed by one or both of the parties and is paid for by one or both of the parties. Under the *FLA,* it is permissible for a private assessor to be identified and requested by a single party, based on that assessor's particular reputation, and then paid for by that party. This is a particular risk where one party has significantly greater resources than the other, and in such cases, the distinction between a partisan assessor and a court-ordered assessor could seriously narrow.

Accordingly, counsel should always examine s. 211 reports critically, as they would any other expert report, and not simply assume that the report is objective because the assessor does not have a prior relationship with either party. While investigations should generally be conducted before the report is prepared, counsel may search case law, review an expert's history of academic publication, and do web-searches for quotes in media or associations to determine whether professional or personal biases may be present. Counsel should also review the final report critically and determine whether the conclusions and recommendations offered can be rationally drawn from the underlying evidence and whether the assessor considered multiple hypotheses or simply adopted their preferred theory.

Challenging Section 211 Reports

> *"We didn't go to court. I just complied. I settled. I felt that if I did go to court I would lose because the report painted me as someone out of control."*

Admissibility

There is a low threshold for admissibility for s. 211 reports generally, and in many cases the reports will meet the requirements for admission of expert evidence in *Mohan* and *White Burgess* even if admissibility is challenged. However, counsel should always consider whether a report should be fully or partially challenged at the admissibility stage, including on the basis of bias.

Reliability

Once admitted, s. 211 reports may still be challenged on the grounds that they lack reliability or are factually inaccurate. Challenges as to reliability will generally occur through the introduction of other sources of contradictory evidence in addition to cross-examination, and will generally go to the weight given to the report.

Rebuttal or Critique Reports

> *"I was desperate. I didn't know what to do. I could ask another psychologist to do a critique of it, but I did not have the money. They said it would cost $4,500.00 and I didn't have the money. So, I put it aside. So, I feel sorry for any single mother who has limited resources. I feel their desperation and their hopelessness, due to a report that misrepresents the truth, and there is no help out there."*

Sometimes parties commission a report that rebuts or critiques the original s. 211 report. While such a report may be an invaluable aid to preparing for cross-examination, counsel should be aware of the significant hurdles to entering such a report into evidence at trial.

While the threshold to admit s. 211 reports is low, critique or rebuttal reports must be found admissible in accordance with *Mohan* and *White Burgess.*[39] Courts have expressed a strong preference for cross-examination of the report writer, with the BC Supreme Court holding in *Dimitrijevic v Pavlovich*[40] that collateral critiques should only be permitted after cross-examination of the original assessor.

There are two main types of rebuttal reports. The first type challenges the methodology used by the original expert. The second type of report may engage in a separate assessment for the sake of reaching a different conclusion.

Courts have shown reluctance to admit either type of critique reports into evidence. In *Hejzlar v Mitchell-Hejzlar,*[41] Justice Burnyeat held that critique reports will rarely be admissible since the original report is prepared for the benefit of the court and is therefore neutral while an expert preparing a critique is hired as an agent of an unhappy party. Accordingly, Justice Burnyeat did not accept into evidence a report by a second psychologist who suggested that the original assessor had failed to adhere to the Code of Conduct of the College of Psychologists, finding it was not relevant to the issues which had to be decided.[42]

In *Dimitrijevic v Pavlovich,*[43] Justice Kent similarly ruled a critique report inadmissible since concerns regarding methodology could be raised by way of cross-examination rather than through a new report. Justice Kent went on to observe that where authors of critique reports have not conducted their own tests they "are unable to assist the court with any informed conclusions or recommendations respecting parenting arrangements."[44] While Justice Kent provided a useful analysis of why critique reports may be relevant and necessary, and emphasized the gatekeeping role of the court, he ultimately concluded that critique reports would rarely be beneficial enough to the trial process to warrant admission into evidence.

In considering Justice Kent's reasons in *Dimitrijevic*, Martinson and Jackson observe that "[e]ach of these is unquestionably a reason why a critique report may be unnecessary or inappropriate in a specific case. We respectfully suggest however that, particularly when dealing with the unique and complex challenges that arise in family violence and/or alienation cases, the need for such a report should be considered without starting from the position that they should only rarely be ordered. The overarching consideration is whether the report is relevant and necessary to assist the court in the exercise of its oversight role and in ensuring a fair and just outcome overall."[45]

We recommend counsel do a thorough case law review before hiring an assessor to prepare a critique report to ensure it can be used for the intended purpose.

"I was desperate. I didn't know what to do. I could ask another psychologist to do a critique of it, but I did not have the money. They said it would cost $4,500.00 and I didn't have the money. So, I put it aside. So, I feel sorry for any single mother who has limited resources. I feel their desperation and their hopelessness, due to a report that misrepresents the truth, and there is no help out there."

Cross-Examination

The primary means of challenging an unsatisfactory s. 211 report is through cross-examination of the assessor. In Provincial Court (Family) Rule 11(1.2) states that if a party wishes to contest any of the facts or opinions in a s. 211 report, they must cross-examine the assessor.

Due to the technical nature of many s. 211 reports, counsel will likely require a second expert to fully understand the strengths and weaknesses of the reports and prepare for cross-examination, even if the second assessor is not preparing a critique report. In addition, this is the only way in which counsel can access the results of any psychometric testing since professional assessors will only release their data to another expert with the professional qualifications to interpret the test results.

Counsel should factor in the additional costs of hiring a second expert and cross-examining the first expert when the s. 211 report is ordered as these additional costs can add thousands of dollars to the cost of the original s. 211 report.

From a systemic perspective, the reliance on cross-examination as the primary means of identifying weaknesses in s. 211 reports is extremely problematic. Cross-examining an experienced expert is frequently a challenging prospect even for counsel and cross-examining without sufficient skill or information can be detrimental to one's case.

Also remember that if counsel does not cross-examine the assessor, any facts set out in s. 211 reports are considered *prima facie* true,[46] even where the facts are based on hearsay, and without the need for further proof.[47]

From a systemic perspective, the reliance on cross-examination as the primary means of identifying weaknesses in s. 211 reports is extremely problematic. Cross-examining an experienced expert is frequently a challenging prospect even for counsel and cross-examining without sufficient skill or information can be detrimental to one's case. In *S(AR) v T(MC)*[48] the Provincial Court commented "it is generally not a good idea for an articled student to cross-examine any expert witness. It was specifically not a good idea in this case because this doctor is a very experienced expert witness." If it is not a good idea for an articled student to challenge an experienced expert in their own field, it is unclear how unrepresented litigants are to take on this task effectively.

The right to cross-examine is in no way a substitute for meaningful standards, guidelines and evidentiary rules that apply to all cases and protect all clients; nor is it a sufficient safeguard to ensure that all clients can meaningfully challenge incomplete or inaccurate expert evidence.

Court's Perception of 211 Reports

> *"The judge in the first trial agreed how biased the report was against me and yet he turned around and accepted all of the psychologist's recommendations."*

While judges are not bound by any of the findings or recommendations in s. 211 reports, in general, research suggests that judges give significant weight to the content and recommendations in s. 211 reports and have high levels of confidence in the opinions of assessors.

A 2005 survey of BC judges found that 60 per cent of responding judges stated that they gave considerable or substantial weight to recommendations contained in the reports, and see the reports as an independent source of evidence and unbiased information.[49] In October 2018, JT Beck analyzed a sample of 43 cases prepared in BC under the *FLA* between 2016 and 2018.[50] They found that in 90 per cent of cases, the court accepted and implemented most, if not all, of the recommendations in the s. 211 reports. Reasons for judgement in s. 211 cases often rely heavily on recommendations from the assessments, and judges may quote portions of these reports in their reasons for judgement.

Judges must determine the weight that should be afforded to the content of s. 211 reports.[51] However, particularly due to the lack of procedural and evidentiary safeguards around the use of s. 211 reports, many people have raised concerns that judges may place too much reliance on the reports rather than strictly exercising their gatekeeping functions. As explained by the Honourable Donna Martinson,

> *"My experience has been that some judges rely heavily on these reports in contested cases, thinking that the expert is in the best position to know what is in a child's best interests. However, in those cases it is the judge who has the responsibility to make that best interests decision. In doing so the judge should look critically at the qualifications of the expert and the basis upon which the expert's decisions were reached."*[52]

There may be little to attenuate the inclination to defer to the expert's opinion where s. 211 reports are authored by a small number of assessors who are well known to the court and have become practised professional witnesses, where judges and lawyers do not have the expertise to independently identify weaknesses in the reports, where critique reports are rarely allowed into evidence, and where cross-examination is also relatively rare.

Summary

Given the important role that s. 211 reports play in many family law cases, one might expect that there would be significant safeguards governing their use, but in fact the reverse is true.

The safeguards identified by Justice Parrett in 1993 — prior disclosure of the evidence, the opportunity to call contradictory evidence, and the opportunity to cross-examine — are no greater than those that apply to the testimony of any other "ordinary" witness. However, the unique fact-finding role given to s. 211 assessors, coupled with the wide discretion to provide experts opinions based on the assessors' views about what is relevant is significantly broader that than the role of a regular expert. At the same time, s. 211 assessors are frequently exempted from the rules that normally govern the admission of expert evidence and are insulated from critique by their peers due to limitations on the introduction of contradictory expert opinions.

Where an assessor fails to prepare a fair report or fails to adhere to their code of conduct or ethics, or simply makes mistakes in their recording of the facts, the only recourse is frequently to cross-examine the expert — a difficult and expensive undertaking. Counsel should therefore never take the decision to order a s. 211 report lightly.

In summary:

- There are no general guidelines, regulations, or standards that govern what can be included in s. 211 reports. Individual assessors are regulated by their own professional regulators and/or employer, and are given wide discretion in preparing the reports.
- Section 211 assessors play a fact-finding role that falls outside the scope of a traditional expert report. Where reports are unchallenged the facts contained in the report will be found to be *prima facie* true, including when they are based on hearsay evidence.
- Section 211 reports have a low threshold for admissibility. Concerns raised about reliability or bias will generally not result in exclusion of the report but will only go to weight.
- Section 211 assessors have traditionally been seen as something distinct from a regular "expert", however, where the experts are providing expert opinions that fall outside the scope of regular knowledge, counsel should still consider whether admissibility should be challenged in accordance with *Mohan* and *White Burgess* on a full or partial basis.
- Once admitted, the primary means of challenging a s. 211 report is through cross-examination which may present considerable financial barriers to clients who do have counsel and even more significant procedural barriers to clients who do not.
- While judges are not bound by s. 211 reports, they tend to place a high level of confidence in them and there is a concern that they will rely heavily on facts and recommendations in the reports.

PART 2

Family Violence — Special Considerations

One of the more concerning observations about cases involving s. 211 reports is the way in which violence can vanish from consideration once a report has been ordered.

In an unpublished review of recent BC cases considering s. 211 reports, JT Beck found that family violence was alleged in 55 per cent of the total cases but was only addressed in 27 per cent of the cases in which allegations were made.[53] Beck also observed a significant disconnect between assessors and judges when it came to family violence, with one or the other addressing it or ignoring it. In 2018, Linda Neilson conducted a pan-Canadian survey of alienation cases and found that once an allegation of alienation was made and a psychological report was ordered, indicators of family violence tended to be ignored in the final report. She found that 41.5 per cent of the parental alienation cases she reviewed involved assertions of domestic violence and child abuse by the other parent. However, evaluation of these claims by a domestic or family violence expert, were only ordered or considered in 2.8 per cent of cases.[54]

The following section highlights some of the concerns that were identified by Drs. Coates and Faulkner in their recent review of BC s. 211 reports and includes references to related academic research.

A Note On Our Case Study

Between 2018 and 2020 Linda Coates PhD and Ellen Faulkner PhD analysed 27 s. 211 reports from BC, which were shared by 21 women who indicated they had been the victim of family violence within their relationship (some had multiple reports completed). Four of the reports were prepared by family justice counsellors, one by a marriage & family therapist, and the remainder by Registered Psychologists. Two of the reports included a parenting capacity component. Twenty women also participated in interviews to provide additional contextual information. Unless otherwise attributed, all quotes in this report are from women who were interviewed as part of this case study; every effort has been made to preserve their anonymity. Where quotes from the s. 211 reports could have identified the women, their answers were paraphrased, indicated by << >>. Every attempt has been made to preserve the participants' original meaning and to accurately record their reflections and experience.

This sample of cases cannot be said to be a random or representative sample. We note that due to the small sample size readers should be careful about extrapolating from our findings. The reports reviewed as part of this project were voluntarily shared by women who were unhappy with their experiences and so, perhaps, it is unsurprising that Coates and Faulkner found their s. 211 reports to be problematic.

At the same time, the results of this case study should be a red flag to lawyers and the legal system, as the cases we reviewed frequently failed to meet the best practises and standards that have been articulated in detail in many other jurisdictions.

Proponents of s. 211 reports sometimes assert most reports in BC are prepared to high standards and, by implication, the small number of reports provided to organizations like Rise are just a few bad examples. However, this is not an adequate response to a systemic problem that, like any systemic problem, is likely to disproportionately impact those already on the margins, those experiencing violence and trauma, and those whose financial circumstances do not permit them to access to lawyers. All clients have the right to expect that when the law provides for and the court orders an assessment of their case, that it will be completed fairly and competently, by an assessor with the requisite expertise. This makes it imperative that the government and/or courts establish strict standards and guidelines for the preparation of reports at the outset, and that lawyers and judges guard against problematic reports when they are entered at trial.

Moreover, the assumption that most s. 211 reports are in fact helpful to the parties may be an article of faith that does not hold up to close scrutiny. Other BC women's organizations have conducted research about the harm caused to women experiencing violence by first s. 15 and subsequently s. 211 reports,[55] and the complaints and concerns raised in this research have persisted over many years.[56] In contrast, we are unaware of a single study conducted in BC or elsewhere that would support such a positive view of s. 211 reports generally. For example, we have not seen a single study showing that a more representative sample of reports has demonstrated that they were

prepared in line with best practices, clearly addressed family violence, were beneficial to the parties who participated, or had positive impacts on the subject children, either in the long or short term.

This dearth of research into the true impact of assessments has been noted by others. In 2016, Dr. Ira Turkat wrote in the Court Review that "[u]nfortunately, even today's prominent proponents of child-custody evaluations admit that at the present time there is still no scientific evidence whatsoever that a child-custody evaluation results in beneficial outcomes for the children involved" or that "mental-health professionals are better at making child-custody decisions than anyone, be they professionals, laypersons, or otherwise."[57] Turkat went on to identify several factors, as well as a recent American study, which suggested that such assessments might actually be detrimental to many families. This study, which included 101 individuals in 35 US states, found that nearly one in four children reportedly experienced negative effects as a result of the custody evaluator's recommendations, and one in five were reportedly harmed or their lives were made worse by the custody evaluator's recommendations. Sixty-five per cent of all parents that participated in the study said that their children would have been better off if the money had not been spent on the child-custody evaluation, including in cases where the parents were not reporting other negative effects.[58]

Drs. Jonathon Gould and Allan Posthuma (who at the time was a regular s. 211 report author in BC), wrote a defence of child-custody evaluations in response stating "since there is no empirical examination of the short- and long-term effects of expert opinions regarding custodial placement and decision making on judicial determinations, it is just as easy to argue that custody evaluations may be helpful." [59] That this is the best defence that could be mounted is cause for concern.

Turkat responded point by point to Gould and Posthuma's defence,[60] accusing them of presenting "ad hoc justification[s]", "jargon" and statistics which risked misleading courts; turning the judiciary into "the custody-evaluator police" to compensate for the poor quality of the evaluations; and that they "demand substantiation from others [to establish negative impacts of reports that] they don't demand from themselves [to establish positive impacts]. Dr. Postuma retired not long after these articles were published, apparently leaving behind multiple unresolved investigations alleging that he had violated the College of Psychologists of BC's Code of Conduct. Another psychologist hired

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to review his work highlighted serious concerns about how he had dismissed claims of domestic violence, and how he interpreted the results of psychological questionnaires.[61]

Noting the limitations of our own research, we strongly recommend that the Provincial Legislature finance, and the BC Courts permit, a broader review of s. 211 reports submitted to BC family courts to determine whether they comply with the international standards and guidelines that have been developed in other jurisdictions, whether they are dealing fairly and effectively with claims of family violence, and to determine both the short- and long-term impact of such reports on the subject families.

The Vanishing of Violence

> *"My judge dismissed the violence I experienced and placed my children with their dad even though he strangled me."*

All of the s. 211 reports reviewed included significant allegations of family violence disclosed by women. Coates and Faulkner found that these allegations were not dealt with in a thorough way by any of the assessors.

In their review of s. 211 reports, Coates and Faulkner found that the women disclosed a broad range of violence which the assessors had recorded in their reports, outlined in the following table.

Type of violence	Times language mentioned in 211s	Language mentioned at least once in 211s	Percentage of reports language mentioned in
Physical/sexualized	76	17/27	80.9%
Coercion / threat	37	13/27	61.9%
Intimidation	10	8/27	38.0%
Emotional abuse	38	14/27	66.6%
Isolation	4	4/27	14.2%
Using children	3	3/27	14.2%
Male privilege	2	2/27	9.5%
Economic abuse	49	13/27	61.9%
Stalking	3	3/27	14.2%
Denying necessities of life	6	5/27	23.8%

Notwithstanding this broad range, Coates and Faulkner found the assessors tended to conclude violence was not an issue in deciding the best interests of the child. For example, assessors often concluded that the violence was historical rather than ongoing, that the disclosures were part of an alienation strategy, or that the violence was not serious enough to be a factor in deciding the best interests of the children. Even admissions by fathers that they had committed acts fitting the definition of family violence were dismissed by the assessors.

Numerous women who were interviewed indicated they had given the report writers clear descriptions of their ex's use of violence and/or that the assessor did not want to hear about evidence of family violence, recalling:

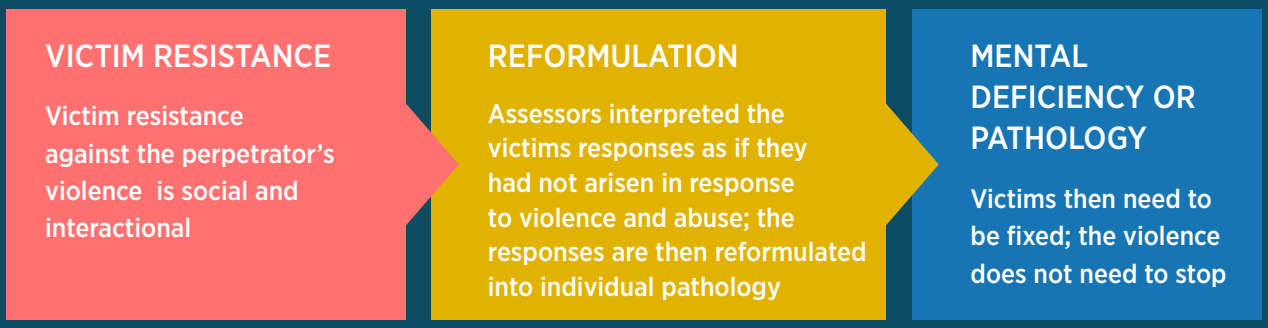
- *"I told her my ex had sexually assaulted me."*
- *"...Told him that I... had just been assaulted."*
- *"I told him about the abuse."*
- *"He did not comment on the family violence information I gave him."*
- *"The assessor told me not to say anything about the domestic violence. She said to me, "I don't want to hear about it." Whenever I brought it up, she would just shut me down."*
- *"I felt like my children and I were dismissed."*

According to Coates and Faulkner, children's views of their own safety were often disregarded by the assessors. For example, when children clearly communicated that they did not want to see their fathers because they were violent or abusive, this was reformulated into evidence that the mothers were engaging in parental alienation.

This finding is consistent with research that suggests that when assessors lack sufficient education and expertise in family violence, there is a real risk that they will pay scant attention to it, and ignore associated risks.[62]

Reformulation of Victim Resistance

Coates and Faulkner found that victim resistance to violence was frequently dismissed by reformulating it into a qualitatively different kind of negative personality trait (such as mental illness, including anxiety or depression) or into negative behaviours (such as hostility, parental alienation, and abuse). These reformulations change the social and interactional problem of violence into an individual and internal problem with the victim and sever the connection between the victim's response and the social interaction to which they are responding. This turns a need for social intervention to stop the perpetrator from harming the victim into a need for individual therapy to "fix" the victim. In every case but one, mothers or children were referred to in the language of mental illness.



Reformulation of victim resistance into mental deficiencies

VICTIM RESISTANCE	REFORMULATION	MENTAL DEFICIENCY OR PATHOLOGY
Fearful of perpetrator	Hostile Paranoid Anxious	Victims need to be fixed; the violence does not need to stop
Refusal to be happy with poor treatment ("sadness")	Depressed	
Orientating to safety by being worried about further violence and the safety of loved ones and self	Anxious Paranoid Emotionally maladjusted	
Protesting abusive or poor treatment	Emotionally maladjusted Overly emotional Having emotional meltdowns Hostile	

Reformulation of victim resistance into negative social actions

Clearly naming the perpetrator's actions as violent and not wanting to see him	Hostility against the father	Victims need to be fixed; the violence does not need to stop
Attempting to protect loved ones from being violated and abused by the perpetrator	Alienation against the father	
Engaging in physical self-defence	Abuse against the father	

Reformulation of Positive and Protective Responses

Coates and Faulkner observed that positive and protective responses by victims were also reformulated into problematic behaviour. They found that when women tried to protect their children — for example by calling for assistance from police or child protection services, preventing the children from seeing the violent parent, or even by nurturing the children — they were again pathologized. For example, Coates and Faulkner noted that assessors criticized mothers' attachments to their children as << extreme >>, characterized their connections with their children as << enmeshment >>, and reformulated mothers' protective responses to their children's << emotional distress >> as << over-reactions >>.

This pattern was also present when assessors drew conclusions about the protective actions of children. For example, when an older child told assessors they were worried about their younger siblings' safety when they were with their father, the assessor characterized this as the older child attempting to alienate the younger children from their father.

When children worried that their fathers << would hurt >> their mothers, made their mothers cry, and << were not safe >> assessors turned this into problematic or even alienating behaviour by the mothers. The mothers were blamed for letting the children see the fathers abuse them and making them cry and therefore failing to protect their children, and as actively alienating the children from the fathers for <<letting>> the children see them << cry >> or see their << fear >>. Most frequently, assessors reformulated fear and called it anxiety.

Differential Use and Interpretations of Emotion

In their case study Coates and Faulkner found that assessors interpreted emotions differently depending upon whether the emotions were those of a mother or those of a father. Mothers were about twice as likely as fathers to be described with negative or maladaptive emotions (such as anxiety, depression, or hostility). Mothers were five times more likely than the fathers to be generally characterized as mentally ill and eight times more likely to be described as having "psychological issues." Mothers were characterized as antisocial at two and a half times the rate of the fathers, were described as being enmeshed with their children at three times the rate, were described as having aspects of borderline personality disorder three times as frequently as the fathers, and were characterised as narcissistic at three times the rate of fathers.

More generally, Coates and Faulkner found that mothers' emotions were constructed as increasing their responsibility while fathers' emotions were constructed as decreasing their responsibility.

For example, mothers' emotions were often held responsible for children's fears. According to Coates and Faulkner one assessor stated that << the mother conveys urgency and threat to the children because she does not trust the father >> while another stated that << the mother's fears are getting in the way of the children trusting the father >>. They concluded that the women's fear, and not their ex-spouses' violence, was causing the children to be afraid. Again, this meant solutions lay with fixing or managing the mothers rather than by taking the position that the fathers needed to change their behaviour and prove themselves to be safe and trustworthy with either the mothers or the children.

Mothers were also frequently held responsible for provoking violent or negative reactions by being difficult, "out-talking" the fathers because they had better communication skills, or by attempting to protect the children.

Mothers were often explicitly held responsible for the quality of relationship between fathers and children. Only in one report did the assessor connect the father's violent treatment of the mother and children with the children not wanting to see the father. In other cases, assessors took the position that mothers should be actively promoting the children's relationship with their father despite the fact that mothers and/or children were saying that he had used violence against them.

Violence by fathers was minimized by casting their actions as emotions, for example "emotional control issues" or "anger" issues, and mothers were then blamed for causing these emotions. Fathers were often credited with having "struggled" with their emotional issues. Fathers' behaviours were rarely understood to cause the mother's or children actions. For example, the father's violence or abuse was rarely understood to cause the mother's or children's fear; rather, as discussed above the mothers' fear of violence was more frequently characterized as a personal shortcoming rather than a healthy response to the use of violence.

Undermining Victim Credibility

Coates and Faulkner found that victim credibility was undermined in the reports they reviewed by using inaccurate descriptions of violence (such as descriptions that either minimized and/or mutualized violence), structuring the report as he-said-she-said, excluding key evidence, failing to give clear descriptions of violence, failing to assess for perpetrator strategies and use of psychological testing to cast doubt on the victim's veracity.

To further consider the issue of credibility they analyzed the use of the term "allegations" (or variants such as "alleged"). Coates and Faulkner defined an "allegation" as a statement or assertion that is unsupported or unproven. Coates and Faulkner found that both mothers and fathers made unproven assertions. They proposed that since all assertions in the data set were unproven in a court of law, one would predict that assessors should mark assertions by both mothers and fathers as allegations and that this should occur at approximately the same rate.

When Coates and Faulkner reviewed cases randomly selected from the sample for this analysis, they found that the term "allegation" was used 264 times. Sixty-seven per cent (177) of these uses were to qualify information presented by the mother. In contrast, only 9 per cent (24) of the fathers' assertions were qualified as allegations. While assessors introduced the term to describe information provided by both mothers and fathers, they qualified the information of mothers as unproven far more frequently than information provided by fathers.

Coates and Faulkner also analyzed the reports for use of the phrase "false allegation" or variants. The term was used 16 times in the dataset. Fourteen of these uses described the mother was described as making false allegations. The phase was sometimes used by assessors to summarize the father's position and sometimes to convey the assessor's conclusion.

Consequently, Coates and Faulkner concluded that information provided by the mothers and fathers was not presented as equally established or equally tentative. Instead information presented by the mothers was disproportionately cast as not established, and therefore subtly presented as less factual or less truthful.

For a discussion of how gender symmetry claims minimize the significance of social context and impact women's credibility see *Martinson & Jackson.*[63]

Failing to Provide Safety

In spite of the violence by fathers against mothers described in all of the s. 211 cases reviewed by Coates and Faulkner, assessors made the recommendation that fathers be favoured or granted equal access to children in all but one case, recommending 50/50 custody in 66.6 per cent of the cases. Some assessors stated at the beginning of their report that 50/50 custody is in the best interests of the child; however, unsupervised access with parents who are violent and unsafe is not necessarily in a child's best interest nor is this a legal presumption under the *FLA*.[64]

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Key Information Excluded

In their review of s. 211 reports, Coates and Faulkner found assessors frequently did not contact third parties ("collaterals") whose names had been provided by the parties. In some cases, psychologists contacted more of the collaterals for one party than the other. This inherently leads to problems with the report being fair to both parties. Psychologists rarely referred to the secondary sources they were provided including police reports and medical records.

Irrelevant Questions

> *"He asked me about the men I had dated. He asked me information about those past relationships. I wondered how this is relevant."*
>
> *"She asked me how many relationships I had. She asked me about people I had slept with and asked me whether I am seeing anyone now."*

Women advised in their interviews that the assessors frequently asked women questions about their childhood and past relationships while failing to ask questions pertinent to the current relationship with the father of the child. Irrelevant questions also included: how many people the woman had dated and whether the woman had had abortions in the past. Additionally, women indicated many assessors had made inappropriate comments about their personal appearance and the interior of their home.

Pressure to Settle

Over half of the women in our interview sample made the decision to settle their litigation after receiving their s. 211 report, rather than attempt to challenge the assessor's recommendations, even where they held concerns for their own safety or the safety of their children. This was due to financial constraints and feeling too emotionally drained to continue. Further, women were aware of how difficult s. 211 reports are to challenge in court once they have been authored.

Costs

The average cost of the privately prepared reports used in the cases analyzed by Coates and Faulkner was $16,296.00. The lowest priced report was $14,000 and one participant with three reports indicated that the total financial impact of obtaining s. 211 reports had been approximately $68,000.[65] As previously indicated, the cost of challenging a report can add significantly to these expenses. Given the high cost, many of the research participants indicated in their interviews that they had lost any financial security they had, facing bankruptcy, losing their homes, and relying on foodbanks.

Delays

On average, people waited 5.31 months for a report to be completed. Many of the reports were over 100 pages and contained a significant focus on the psychological testing and assessments.

Negative Impact on Women and Children

Women indicated in their interviews that they often experienced extreme psychological distress after receiving s. 211 reports and felt victimized by the psychological assessor as a result of the contents of the report and the process. Many women believed that talking to a professional assessor would increase safety for themselves and their children; when this backfired, it led to women losing faith in themselves and in the legal system.

Use and Misuse of Psychological Tests

Social science can be helpful when used with care to inform individual cases but can be dangerous when it is broadly accepted without understanding its limitations.[66] Many assessors administer psychometric testing to parties; however, lawyers and judges do not receive training in how these tests are constructed, their purposes, and their limitations, which makes it difficult to draw appropriate conclusions without professional assistance.

Whenever psychological testing is used, there should be a specific reason for the use of that test, and that reason should be clearly explained in the report. Coates and Faulkner observed that it appeared that assessors were frequently administering personality testing even when there were

no issues raised that would seem to make it necessary. Further, these tests were often unrelated to assessing the party's ability to parent.

Coates and Faulkner found that assessors required family members to complete tests that were designed to measure individual, internal qualities such as personality traits or to identify possible mental illness, usually the Minnesota Multiphasic Personality Inventory and the Personality Assessment Inventory. These tools assess people as an isolated individual but do not assess how people act socially in relation to others. The content of the reports also tended to focus on personality and psychopathology rather than the material issues relevant to assessing the best interests of the child.

While psychological tests were consistently used, there were no tests used to determine if there was violence against the spouses or children, or any assessments for the current levels of safety for the parents and children, despite violence being alleged in all cases. The tests administered were not designed to determine best interests of children, or the best parenting arrangements. Assessors did not once include the purpose for which they were including the tests in their reports.

Additionally, not once did a report writer include potential errors with the tests, identify warnings that the tests may not be able to predict behaviour, identify that the tests were not designed for either individuals engaging in or exposed to family violence, or identify potential problems with interpretation of the tests.

Coates and Faulkner found that of the 36 different psychological tests given, only two were explicitly relevant to the commission of family violence: the Child Abuse Potential Inventory and the Aggression Questionnaire.

Test / screening tools used in s. 211 assessments	
Minnesota Multiphasic Personality Inventory-2 Restructured Form (MMPI-2 or MMPI-2RF)	13
Personal Assessment Inventory (PAI)	12
Child Abuse Potential Inventory (CAPI)	5
Mayer-Salovey-Caruso Emotional Intelligence Test (MCSEIT)	4
Parent/Child Relationship Inventory (PCRI)	4
Paulhus Deception Test (PDS)	4
Achenbach Child Behaviour Checklist	3
Family Assessment Measure 3rd Edition. (FAM-III)	3
Wisconsin Card-Sorting Test (WCST)	3
Comprehensive Executive Function Inventory CEFI	2
Parenting Stress. Index 4th Edition (PSI-4)	2
Personality Inventory for Youth — PIY (for child)	2
State Trait Anger Expression Inventory 2nd Edition (STAXI-2)	2

Test / screening tools used in s. 211 assessments	
Substance Abuse Subtle Screen Inventory 3rd Edition SASSI-3	2
Adult Behaviour Checklist	1
Adult Self Report	1
Aggression Questionnaire	1
Baron Emotional Quotient Inventory, Youth Version (BarOn)	1
Behaviour Rating Inventory of Executive Function, self-report version (BRIEF-SR)	1
Bricklin Perception of Relationships (PORT)	1
Burks' Behaviour Rating Scales	1
Child Adaptability / Plasticity Scale	1
Child Behaviour Checklist (CBCC)	1
Child Sexual Behaviour Inventory — CSBI (for child)	1
Children's Self-Report and Projective Inventory (CSRPI)	1
Comprehensive Trail-Making Test (CTMT)	1
Connors Comprehensive Behaviour Rating Scale (CBRS)	1
FLA Definition of Family Violence	1
MMPI-2 Child Custody Interpretive report by James Butcher PhD	1
Parent Awareness Skills Survey (PASS)	1
Parental Attachment Scale	1
Parenting Alliance Measure — PAM	1
Parenting History Survey (PHS)	1
Personality Inventory for Children (PIC-2)	1
Stroop Color and Word Test, Children's Version (STROOP) (for child)	1
Test of Non-verbal Intelligence 4Th Edition (TONI-4)	1
Assessment / Screening Tool / Test for Family Violence	0
Conflict Tactic Scale	0

Faulty Logic

There is no psychological test that has been "scientifically validated for its predictive reliability for outcomes in child-related disputes."[67] Despite this, assessors did not present the limits of the predictive ability of the tests they used, or the dangers of using a psychological test instead of observing the pre-existing behaviour itself. Coates and Faulkner explain it this way:

> *All psychological tests include error. No test can definitely say that a person did or did not commit acts of violence.*

> *An appropriate analogy is that when it is raining, it would be foolish to look at the weather forecast to determine if it is indeed raining. Weather forecasts contain errors and therefore will be right at times and wrong at times. It would be even more foolish to conclude that it cannot possibly be raining because the weather forecast says that it is sunny. It would also be foolish to discount documentation that it had rained the day previously on the basis that yesterday's weather forecast said that it was not going to rain.*
>
> *Actual behaviour must be given precedence over predictions of behaviour. Therefore, a discrepancy between mother's and children's evidence that the father had been violent and the predictive test results saying the father is unlikely to be violent, should not be taken as a credibility issue of the mother and child.*

Psychological tests can at best be used to "generate hypotheses that have to be considered in light of other sources of information" rather than offer determinative information about parenting skills and abilities.[68]

Lack of Attention to Domestic Violence

Potential misdiagnoses that may result from the psychological testing further disadvantage women who have experienced violence at the hands of their spouse.[69]

There is a significant body of research indicating that psychological testing may penalize survivors of domestic violence by confusing "psychological distress or dysfunction induced by exposure to domestic violence with personality disorder or psychopathology."[70]

For further information see Atira's literature review on "The Limits of Psychological Testing in Parental Capacity Assessment Reports."[71]

Lack of Attention to Cultural Differences

> "*The whole experience was horrific… I was raised in a different culture. I should not have had to fill out those tests. If I had an Indigenous assessor look at my test results the outcome might have been different.*"
>
> "I questioned why he needed to ask about my birthplace, and he didn't even get my birth place correct*… he made a cultural reference somewhere which was even incorrect, and he did not even ask about my history with the father which shows a clearer pattern over a 20-year period."*

The women who were interviewed reported that assessors lacked cultural humility and understanding in various aspects of their reports. We know from our work with Indigenous and racialized women that their experience of psychological standardized testing and s. 211 report assessments/processes often reproduces and reinforces colonial and racial bias and leaves them vulnerable to systemic racism.

In 2018, the Canadian Psychological Foundation and the Psychology Foundation of Canada released a report responding to the Truth and Reconciliation Commission of Canada's report.[72] Describing the situation as "dire" they stated "[w]e lack the tools, training, understanding of culture, and appropriate recommendations to consistently provide meaningful helpful psychological assessments to Indigenous Peoples."

Many of the psychological tests themselves have been found to contain cultural biases in their results, with some researchers arguing that while some differences may be the result of "psychological distress spurred by historical oppression and present adversity," they also reflect "a divergent worldview."[73]

The issue of cultural bias is also addressed in Atira's literature review.[74]

Parental Alienation

An in-depth review of the literature and case law relating to alienation is well beyond the scope of this toolkit. However, the concept of alienation poses some special concerns in cases where family violence is a factor. For a full review of the different tools available under the *FLA* to address negative parenting behaviours, please see John-Paul Boyd's detailed discussion in "Alienated Children in Family Law Disputes in British Columbia."[75]

There are a number of general concerns that have been identified with respect to alienation cases that may have significant impacts on victims of violence, including (a) gender bias; (b) non-attention to the best interests of the child (c) non-adherence to legal rights of children; and (d) failure to adhere to the legal principles associated with expert evidence.[76]

There are also concerns that are specific to cases involving family violence, including that retaliatory claims of alienation are being made in cases where domestic violence or child abuse is alleged, thereby shifting the focus away from the violent family member's behaviour onto the victim's efforts to protect the child from an unsafe parent and/or failure to encourage a positive relationship between the child and the violent parent.[77]

Because parental alienation is a deeply contested concept, there are conflicting definitions, but broadly speaking the concept describes situations where one parent manipulates or brainwashes a child to reject the other parent, and the child expresses that rejection unambiguously and without remorse.

The first iteration of "parental alienation syndrome" appeared in 1985, in a short article by Richard Gardner called "Recent Trends in Divorce and Custody Litigation."[78] Gardner described parental alienation syndrome as a "psychological disturbance" in which "children are obsessed with deprecation and criticism of a parent—denigration that is unjustified and/or exaggerated." Gardner's article included a number of purportedly diagnostic behaviours.[79] Gardner's original theory was explicit that mothers were more likely to be alienators than fathers.

From the beginning, parental alienation syndrome was controversial. Boyd writes, "Men's rights groups loved the theory because most of the parents said to engage in alienation were mothers; women's groups loathed the idea as it seemed to downplay the impact of violence on children's interests and preferences. Psychologists were skeptical because there was so little reliable research on alienation, the theory didn't meet the scientific criteria to be labeled as a diagnosable 'syndrome,' and the theory seemed overly simplistic and was frequently misapplied in court."[80]

There is still no method of diagnosing parental alienation in any reliable or evidence-based capacity. Critically, there is no "scientifically validated criteria to identify 'alienated' children and differentiate them from abused or otherwise psychologically traumatized children.

In subsequent years there have been attempts to rehabilitate the concept of alienation and expunge its overtly sexist origins. In 2001, Joan Kelley and Janet Johnston reformulated alienation using a family systems approach to the problem. They argued children's relationships with their parents could break down for reasons that were not related to malicious intent by one of the parents and identified a number of factors that could reasonably result in a child being *estranged* rather than *alienated* from a parent including: family violence, a rigid or restrictive parenting style; inconsistent and unpredictable expectations and behaviour; persistent immaturity and self-centred behaviours; being emotionally unavailable to the child; and having substance abuse problems.[81] They also described alienation in more gender neutral terms.

In order to differentiate their research from Richard Gardner's discredited theory, Kelley and Johnston and subsequent researchers removed the term "syndrome" and simply refer to "parental alienation" or "alienated children."

While the debates surrounding parental alienation have become more sophisticated in subsequent decades, the theory has remained controversial. For example the American Psychiatric Association has so far consistently refused to add parental alienation to its *Diagnostic and Statistical Manual of Mental Disorder* as it lacks an adequate research foundation,[82] the National Council of Juvenile and Family Court Judges has referred to "parental alienation", "alienation," and "parental alienation syndrome" as being "discredited by the scientific community,"[83] and in 2019 and 2020 efforts were both made and resisted to introduce the term into the World Health Organization (WHO) *International Classification of Diseases 11th Revision (ICD-11)*.[84] Parental alienation was ultimately not

included in the WHO's classification, although the battle wages on. This has led some researchers to argue that "[g]iven that the absence of valid science supporting PAS/PAD/PA has been widely acknowledged... the concept is better understood as ideology, not scientific theory."[85]

There is still no method of diagnosing parental alienation in any reliable or evidence-based capacity.[86] Critically, there is no "scientifically validated criteria to identify 'alienated' children and differentiate them from abused or otherwise psychologically traumatized children."[87]

It is important to understand that there is no real dispute that in some cases parents may denigrate each other after separation, or that a parent may manipulate a child to reject the other parent. However, many researchers argue that the correct response in such cases is to describe the parent's behaviours, address them if necessary, and to establish the cause of the child's rejection through a comprehensive review of all of the facts. Indeed, family courts routinely review the actions of parents without recourse to expert evidence. The objection is to "using the label 'alienation' as a diagnostic, scientific, or psycho-legal construct in place of an objective and comprehensive causal assessment,"[88] and as a basis for discounting abuse allegations.

Gender Bias

In 2018, Dr. Linda Neilson conducted a pan-Canadian survey of case law involving accusations of alienation between 2008 and 2018. Neilson found that nationally, 68.93 per cent of alienation claims are made against mothers and 31.07 per cent against fathers. Neilson found that this figure was not in and of itself an indication of gender bias since 70 per cent of separated or divorced parents report the children live primarily with the mother and it can therefore be expected that more claims will be brought against mothers.[89]

Courts made no explicit findings of alienation in 50.9 per cent of cases, and this was approximately equal for mothers and fathers. However, when Neilson looked at cases in which courts accepted and applied alienation theory and made parental alienation findings against one parent there was a statistically significant difference in how mothers and fathers were treated. When courts made findings against fathers, the children were left in the care of the fathers in 35.9 per cent of cases, and were left in the shared care of the father and mother in an additional 4, for a total of 43.4 per cent of cases. This stood in contrast to occasions when courts made parental alienation findings against mothers. The children were left in the primary care of their mothers less than half as often, in only 16.8 per cent of cases, and children were allowed to maintain a significant relationship with their mother in only 29.5 per cent of cases.[90]

In his 2016 paper "Alienated Children in Family Law Disputes in British Columbia" JP Boyd reviewed 115 British Columbia decisions available on CanLII published between mid-2008 and mid-2015 in which claims of alienation were made which were important to the outcome of the court hearing and reviews the different tools available under the FLA for addressing negative parenting behaviours. He found that mothers were more frequently accused of being alienators than fathers, with

67 per cent of the allegation being made against mothers, but interestingly he found that overall, claims against mothers were less likely to be accepted by the court than claims against fathers.[91] He found that allegations of alienation were established in only 21 per cent of the cases he looked at, a rate about one-third of that established in the national sample, although the rate still increased significantly between 2012 and 2015. The fact that allegations against mothers are less likely to be substantiated is difficult to interpret, but is not inconsistent with our concern that unmeritorious claims of alienation are being brought against women in BC as a retaliatory strategy; even if such claims are ultimately dismissed, the stress and expense for women where alienation is claimed can be overwhelming.

Non-Attention to Best Interests of Child

Critics argue that alienation deflects attention from actual parenting practices, the quality of the parent-children relationships, and the best interest of the children. In her review of Canadian caselaw, Neilson observed that many assessors started from the premise that children benefited from equal time with both parents and attributed blame to the preferred parent when the children resisted such contact. The focus of the case then shifted to repairing the relationship between the children and the rejected parent and punishing the preferred parent. She found that when alienation was claimed, judges failed to complete a thorough analysis of the evidence associated with statutory best interests of the child criteria in less than one third of all cases, and — most disturbingly — in only 48 per cent of cases where child abuse or violence was also claimed. Neilson also observed that when courts did engage in a thorough analysis of evidence associated with statutory best interest of the child criteria, they were "less apt to make parental alienation findings, more apt to consider and accept the views of children, and less apt to make punitive orders."[92]

Non-Adherence to Legal Rights of Child

Neilson found that children's views were not considered or dismissed in 79 per cent of alienation cases despite Canada's legal commitments to take their views into account.[93] Interestingly, she also noted that in the small number of cases where courts heard direct evidence from the children, they were "more inclined to engage in thorough child focused best interest of the child analysis and were more accepting of youth views and concerns."[94]

In *JESD v YEP*[95] the child of the relationship applied to become a party in the court case. The judge received a s. 211 report indicating alienation and as a result pre-emptively refused to permit the child to have counsel, even though the report had not yet been entered as part of the trial process, and its value not tested through cross-examination.[96]

On March 1, 2020, the national Canadian Bar Association Children and Youth Law Section submitted a comprehensive report to the United Nations Committee on the Rights of the Child on Canada's

compliance with the *Convention on the Rights of the Child*. Among the concerns raised was the lack of implementation of children's rights when parenting assessments are being conducted.[97]

For a more in-depth discussion of children's substantive equality rights in relation to s. 211 reports, see *Martinson & Jackson*.[98]

Failure to Adhere to Expert Evidence Principles

One of the concerning issues with alienation is the enthusiasm with which lawyers and courts have accepted it, often abandoning accepted rules of expert evidence; this is particularly troubling given that the concept is deeply controversial among social scientists. The effect is that a social science theory or ideology has been converted into an accepted legal construct, which is severed from its research foundations and has been applied in some cases without an understanding of its limitations or of competing theories.[99] There are a number of examples of this occurring in BC.

In *NRG v GRG*, the BC Supreme Court stated:

> *Regardless of academic debate respecting labels and diagnoses, the simple fact of the matter is that alienation is a useful and important concept which is frequently at play in high-conflict separations and has been recognised as such in numerous cases before the Canadian courts.*[100]

In his 2016 review of case law, JP Boyd found that no expert evidence was adduced in 18 per cent of the cases in which such allegations were accepted by BC courts.[101]

In one BC Supreme Court case the expert was qualified to give information about alienation generally even though she had gathered no primary data, for example through interviews with the parents or children involved.[102] In another, the Supreme Court cited and relied on expert evidence given in another case in support of an order for a reunification program.[103] In a BC Provincial Court case the judge made a finding of alienation based only on affidavits of the parties where there was no oral evidence or cross-examination on the affidavits.[104]

The BC Court of Appeal has recently clarified in *Williamson v Williamson*[105] that proving alienation requires expert evidence introduced in accordance with the test in *Mohan*[106] and *White Burgess.*[107]

Family Violence

In her review of Canadian caselaw, Neilson found that 41.5 per cent of the parental alienation cases she reviewed involved assertions of domestic violence and child abuse. However, evaluation of these claims by a domestic or family violence expert was only ordered or considered in 2.8 per

cent of cases.[108] Research suggests that the rate of intentionally false allegations of child abuse is low.[109]

Assessors who lack domestic violence expertise may fail to give consideration to safety, risk factors, and the impact of negative parenting behaviours. This creates significant challenges in cases where both alienation and family violence are alleged because, to be accurate, the assessor has to differentiate between alienation, estrangement, and other justifiable reasons why a child does not want to spend time with a parent.

One of the reasons why diagnostic criteria for alienation have not been scientifically established is because to do this, parental advocates would need to show there are behaviours that are exclusive to alienation.[110] Many of the elements that are touted as present in alienation are the very same elements found in cases of domestic violence and child abuse, and where children justifiably reject a parent based on that parent's own behaviour.

For example, alienation is supposedly characterised by children rejecting a parent without remorse. However, if a parent mistreats a child, the child may not — and should not — be remorseful for telling people about the mistreatment.[111] Parental alienation advocates often state that if a child and preferred parent are making the same allegations this is proof of alienation; in fact, it may also simply indicate that the protective parent has listened to the child's complaint and accurately reported what the child said.[112]

Moreover, there are many reasons why children may reject parents where there is neither alienation nor abuse. Kelly and Johnston found that major parenting deficiencies that do not qualify as abuse (persistent immature and self-centred behaviours, rigidity, restrictive parenting behaviour, mental illness, and chronic anger) were sufficient to lead a child to want to markedly limit time with that parent.[113] One would fully expect a child who has been cared for primarily by a warm, patient parent would object to being taken from that parent for significant periods to live with a harsh and intimidating parent.[114]

The only empirical analysis of alienation theory — which presumes that one parent denigrates the other causing the child to turn against the second parent — has been contradicted by recent studies which have found that after separation "one parent's denigration of the other parent often 'boomerangs' against the first parent, rather than causing lasting harm to the child's relationship with the denigrated parent."[115]

Therefore, rather than starting from a presumption that alienation is occurring and then searching for data that supports this conclusion, responsible, objective assessors should be comparing alternative hypotheses to determine whether the data is equally or more consistent with different explanations. To conclude that the presenting issue is alienation, there should be solid evidence of an actual campaign of denigration, and the child's reaction should not be able to be reasonably explained on other grounds.[116]

Reformulation of Victim Resistance into Alienation

In Coates and Faulkner's review of cases, 100 per cent of mothers indicated they had experienced family violence and 100 per cent of fathers denied violence. Fathers alleged alienation, among other things, in 71.4 per cent of cases. Coates and Faulkner found that assessors regularly discounted evidence of abuse, dismissed corroborative evidence of abuse, and excluded evidence provided by collaterals. Not one assessor detailed the consequences of the violence, and safety was not a prominent feature of any of the reports. Although safety was explicitly mentioned at least once in 86 per cent of the reports, in 38 per cent it was mentioned only in order to deny that there were safety issues, and other reports constructed the safety issues not as violence by the father but as alienation by the mother. Risk to children and mothers was never comprehensively assessed, and none of the assessors used risk assessment tools or modifications of those tools in an attempt to understand the degree to which mothers and children might be in danger.

Significantly, Coates and Faulkner found that in no case did an assessor determine the order of allegations and then remark on the significance of the timeline (for example whether alienation was only claimed after family violence was disclosed). They found that when evidence from the children or other professionals disputed claims of alienation, the assessors made significant attempts to bolster the theory.

In their review of BC cases, Coates and Faulkner observed assessors making the following reformulations in cases where alienation has been claimed.

VICTIM RESISTANCE	REFORMULATED INTO ALIENATION
Mother discloses violence	Attempt to alienate children
Children disclose violence	Disclosure is evidence of alienation
Mother is afraid of father	Mother is modelling fear to alienate the children from their father
Children are afraid of father	Mother has caused the children to be afraid of the father
Mother doesn't want to see father	Mother modelling alienation against the father
Children do not want to see father	Children are exhibiting alienation caused by mother
Mother protects children from their father	Mother is restricting father's access to children as part of parental alienation
Mother reports ongoing family violence	Mother is fabricating violence to further parental alienation

The circular reasoning that underlies these reformulations places women in a terrible double bind: disclose family violence and risk these disclosures being labelled evidence of alienation or stay quiet and allow the court system to make decisions about parenting without evidence of the abuse.

Unlike assessors' characterizations of violence, which was frequently described as being in the past and therefore irrelevant in spite of evidence on ongoing behaviours that would meet the broad *FLA* definition of family violence, alienation was typically characterized as ongoing and therefore relevant.

Summary

- Research suggests that s. 211 reports do not always appropriately address family violence or future risk, and do not provide recommendations for safety planning even in cases where family violence is being explicitly claimed by one of the parties.
- Allegations of family violence frequently vanish in s. 211 reports, and a number of studies confirm that when assessors do not have expertise in family violence, assessors give insufficient attention to the safety of women and children.
- Section 211 authors are permitted to conduct psychometric evaluation of clients without justifying their use or explaining any limitations to the tests.
- Alienation is a controversial concept that may be used as a "defence" to family violence by permitting the perpetrator of violence to reformulate resistance to violence into a form of abuse and flip the characterization of abuser and victim.

PART 3

Before, During and After a s. 211 Report is Ordered

This section identifies considerations for counsel if you are seeking a s. 211 report or if opposing counsel or the judge suggests a s. 211 report be completed, particularly by a private assessor.

Before Ordering the Report

The fact that s. 211 reports are exempted from many of the safeguards that normally accompany expert opinion evidence creates special considerations for counsel, particularly where a client has experienced family violence.

Before ordering or agreeing to a report, you should critically assess whether a report is required. The following questions have been adapted from *Martinson & Jackson*:[117]

- What are the issues in dispute? Is an expert opinion required or can the information be presented through a free Views of the Child report by a family justice counsellor, a Hear the Child report, or through other ordinary witnesses?
- What is the specific purpose of the report and what type of expertise is required to address these issues?
- Does the expert being considered have the specific expertise necessary to address the issues identified, including specialized training in family violence?
- Is the expert impartial without any preconceived biased notions about parenting roles?
- Does the expert have the appropriate cultural skills required for the case?
- If interpretation or translation is required, how will this be provided?
- Is psychological testing required? If so, what kind of testing and what is its purpose? Should limits be placed on testing?
- What collateral information will be provided to the expert and why?
- How will the views of the child be considered?

- What is the cost of the report and who will pay? How and when? What additional costs might be incurred if the report has to be challenged?
- What period of time is required to complete the report? What is the availability of the assessor if cross-examination is required?

Many of these issues should also be discussed with opposing counsel and the assessor, and be incorporated into the retainer letter and/or order appointing the assessor.

Calculate Delays and Cost

Confirm that the proposed author is available to complete the report and how long they estimate it will take them. Typically, an assessor will confirm the trial dates before accepting the appointment so they can (and should) indicate whether they can prepare the report within the required time-frame, and whether they will be available to testify. (Note that Supreme Court Family Rule 13-1, and Provincial Court (Family) Rules 11(1.1)(2) set out the service requirements for filing and serving the report and for serving the assessor with a notice to attend for cross-examination.)

How much time will you need to review and understand the results of the report? If you are obtaining a full s. 211 report with psychometric testing it may run well over 100 pages.

In order to critically assess the s. 211 report, you may also need to consult with a different expert who can identify and explain the report's strengths and weaknesses, and review any test results. This will require additional time.

Section 211 reports prepared by private assessors are cost prohibitive for many parties. If the opposing party is requesting a s. 211 report, consider seeking that the court order that party to pay the full costs of the report or distribute costs relative to the parties' respective incomes. The cost of potentially cross-examining the expert should be taken into account when the report is ordered as this is the primary method of challenging reports, and frequently falls on the party requesting cross-examination.

The following table shows estimated ranges for reports by psychologists. Please note that actual delays and costs may vary significantly.

	Delay (approximate)	Costs (approximate)
Preparation of s. 211 report	2 – 5 months	$10,000 – $20,000
Review of report by second expert and/or preparation of second report	2 months	$2,000 – $7,500
Cross-examination	0.5 – 1.5 days	$5,000 – $10,000
Total	4 – 7 months	$17,000 – $37,500

In addition to the cost of the reports themselves, be aware that reports may include recommendations (for example private counselling or family reunification therapy) that have extremely high costs for the parties.

Research Assessors

If a s. 211 report is completed by a family justice counsellor, you do not have to provide a name and a family justice counsellor will be assigned. Unlike private assessors, all family justice counsellors receive mandatory family violence training.

If a private assessor is used it is common practice for counsel to propose the assessors. The names of assessors may be obtained through referrals from other lawyers and listservs but you should also search the internet, academic journals, and caselaw to obtain information about previous work done by the assessor, including identifying areas of expertise or special interest. You should request a CV from any assessors being considered.

As outlined in Parts 1 and 2 of this report, the erasure of family violence is a significant limitation of s. 211 reports, despite it being a mandatory factor that courts must consider when assessing the best interests of the child. It is therefore important, wherever possible, for you to carefully research an assessor's qualifications and methodology prior to their appointment. Once an assessor has been appointed there will be no further opportunity to ensure that they have the necessary expertise.

Applying for the Order

Test for an Order

In *Smith v Smith*[118] the Supreme Court of British Columbia took a broad and generous approach to applications for s. 211 reports, and the threshold justifying their production is low. However, the onus remains on the person seeking the report to establish that it is necessary and in the best interests of the child.[119]

Despite the low threshold for obtaining reports, there are cases where judges have occasionally refused to order s. 15 or s. 211 reports. For example, in *Ryan v Reid*,[120] the court noted that assessments should not be "fishing expeditions" and that there were no demonstrated emotional or behavioural problems of significance in the child or allegations of true parenting difficulties that would justify a report. In *Syminton v Simor*,[121] the court held that the "ordering of a Custody and Access Report must be approached with caution and must be ordered only when necessary and in the best interests of the child. The caution arises, as the cases make it clear, from the fact that

a psychological assessment of a child is an intrusive process." In *DDR v KTR*,[122] Francis J declined to order a s. 211 report where the child had already been interviewed by two professionals, where further interviews would be stressful, and where it was in the best interests of the child to have the trial conclude as quickly as possible.

In *NR v NP*,[123] Justice Riley stated that the court must consider the countervailing interests when ordering a report, the three most obvious being the time and delay associated with obtaining a report, the instruction or disruption in the lives of the children, and the cost of the report. However, he ultimately found that the benefit of the report outweighed these concerns.

Where quotes from the s. 211 reports could have identified the women, their answers were paraphrased, indicated by << >>.

What to Include in the Order[124]

Issues in Dispute

Since there are no regulations or other guidelines in BC that govern the content of a s. 211 report, counsel should take care to identify what issues are in dispute and what expertise is required to comment on them. As noted above, s. 211 reports should not be fishing expeditions.

- Counsel should ensure that the order sets out the specific issues in dispute that the assessor is to evaluate.

Family Violence

The *FLA* requires, in s. 8, that family dispute resolution professionals assess if family violence is present and use this information to inform the types of dispute resolution used to resolve the matter. As explained in Part One, private assessors are not captured in the definition of "family dispute resolution professionals," and for psychologists and clinical counsellors there are no mandatory guidelines that require them to screen for family violence or address this issue in their reports if they do not feel this is relevant. Social workers are also not captured by s. 8 but do have Standards of Practice that address domestic violence in parenting assessments.

Many of the women we spoke with indicated that the assessors they spoke to asked no direct or indirect questions about family violence and were dismissive when it was brought up.

Some orders that counsel may consider requesting include:

- The assessor must screen for family violence.
- All instances of family violence (disclosed, reported, or known to the assessor) need to be included in the report, with sources. Violence should be clearly described, and its impact assessed. If the assessor finds that the violence is not relevant there should be a clear explanation.
- The assessor must include information about their training with respect to family violence within the report, either through an attached CV or narrative.

Fact-Finding Role

As outlined in Part One, assessors play a unique fact-finding role and, where the assessor is not cross-examined, the report stands as *prima facie* truth of the facts contained within it, including hearsay.

The women who were interviewed as part of this project gave frequent examples of instances where the psychologist misreported the information they had provided or failed to include information about family violence. One woman gave an example of the psychologist telling her collateral support that she could not include their information about family violence because it was hearsay, despite the fact that s. 211 reports commonly contain hearsay.

- Counsel should request that all notes taken by the assessor be disclosed to them. (Where psychometric tests are used, the raw data will not be disclosed to counsel.)

Limitations on Psychological Testing

The use of psychological testing has important implications for clients in terms of both the ultimate recommendations and the cost of the report. We recommend counsel consider seeking the following limitations.

- If a psychological test is used it must be justified in the specific case and the reasons for justification shall be included in the report to explain how the test speaks to "the ability and willingness of a party to a family law dispute to satisfy the needs of a child."
- The assessors must clearly include the rationale for selecting the tests, and the method of interpreting the test.

- The assessor must clearly set out the limitations of the test, including limitations regarding the interpretation of its results.
- The report should clearly state whether the assessment tool has been developed for use in parenting disputes.
- The report should clearly state the population used to standardize or norm the test.
- The assessor should stipulate whether or how the test considers the broader social context of interpersonal violence, including violence against women and children.

Retainer

Counsel for both parties will generally send a joint retainer letter to a private assessor, even when a court order has been made for their appointment. The retainer letter will provide some basic information about the case (worded neutrally), and should set out issues to be assessed; the documents provided to the assessor; communications protocols between the assessor and counsel/parties (such as copying both counsel on all correspondence to and from the assessor); any interpretation/translation services that will be required; and any other issues that apply to the preparation of the specific report (for example, a child's disability, if parenting time is supervised). The issues can be framed broadly, tracking the language of s. 211, but if specific issues are to be addressed, these should be set out in the retainer.

The retainer should address how documents will be provided to the assessor and can contain a provision that the consent of both parties/counsel is necessary before any documents (including court materials) are provided. Counsel commonly require that this term be included to avoid their clients being ambushed, and some assessors will not accept any documents unless both parties/counsel agree.

If you disagree about the content of the retainer, including about protocols, you can apply to the court. If the report was ordered at a contested hearing, you can ask to appear before the judge who made the original order. You should also consider asking for terms at the contested hearing that set out when they will return to court. For example, a judge could include a term stating that if the parties don't agree on the assessor within a prescribed period of time that they may return to court to resolve the issue.

It is also good practise to ask the assessor (in writing, copied to the opposing counsel) early on, before the assessor meets with either of the parties, what documents the assessor wants to review and when the assessor wants to review them.

If the assessor asks for documents in the course of the assessment, the request should be communicated to both parties/counsel, even if the request was made during a meeting with one party, and the document should be provided not only to the assessor but to the other party/counsel. If

advance consent is required by the retainer, it should be obtained before the document is sent to the assessor.

If there is a disagreement about whether a certain document should be provided to the assessor an application can be made to the court.

Preparing Your Client

Many of the women who were interviewed advised that they had no idea what to expect prior to meeting with the psychologist. Counsel should take the time explain what to expect from the s. 211 assessment process, the role of the psychologist, and how to prepare for the assessment. What follows is a draft script for this conversation:

>> EXPLAIN THE ROLE OF THE ASSESSOR

The assessor will assess the parenting of you and the other parent by observing your children, interviewing the children, and interviewing each parent. The assessment will normally include a home visit. The assessor will ask you questions about your life. This interview is not confidential. Anything that you say may be included in the report, which will be given to the other party and the judge.

The assessor is not a personal counsellor, and the purpose of the meeting is not to help you therapeutically, but to gather information. The assessor is required to be neutral and may not make many comments in response to the information you give them. This might be quite different from other times that you have met with a counsellor.

The assessor will likely ask you to sign a consent form and should explain “informed consent” to you. In the context of a court-ordered report there are some limitations to your ability to withhold consent about how the information is used. For example, you may not want your test results to be included in the report, but the assessor will be able to include them anyway because of the court order.

>> DOCUMENTS AND COLLATERALS

[As early as possible, you should discuss with your client what documents and “collaterals” should be provided to the assessors and advise them on what you think the assessor should consider.]

If the assessor requests any documents from you during your meeting, please tell them that you will advise me of the request.

[Depending on the protocols in your retainer, clients should not provide documents to the assessor directly without consent.]

The assessor may ask you about "collaterals." These are people who can speak about your children and their needs. You will need to prepare a list with the names and contact information of people who the psychologists can contact as collaterals. Make sure to also include your relationship to the person (friend, neighbour, counsellor, close family member) and their involvement with your children. We will discuss this list before it is provided to the assessor.

>> WHAT TO BRING

Bring food and water. You may not have time to run out for a snack, and you may not be provided with water or coffee breaks. You should feel you are able to ask for breaks when you need them. If the assessor refuses to allow you to take a break when you need one, please make a note of this after your appointment. During some tests you may not be allowed to leave for a break so it may be a good idea to ask for a short health break before you start any testing to have a drink, snack or washroom break.

>> WHAT TO EXPECT

Try to ensure that you know how long the assessor will be meeting with you when you set up the appointment. In some cases, the length of the session can be up to eight hours. Take note of how long you meet with the psychologist, and how long the psychologist meets with your children.

The assessor may ask you to complete psychological tests. These tests are often multiple choice and may be administered on a computer or by using a pencil and bubble sheet. If this happens, we may need to hire another assessor to review the results of the tests, since the assessor will not release the raw data to me or to the court.

The assessor may also ask very broad and open-ended questions. If possible, focus on the current matter before the court. Sometimes assessors may ask questions about your personal history — if the assessor's question does not relate to issues before the court, then be honest but brief.

>> BE PROFESSIONAL

Treat the assessor professionally and be courteous. The assessor will report on your behaviour and this information will be provided to the court. Be aware that the assessor may not be courteous or professional towards you and may make negative remarks about your home or appearance. Again, if this occurs make a note of any such instances.

>> CONVERSATIONS ABOUT THE OTHER PARTY

The way you speak about the other parent will be reflected in the report. When you are expressing your concerns, try to provide specific examples of the behaviours that worry you. Speak honestly and avoid broad generalizations such as 'always' and 'never'; instead use 'often' or seldom.' Unless the other parent has been formally and properly diagnosed with mental illness, you should not speculate about whether they are mentally ill or about a diagnosis you think they may have. Even though your ex-spouse may be referred to in formal ways in the legal system (like the "opposing party" or the "respondent"), it is typically best to simply refer to them by their first name during the assessment.

>> CONVERSATIONS ABOUT YOUR CHILDREN

The assessor may also ask you to talk about your children. Try to be thoughtful and detailed. You will want to demonstrate that you understand the children's individual needs separate from what you or the other parent might want. If you have any concerns about the children try to be specific and accurate especially when describing something that the child did or said.

>> EXPERIENCES OF VIOLENCE

If you have experienced violence, it is important to discuss what happened and the impact on you and the children. Do not minimize your experience with violence from your partner. If there are still safety concerns, it is important to explain them. Your survival of violence, whether physical, sexual, emotional, verbal and/or financial, is an important factor for the court to consider. However, you should be aware that many assessors do not necessarily have training in understanding the dynamics of violence, and you may feel that they are not helpful or that they do not believe you. While assessors may not understand, it is still important to tell them if the children have experienced violence themselves or witnessed violence against you or someone else in the home.

>> TAKE NOTES

After your appointment is over you should take notes as soon as possible about what happened, and what was said. Include any concerns that you had. These notes may be important when we prepare for court if the assessor makes mistakes about what information you provided when they write their report.

[Ideally you should plan to talk with your client soon after they have met with the assessor to gather information about what happened during the assessment and identify any immediate concerns while their memory is still fresh. Ask your client about the assessor's conduct and how much time the assessor spent with them and with their children.]

Many women we met with described that both the process of obtaining a s. 211 report, and the contents of the resulting report were deeply harmful. We recommend discussing counselling services or other supports that may be available for your client before or after the s. 211 assessment has been completed.

Reviewing the Report

"I was trying to challenge the assessor on his incorrect facts. I couldn't get his notes. In court, I was trying to understand why they were not believing that I was a victim of abuse."

Review the Report in Detail

Section 211 reports can be challenged on the grounds that they lack reliability or are factually inaccurate.

We recommend that you review the s. 211 report in detail and, if you contemplate challenging the report, request and carefully review the assessor's notes as soon as possible. Compare the notes carefully to what is set out in the report—check for inaccuracies, "re-wording", omissions, and statements in the report that are not evidenced in the notes. There will be a charge to obtain these notes depending on the volume of materials, usually a few hundred dollars. The notes will be provided to both counsel/parties and the assessor can be cross-examined on them.

Ensure that your client also reviews the report carefully for discrepancies between what they told the assessor and what was reported, and for any other inaccuracies. If the report is found to be unreliable due to inaccuracies this may diminish the weight given to the report.

Note that if your client identifies inaccuracies you should plan to introduce this on direct examination as well as during cross-examination. In addition to challenging the assessor directly on the facts, questioning the hypothetical basis of the conclusions may also be an important source of cross-examination questions (for example, "your opinion was based on the following facts; however, if these facts changed your opinion would also change…").

Acting Inside the Scope of the Order

- If the judge set parameters for the scope of the report, did the assessor act outside of this scope?
- Did the assessor offer opinions outside of their expertise? For example, did they comment on the cognitive abilities of the children if this is not within their area of expertise?

Family Violence

- Have incidents of family violence, including specific behaviours, been clearly and chronologically described in the report? For example, Coates and Faulkner found that at times the violent behaviours were described using abstract emotional terms such as "anger" or "temper." These terms are problematic because they do not convey what actually occurred or who did what to whom in what context.
- Has the assessor reduced clear statements by the client that violence has occurred into a mental phenomenon, i.e., a "belief" or perception that family violence had occurred or might occur. For example, Coates and Faulkner found there were instances where assessors changed disclosures of violence to matters of the mind — <<her perception that her father purposely hurt her>> or <<his belief that his father punched him>>.
- Has the assessor misrepresented negative behaviours or reformulated incidents of family violence in order to blame the victim of violence and exonerate the perpetrator of family violence? For example, Coates and Faulkner found that assessors tended to characterise children's reports that violence escalated after they had disclosed the abuse as a sign that the children were fabricating or exaggerating the ongoing violence. Note that violence is frequently reformulated in cases where alienation is claimed.
- Has the assessor assumed or imputed positive motivations and intentions to either of the parties without evidence? For example, Coates and Faulkner reported that assessors tended to describe fathers as having positive motivations even when they described them using violence. Assessors explicitly concluded, even after multiple assaults committed over long periods of time, that the fathers had <<no intent to harm>> or <did not intend to harm>> the children despite the fact that such positive motivations are not consistent with the strategies used by the perpetrators to suppress victim resistance.
- Has the assessor dismissed actual evidence of violence, including where the perpetrator admitted to family violence? Coates and Faulkner found fathers sometimes admitted to rationalized acts of financial abuse, physical violence, psychological violence and harassment that were not recognized as violence by the assessors. For example, when asked if he had been violent, one individual responded that << she pays me back in

kind >>. The assessor failed to recognize that in order for the violence to be 'paid back' this person must have initiated the violence. The assessor also failed to take note of the individual's rationalization that violence was justified because the other party was also guilty.

- Has the assessor turned the social and interactional problem of violence into an individual and internal problem within the victim? For example, have they reformulated rational responses and resistance to violence into mental illness, such as anxiety or depression, or negative behaviours such as hostility or parental alienation?
- Has the assessor wrongfully limited the impact of violence to the past? For example, Coates and Faulkner reported that even when assessors recognized the violence as corroborated, and therefore as having occurred, they still frequently dismissed its significance for the mother and children, and described the violence as limited to the past. In these same reports, mothers, children, and sometimes the fathers themselves provided evidence of ongoing patterns of family violence that were not recognised as violence by the assessors. For example, failing to recognise that the refusal to pay child support could in some cases be financial abuse. Assessors also failed to account for the continued negative impacts of the violence.
- Where violence has been identified, has it been taken into account in the assessor's recommendations by ensuring safety for the affected persons?

Fact-Finding

- Are the facts consistent with the assessor's notes/information provided by your client?
- Are the facts based on hearsay (which may impact the weight given that evidence even if it is admissible)? If so, did the assessor fail to follow up with sources who could have confirmed hearsay information?
- Did the assessor follow up/fail to follow up with sources who could have confirmed or rebutted information given by a party?
- Did the assessor make arbitrary decisions about who was credible?

Parallel Process

- Did the assessor follow a parallel process? For example, did the assessor spend about equal time with each party, and review the collaterals and documents of each of them?
- Did the assessor give both parties the same opportunity to respond to statements made by others? For example, did the assessor give one party the opportunity to respond to what the children said about them, but not the other?

Psychological Testing

We strongly recommend that if psychological testing has been used you retain another assessor to review the report, despite the cost. Without a second assessor, you will not know the full extent of any problematic testing, not only because as counsel you are unlikely to have the necessary expertise, but because you will not have access to the raw data from the tests, and so will not be able to identify any errors, misinterpretations, improper use, or misrepresentations in the original assessor's report. Raw data will not be given to counsel, only to another professional who is qualified to interpret it.

- If the assessor used psychological testing, did they explain their purpose in using each type of test?
- Did the report include the cautions and limitations of the psychological tests that are used? For example, some commonly used tests may produce misleading results and incorrect diagnoses when applied to survivors of domestic violence,[125] and these limitations should be noted.
- Did the assessor rely on the outcomes of the test as a means of predicting the behaviour in the future? Psychological tests cannot generally be used to make predictions of future behaviour.
- If the test results state that the test was invalid due to the client "faking good" or some other reason, did the assessor interpret the results anyway? Invalid tests should never be interpreted.
- Did the assessor rely on psychological testing to dismiss claims of family violence? As outlined previously, the vast majority of tests used by assessors in BC do not account for family violence and so cannot indicate whether it is or is not present.
- Did the assessor emphasize psychological test results over actual behaviours reported by the parties? For example, if a client has disclosed that family violence actually occurred, it is not necessary to use a test, which will always be flawed, to predict whether the opposing party will commit violence. Conversely, it is also a logical fallacy to suggest that the opposing party is a safe parent, even though the client has disclosed family violence, because a psychological test has said they were unlikely to commit acts of violence. Actual behaviour must be given precedence over predictions of behaviour.

We strongly recommend that if psychological testing has been used you retain another assessor to review the report, despite the cost.

Alienation

- Has the assessor started from a presumption that 50-50 is the preferred parenting schedule or that achieving 50-50 is the goal of case? This is contrary to the *FLA* which states that no particular parenting schedule is preferred.
- Has the assessor made an assumption that children rarely reject a parent unless the other parent is responsible?
- Has the assessor attempted to identify different reasonable explanations for the child rejecting one of the parents and fairly explored how the information supports different hypothesis?
- Has the assessor ignored or dismissed the views of the children?
- Has the assessor ignored or dismissed evidence of positive parenting by the primary parent?
- Has the assessor ignored or dismissed evidence of negative parenting by the rejected parent, including family violence?
- Has the assessor ignored the views of other professionals who have assisted the parties, for example counsellors?
- Has the assessor made the goal of the assessment to fix, or even manufacture for the first time, a positive relationship between the child and the rejected parent rather than ensuring that the best interests of the child, as set out in the *FLA*, are being met, including promoting safety?
- Has the assessor failed to consider parent or child safety?

Jaffe, Ashbourne and Mamo have proposed the following priorities where alienation is alleged, which may be helpful for assessing these types of cases:[126]

- Protect the child and primary parent from abuse and family violence.
- Protect the child from ongoing parental conflict and litigation.
- Protect the stability and security of the child's relationship with the primary parent and respect the right of the primary parent to direct his or her life.
- Respect the right of the child to have a meaningful relationship with each parent.
- Promote the benefits of the child having a positive relationship with a co-parenting team of parents.

Misleading Conclusions

- Are the assessor's conclusions internally inconsistent, or inconsistent with other evidence that they have cited? For example, in *NL v DL*[127], the court criticized the assessor for finding that the father was a capable parent while simultaneously recommending that child protection services monitor his interactions with the children.
- Has the assessor minimized or diminished certain events without providing an explanation, including dismissing child protection complaints and police reports?
- Did the assessor test or explore competing hypotheses, or did they set out to prove their own preferred theory? For example, if a child does not want to get out of your client's vehicle to go into the other parent's house during a drop off, an assessor may conclude that the child does not respect your client, or that your client is playing games. An alternative conclusion, if supported by your client's evidence, may be that the child is fearful to go into the other parent's house because of the other parent's past behaviour.
- Did the assessor go beyond a fair assessment of each parent and prescribe "treatment" such as reunification therapy? Assessors are not hired to develop plans for reunifying families, and to do so is an inappropriate step that presupposes that the judge will find that reunification is in the best interests of the children. Such programs can also come with very high costs.

You are also entitled to present alternative conclusions to the court if supported by evidence.

Code of Conduct Breaches

If applicable, review the relevant Code of Conduct or Ethics, or Standard of Practice for the assessor who completed the report.

- Did the assessor's conduct fall outside their professional obligations as set out in their Code of Conduct, Code of Ethics, or Standards of Practice?
- Were there instances of unethical behaviour?
- Did the assessor ask inappropriate questions?

Challenging the Report

Reliability

In "The ABC's of Expert Evidence", Todd R. Bell, Anne Demeulemeester, and Lindsey Cruickshank[128] provide a list of common critiques of s. 211 reports:

(1) the expert spent insufficient time with the parties to allow for an adequate assessment;

(2) the expert spent more time with one party than the other;

(3) the expert failed to observe the parties in the presence of the children;

(4) the expert failed to observe the parties with the children in their respective homes;

(5) the expert simply adopted the version of events presented by one party;

(6) the expert failed to speak with collateral witnesses;

(7) the expert failed to review relevant documents, including the pleadings;

(8) the expert opined on matters outside their area of expertise;

(9) the expert gave opinions beyond those set out in his or her report;

(10) the expert did not follow the standards set by the relevant professional code of conduct;

(11) the expert attempted to usurp the court's role as finder of fact and final arbiter of the matters in issue;

(12) the expert relied on inaccurate or unproven facts;

(13) the assumptions relied on by the experts were not proven in court; and

(14) the expert was biased.

None of these issues are determinative. Our review of cases in which s. 211 reports have been criticized and/or given little or no weight, in whole or in part, suggests that while any of these issues may raise concerns for a judge, the most problematic situations arise when assessors make recommendations that are inconsistent with the factual basis of the report or are speculative based on the available evidence. This is true both when the assessor's recommendations are inconsistent with the court's findings of fact, and when the assessor's recommendations are inconsistent with their own evidence-gathering.

For example, in *NJ v. SJ,*[129] the assessor failed to refer to certain incidents of family violence in their report, and also wrote the report at a time when no judicial or child protection findings had been

made with respect to family violence. There was no direct evidence of alienation and the circumstantial evidence was highly questionable. Brundrett J found that the assessor's "factual assumptions as to alienation are not established on the evidence before me, are inconsistent with the facts that I have found, or are too speculative to be relied upon in support of a reliable finding of alienation." Further, once the behaviour of the children and claimant was seen in the context of family violence it was found to be "equally consistent with justified estrangement."[130]

In *Dowell v Hamper,*[131] the assessor was challenged on cross-examination that he had downplayed or minimized family violence. He denied that this was his intent but said that the issue of family violence could "largely be left behind" as the parties were no longer cohabiting and in his opinion "the focus should be on the future."[132] The assessor failed to review the parties' affidavits in detail, failed to read the reports of other medical professionals including other medical information available regarding the father's serious mental health issues, and "seem[ed] to have accepted that the father underwent some sort of 'epiphany' or self-realization that has allowed him to overcome previously existing challenges in parenting skills."[133] Ultimately the assessor's acceptance of factually incorrect premises combined with his failure to review affidavit evidence undermined his conclusions regarding alienation, which were also not supported by references to factual incidents that evidenced alienation.[134]

In *NL v DL*[135] the court found that the assessor was "inconsistent in concluding that the Father is a capable parent who can protect and provide for the children on a daily basis yet recommends that the Ministry of Children and Family Development should become involved to monitor the interactions between the Father and the Mother and the Father and children. She also recommends that a social worker be assigned to the family to determine when unsupervised visits could take place. Clearly, the Father is not currently a parent who should be left alone to care for the children."

For additional examples of cases where the judge disagreed with the assessor's recommendations because they were inconsistent with the facts found at trial and/or credibility findings made by the judge, see: *SMM v JPH;*[136] *Bradford v Bradford*;[137] *Sampley v Burns;*[138] and *Shapiro v Simpson*.[139] For an additional example of where the assessor's conclusions were inconsistent with the assessor's own fact-finding process and "based on a shaky factual foundation," see *HK v WK*.[140]

Our review of cases in which s. 211 reports have been criticized and/or given little or no weight, in whole or in part, suggests that while any of these issues may raise concerns for a judge, the most problematic situations arise when assessors make recommendations that are inconsistent with the factual basis of the report or are speculative based on the available evidence.

Additional situations where judges have criticized assessors, and where the criticism has affected the weight given to some or all of the underlying s. 211 report, have included:

- where the assessor's report and testimony "seem[ed] to go beyond what was needed to be said or seem[ed] to favor [one party's] evidence unduly;"[141]
- where there was an imbalance in the time the assessor spent with each of the parties;[142]
- where the assessor did not make equivalent home visits, and commented that he was therefore limited in what he could glean from the maternal home visit, but subsequently did not, in fact, limit his analysis or conclusions;[143]
- where the assessor "did not rely on what the [children] told him or others;"[144]
- where the assessor's impressions were "so vague as to be unhelpful;"[145]
- where the assessor failed to speak to collateral witnesses including a psychologist who had been providing therapeutic counselling for a considerable period of time;[146]
- where the assessor made a diagnosis while failing to list or rigorously apply the DSM-V criteria;[147]
- where the assessor "tempered and minimized the respondent's mistakes and errors in judgment;"[148]
- where the assessor made "no analysis of potential harm to the children if their parenting time with their mother [was] reduced;"[149] and
- where the assessor was overly focused on explaining the father's conduct and how it could be dealt with rather than on the impact of his behaviour on the children and the risks to them.[150]

Cross-Examination

Cross-examining an expert is "risky."[151] It has been recognized that challenging a professional on their evidence is very difficult, "given the professional's specialized knowledge and expertise."[152] Experts may be reluctant to acknowledge limitations in their expertise, or that they may have made errors in their opinions. Experts may be unfamiliar with articles or sources that contradict their findings and refuse to acknowledge them as authoritative sources; without a second expert to introduce these competing theories or research, these contradictory sources of information will likely be inadmissible.

Cross-examination may be a Catch-22. While a review of case law confirms that it is indeed challenging and often unsuccessful, it is also necessary. Where an expert is not cross-examined, the

facts in their report are *prima facie* evidence of the truth. In Provincial Court, (Family) Rule 11(1.2) states that if a party wishes to contest *any* of the facts or opinions in a s. 211 report, they must cross-examine the assessor.

Where you do decide to cross-examine the expert, you will almost certainly find it helpful to work with another expert, even if they are not being asked to provide a rebuttal report, and we strongly recommend taking this step if possible, despite the extra expense. If psychometric testing has been completed as part of the assessment, this is the only way that counsel will be able to obtain the underlying test results.

Where you do decide to cross-examine the expert, you will almost certainly find it helpful to work with another expert, even if they are not being asked to provide a rebuttal report, and we strongly recommend taking this step if possible, despite the extra expense.

Critique or Rebuttal Reports

In some cases, counsel have sought 'rebuttal' or 'critique' reports by different assessors. The Supreme Court Family Rule 13-3 allows a party that "wishes to present to the court expert opinion evidence on an issue other than a financial issue" to appoint their own expert.

There are several factors to consider before you retain a second assessor to prepare a critique report, aside from the cost. First, unless you are seeking a whole new report, there will necessarily be limitations on the contents of the report because the second expert will not have conducted their own tests and observations.

Second, rebuttal reports must meet the tests in *Mohan* and *White Burgess* to be admitted into evidence. In most cases they are found to fail as they are considered unnecessary due to the existence of a "neutral" s. 211 report, the inability of the second author to conduct independent tests, the ability of the unhappy party to cross-examine the s. 211 assessor, and the fact that they are seen as partisan.

For example, in *Hejzlar,*[153] the plaintiff unsuccessfully applied to the court to introduce a critique report prepared by another well-known psychologist into evidence. The court made this decision on the grounds that critique reports are of little probative value because the critic does not have the ability to conduct an independent testing of the data as they are limited in their review by the Code of Conduct of the College of Psychologists of BC. The court held that the methodological concerns that were raised in the critique report could and should have informed the cross-examination, and that cross-examination should be the preferred vehicle to have such concerns heard by the court.[154]

Section 11.36 of the Code of Conduct of the College of Psychologists of BC dictates what psychologists can do when they are reviewing the report of another psychologist:

(a) they must limit comments to methods and procedures;

(b) they must not state any conclusions unless they have done their own individual assessments; and

(c) they must restrict themselves to comments as to their sufficiency and accuracy.

In *PGE v HRC*,[155] the court found that a critique report was more of "an assistant for the litigator and not for the court." Similarly, in *LCT v RK,*[156] the court gave critique reports little weight, commenting that critique reports are "more of an *aide memoire* for counsel to assist in cross-examination of the doctors [who prepared the s. 211 reports] than anything else."

However, there may be a stronger case for admission where the second assessor has engaged in independent testing resulting in a significant contradiction.

In *NRG v CRG*,[157] the mother was self-represented and was confronting serious accusations of alienation. The psychologist who performed the s. 211 assessment purported to make a "clinical assessment, falling short of a formal diagnosis" to the effect that the mother suffered several disorders, including paranoid personality disorder and obsessive-compulsive personality disorder. The mother's treating psychologist prepared a second document identifying a flawed methodology and various perceived deficiencies in the assessment including the "diagnosis." A third psychologist analyzed the raw data derived from the original assessor's testing and administered additional testing to the mother. This latter psychologist prepared a report concluding that the mother was essentially a well-functioning individual with no major personality disturbances and certainly nothing that would have any negative impact on her ability to parent her children.

In this case, the circumstances militated in favour of the court admitting the competing observations of the various psychologists into evidence.

Conclusion

"The system is set up to put an extraordinary amount of power in the hands of the evaluator. When they ignore family violence or blame the victim, they are perpetuating abuse and rendering victims powerless — the judicial system and registered psychologists combined form a formidable and seemingly insurmountable wall. I have never felt more helpless and abused in my life than when the psychologist ignored the abuse and in essence joined ranks with the abusive party. If the courts take the report as impartial or adequately investigated, then I am rendered mute — exactly what the abusive person wants."

Section 211 reports are a common feature of BC Courts but vary widely in terms of their content and quality. While reports may be helpful in some circumstances or with regard to specific issues, they pose special concerns for clients who have experienced family violence.

While these concerns are significantly diminished for reports prepared by family justice counsellors, who have mandatory family violence training and do not use psychological testing, they are heightened in cases where private assessors conduct psychometric tests or provide extensive opinions based on technical or specialised knowledge.

Despite s. 211 reports prepared by private assessors having all the hallmarks of expert evidence, the safeguards that normally accompany expert witnesses have been stripped from the process. At the time of writing, BC has established no regulations setting out what reports must contain, no assessor standards that govern best practices, and no requirement that the assessor have expertise in family violence.

Section 211 reports are frequently introduced into evidence without admissibility hearings, and without being required to meet the tests in *Mohan* and *White Burgess*, unlike virtually all other expert reports. Assessors are granted a fact-finding role not afforded to other experts, seemingly based on the wording that existed in BC's previous family law statute, and a line of cases that was started in relation to family justice counsellors a decade before the modern rules of evidence were outlined by the Supreme Court of Canada.

Once a report has been ordered, BC courts have been extremely reluctant to allow the introduction of competing expert evidence. As a result, the primary means of challenging an unsatisfactory

s. 211 report is through cross-examination of an experienced expert witness; this remedy is not only extremely expensive but challenging for many lawyers, and completely impractical for most self-represented litigants.

Outside the court system, clients may make complaints to their assessor's professional body, but even a successful complaint is unlikely to have any impact on their family law proceeding.

The importance of complaints, and their role in protecting the public, if not the parties themselves, is not hypothetical. During the two years we have been working on this project, media reports surfaced about two Canadian psychologists failing to competently complete assessments about parenting. In July 2019, Ontario psychologist Nicole Walton-Allen, who had conducted more than 100 assessments as an expert in child protection cases, was reported to have lied about her credentials and was found to be unqualified to perform the work.[158] In 2019, Dr. Allan Posthuma, who had prepared reports in over 200 BC cases, was the subject of multiple investigations for breaches of his Code of Conduct. He ultimately retired prior to a disciplinary hearing being held, leaving numerous complaints unresolved on the public record.[159]

Without any systemic oversight of private assessors through universal guidelines, regulations or standards on the front end, and few effective means of holding assessors accountable through the introduction of opposing expert evidence or an efficient complaints process on the back end, it is not surprising that our review of reports found that at least some of the reports being produced in this jurisdiction are failing to meet the standards that clients deserve and should be able to expect. Such standards have been developed in other jurisdictions. Without a robust process for scrutinizing evidence at the admissibility stage, it is not surprising that there is ample evidence in our case study and in BC's recent case law of problematic reports being entered into evidence; such reports may be accepted for the truth of their contents where parties lack the finances or emotional reserves to challenge them. The ability to cross-examine the assessor, in those cases where resources allow, is in no way a substitute for robust system of checks and balances.

As a result, counsel whose client has been subject to family violence or abuse should approach s. 211 reports with great caution and be prepared to build as many of their own safeguards into the process as possible.

APPENDIX A

Excerpts and Summaries from International Guidelines and Standards

The case study conducted by Coates and Faulkner as part of this project suggests that at least some of the s. 211 reports being produced in BC are failing to meet best practices, and that women and children who have experienced violence are being harmed as a result.

BC is not the first jurisdiction to grapple with the need for assessor standards and many other jurisdictions, both domestically and internationally, have developed detailed and authoritative standards.

We strongly recommend the creation of provincial assessor standards that would govern all assessors and all assessments in family law proceedings in BC. These assessor standards would be comprehensive and consistent with international guidelines and standards, would cover all of the core components of an independent and impartial parenting assessment, and ensure compliance with all of the relevant legal principles which govern s. 211 reports.

We recommend the following seven core components as being necessary to achieve assessor competency:

(1) Assessors must have special knowledge and skills with respect to family violence, beyond general qualifications in the mental health field, including in-depth knowledge about the nature, dynamics and impact of family violence.

(2) Assessors must screen for family violence, initially and throughout, in every case.

(3) Assessors must address all forms of bias, including explicit and implicit, individual and institutional, and cultural.

(4) Assessors must have knowledge of the applicable law, including knowledge of children's rights.

(5) Assessors must collect information and data in a fair and impartial manner.

(6) Assessors must consider the requirements that must be met to justify the use of psychological testing (additionally, significant limits that should be placed upon its use).

(7) Assessors must consider the requirements for fair and impartial analyses and, more broadly, ensure that their recommendations are based upon a fair and just, equality-based analysis. This this is a particularly important requirement as, unlike most experts, s. 211 assessors play a fact-finding role which includes credibility findings.

This Appendix provides excerpts and summaries from international guidelines and standards that support our recommendations. However, interested individuals should review the complete versions of documents discussed below.

The Association of Family and Conciliation Courts created Model Standards for Custody Evaluators[160] (*AFCC Standards)* in 2006, and supplemental Guidelines for Examining Intimate Partner Violence[161] (*AFCC Intimate Partner Guidelines*) in 2016. The *AFCC Standards* are widely used in the United States and in parts of Canada, such as Ontario, which has an AFCC Chapter, but they are not applied in British Columbia.

In 2006 the National Council of Juvenile and Family Court Judges and the State Justice Institute created "Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide"[162] (*US Judge's Guide).* In 2017, the US Department of Justice, Office of Justice Programs and the National Institute of Justice also prepared an article entitled "The Need for Mandatory Domestic Violence Training for Court Appointed Custody Evaluators."[163]

In 2015 the Family Court of Australia, the Federal Circuit Court of Australia, and the Family Court of Western Australia developed the Australian Standards of Practice for Family Assessments and Reporting[164] (*Australian Standards)*.

We also strongly recommend that that interested individuals review *Martinson & Jackson* for a recent discussion of standards.[165]

1. The requirement for special knowledge and skill of domestic violence

Section 5.11 of *AFCC Standards* state that evaluations involving allegations of domestic violence require specialized knowledge and training as well as the use of a "generally recognized systematic approach to the assessment of such issues as domestic violence…"

The *AFCC Intimate Partner Guidelines* also emphasize the importance of specialized qualifications:

> *Knowledge and Skills. A child custody evaluator needs in-depth knowledge of the nature, dynamics, and impact of intimate partner violence.* [166]

The *Australian Standards* state:

> Family assessors must have detailed knowledge and understanding of the nature, dynamics, cycle, impact and relevance of family violence and conduct assessments, as per the Family Court of Australia and Federal Circuit Court of Australia *Family Violence Best Practice Principles — edition* 3.1 (2013) and the *Family Violence Policy* of the Family Court of Western Australia.[167]

The *US Judge's Guide* emphasizes that qualification in the mental health field is not enough, and that basic training in domestic violence is insufficient:

> Choose the Expert
>
> First and Foremost, Training and Experience in Domestic Violence
>
> Domestic violence is its own specialty. Qualification as an expert in the mental health field or as a family law attorney does not necessarily include competence in assessing the presence of domestic violence, its impact on those directly and indirectly affected by it, or its implications for the parenting of each party. And even though some jurisdictions are now requiring custody evaluators to take a minimum amount of training in domestic violence, that "basic training" by itself is unlikely to qualify an evaluator as an expert, or even necessarily competent, in such cases.
>
> Ideally, your jurisdiction will already have a way of designating evaluators who have particular competence in domestic violence. Where that is not the case, you might test the evaluator's level of experience and expertise, despite the difficulties inherent in any such inquiry, by asking:
>
> - whether the evaluator has been certified as an expert in, or competent in, issues of domestic violence by a professional agency or organization...;
> - what courses or training (over what period of time) the evaluator has taken focused on domestic violence;
> - the number of cases involving domestic violence that the evaluator has handled in practice or to which he or she has been appointed, remembering, however, that such experience may *simply* reflect the mechanism used by the court in identifying potential evaluators, rather than any relevant expertise; and
> - the number of cases in which the evaluator has been qualified as an expert in domestic violence.[168]

2. Screening

Given the centrality of family violence to the *FLA,* which requires all family dispute resolution professionals including lawyers and family justice counsellors to screen for family violence, there is no obvious reason why private assessors writing s. 211 reports should be exempted from this basic requirement and why they should not be required to have expertise in this area given that it is a mandatory factor judges must consider when determining the best interests of the child.

The *AFCC Intimate Partner Guidelines* contain a strong statement calling for universal and ongoing screening in every case, and that the evaluator make behaviourally specific inquiries.

> *Universal and Ongoing Screening.* A child custody evaluator follows an intimate partner violence screening protocol in every case, including those where no allegations or judicial findings of intimate partner violence have been made.
>
> An evaluator may not assume that intimate partner violence is present or absent in a case. The purpose of screening is to identify information, behaviours, or disclosures indicating that intimate partner violence is or may be an issue. Screening is an ongoing process rather than a one-time event.
>
> ...
>
> An effective screening protocol is structured to promote safe and informed disclosures. An evaluator inquires about specific behaviours, multiple forms of abuse across time, and the existence of risk factors.[169]

This screening is said by the *AFCC Intimate Partner Guidelines* to be an important part of one of the three overarching Guiding Principles for evaluators: "Prioritize the safety and well-being of children and parents." The other two Guiding Principles are "Ensure an informed, fair, and accountable process;" and "Focus on the individual family."[170]

3. Addressing Independence and Impartiality — Absence of Bias

Everyone agrees that effective s. 211 reports must be independent, impartial and unbiased; achieving this result is a challenge. The *AFCC Guidelines* provide an example of how to tackle this issue. They deal with impartiality, independence and absence of bias in Guideline 5 under the heading "Ensure an Informed, Fair, Accountable Process." This Guideline also deals with the importance of recognizing gender, cultural and other biases relating to intimate partner violence. Of course, impartiality, independence and lack of bias, and specialized knowledge and skills in domestic violence go hand in hand.

Guideline 5 states:

> Mitigation of Bias. A child custody evaluator strives to recognize his or her gender, cultural and other biases related to intimate partner violence and take active steps to alleviate the influence of bias on the evaluation process.
>
> An evaluator endeavors to be alert to and avoid:
>
> a. Imposition of personal assumptions, biases, and beliefs about intimate partner violence and parenting and co-parenting;
>
> b. Misapplication of dominant cultural norms and values related to intimate partner violence which includes biases based on race, class, socioeconomic status, sexual orientation, religion, ethnicity, English proficiency, and/or immigration status of the parties;

c. Application of gender-based stereotypes and role expectations that can normalize abuse and discrimination;

d. Consideration of hypotheses that are not informed by existing research data on intimate partner violence; and

e. Use and/or misapplication of 'cultural explanations' offered by parties to justify (i) maternal and/or paternal inequality and devaluation, (ii) attitudes to divorce that stigmatize parents, and/or (iii) roles and practices that elevate or diminish the authority and social connections of either parent.

An evaluator's efforts to limit the impact of bias may include, but are not limited to: self-assessment, continued collection of information, updating central hypotheses, and seeking professional consultation.[171]

The *Australian Standards* also have a section on cultural issues which includes specific considerations for Indigenous families.

Cultural issues

34. Family assessors must ensure that all parties and relevant persons who need to be included in the assessment are able to do so without restriction due to language, culture or disability.

...

Family assessors should make enquiries with Indigenous parties as to whether the engagement of an Indigenous consultant or advisor is needed to assist the family members in the. process, and to advise the assessor about culturally appropriate interview practices.[172]

While the *US Judge's Guide* does not have a separate section on bias, the overall approach taken in them facilitates a lack of bias.

4. Knowledge of Applicable Law

The *AFCC Standards* are explicit about the importance of knowledge of statutes, case law, and rules. Evaluators have an obligation to understand fundamental rights and not to violate or diminish those rights:

2. Knowledge of the Law

2.1 Knowledge of Statutes and Legal Precedents

All child custody evaluators shall have knowledge of the legal and professional standards, laws and rules applicable to the jurisdiction in which the evaluation is requested...

2.2 Respect for the Legal Rights of Litigants and others

Child custody evaluators shall have an understanding of the fundamental legal rights of those who are part of the evaluation process and shall conduct themselves in such a manner as to not violate or diminish those rights.[173]

The legal rights of children can be overlooked in family law cases generally, and with respect to rights relating to s. 211 reports specifically.

On March 1, 2020, the national Canadian Bar Association Children and Youth Law Section submitted a comprehensive report to the United Nations Committee on the Rights of the Child on Canada's compliance with the Convention on the Rights of the Child. Among the concerns raised was the lack of implementation of children's rights when parenting assessments are being conducted.[174]

The *Australian Standards* have a section dealing with the rights and interests of children, including sections that address informed consent and necessary training and skills for assessors.

16. Children must be advised of the purpose of the interviews and informed of what will happen with the information they provide to the assessor.

...

17. Children must be informed that they do not have to provide information, answer questions or express views about which parent they may wish to live with or spend time with, or about any aspect of their parenting arrangements.

(a) Interviews with children should commence by informing children that what they tell the family assessor is not confidential.

(b) Children must be made aware that they do not have to express their views about the possible parenting arrangements, and must not be pressured into expressing a view.

...

19. Family assessors should be trained and skilled in forensic interview strategies with children and should follow generally recognised procedures when conducting interviews and observations with children.[175]

5. Impartial Information Gathering

The *AFCC Intimate Partner Guidelines* deal specifically with information collection.

FOCUS ON THE INDIVIDUAL FAMILY: Information Collection, Investigation, Analysis, and Synthesis

6. Explanations and Disclosures A child custody evaluator enhances safety by informing parents and collateral witnesses that the information they share about

intimate partner violence may be disclosed to the court and the parties by the evaluator.

...

7. Information Collection: Challenges. A child custody evaluator employs a rigorous multi-method and multi-source protocol that anticipates challenges associated with investigating the effects of intimate partner violence on children, parenting and co-parenting.

An evaluator may expect to invest substantial time and energy conducting a vigilant and thorough investigation of the impact of intimate partner violence on children and parenting. Evaluators may encounter challenges associated with information collection about intimate partner violence.

- A person who uses intimate partner violence may deny or minimize it.
- A person subjected to intimate partner violence may minimize or fail to disclose intimate partner violence even when long-standing and severe.
- Delayed disclosure of intimate partner violence does not indicate lack of credibility.
- A traumatized party may react or respond unexpectedly to evaluator inquiry.
- Intimate partner violence may not be documented in photos, medical records, police reports, protective orders, or through eyewitnesses.
- Coercive controlling behaviours may exist in the absence of past or recent physical violence.
- A child may deny or minimize or react in ways not anticipated by an evaluator.
- A parent subjected to intimate partner violence may engage in protective parenting that is only understood in the context of the intimate partner violence
- Standard psychological testing is not useful for the purpose of identifying whether intimate partner violence has occurred and/or whether a given parent has committed and/or whether a given parent has been subjected to intimate partner violence.

8. Information Collection: Intimate Partner Violence. To obtain a full understanding of the events and circumstances, an evaluator strives to investigate and collect information concerning:

a. the nature of aggression;

b. the frequency, severity and context of intimate partner violence;

c. whether one or both parties are responsible for the aggression; and

d. various risk factors for lethality, future violence, stalking, and abduction.

...

9. Information Collection: The Child. A child custody evaluator collects information concerning:

a. the child's experience(s) of past and current intimate partner violence, if any;

b. if the child has had such experience(s), the possible impact of the intimate partner violence on the child's health, safety, and wellbeing.

...

10. Information Collection: Parenting and Co-Parenting. A child custody evaluator collects information related to the potential impact of intimate partner violence on each parent's capacity to parent and/or co-parent.[176]

The *Australian Standards* require that family assessors use evidence-based methods including multiple data gathering methods in order to increase accuracy and objectivity.[177]

The *US Judge's Guide* suggests to judges that it is particularly important to obtain reliable collateral sources, explaining that:

> *Since abusive partners may deny and minimize their use of violence and other controlling behaviors, even to themselves, they may present as sincere and caring partners and parents. Their expressed concerns about the parenting capacity of their abused partners may be consistent with a longstanding habit of relentless criticism. Alternatively, the abused partner may indeed present as a less than competent parent; but his or her deficiencies may result from the emotional and physical toll the abuse has taken, and may to that extent be temporary in nature. Children may, in self-protection, have identified with their abusive parent rather than the parent who appears unable to offer protection, and may, in the form of rejection or blame of the victim, express their anger at being unprotected.*
>
> *In this complex and confusing environment, an evaluation that reaches conclusions based on the "he said/she said" of conflicting accounts without recourse to other corroborating sources may be inherently unreliable.*[178]

The *US Judge's Guide* also suggests who might be helpful as well as what records might be helpful. We emphasize that the *US Judge's Guide* includes shelter workers within the category of professionals who can provide important collateral information. In our experience, people from women-serving organizations who have direct knowledge about domestic violence are often specifically excluded from sharing their expertise:[179]

Some other sources of information identified by the *US Judge's Guide* follow.

> Helpful collateral sources may include:
>
> - other family members, friends, neighbors, co-workers (especially of the abused parent), community members, or former partners who have had regular interactions with the family or been involved in particular incidents relevant to the inquiry. Care must be taken in these instances to guard the flow of information so that neither an adult party nor a child is put at increased risk, keeping in mind that the abuse may not have been disclosed to others yet;
> - professionals with whom the family has had ongoing associations, such as doctors, teachers, clergy or counselors;
> - professionals (including shelter advocates, child welfare workers, or attorneys) who have become involved with the family because of reported incidents of, or concerns about, domestic violence or the safety or well-being of the children involved.
>
> Pertinent records may include:
>
> - police reports;
> - child abuse/child protection reports;
> - court files in the present case and any relevant prior civil or criminal cases involving either party;
> - medical, mental health, and dental records; and
> - school records.[180]

6. Psychological Tests

The *US Judge's Guide* has a significant and important section on psychological testing:

> The Role of Psychological Testing
>
> In the rare case in which it is a relevant and necessary aspect of an evaluation, you may decide, or the expert may decide, that psychological testing would provide a helpful supplement to the information obtained through interviews and examination of the written record. This is an area to approach with caution.
>
> The relevant questions to ask are the following:
>
> - What is the test being used to measure?
> - How is the test relevant to issues of custody and visitation?

- Is the test valid for the purposes for which it is being used, and is the expense justifiable given the test's limitations?
- Is the test recognized and accepted by experts in the field?
- What are the qualifications necessary to use the instrument?
- Does the expert have those qualifications?

In determining the relevance and reliability of psychological testing, consider the following:

- Research literature indicates that "there are no psychological tests that have been validated to assess parenting directly.
- No psychological test can determine whether or not a person has been an abuser or abused. There is no single profile of a victim or a perpetrator of abuse.
- The more tailored tests, developed in the past decade to address the questions most relevant in the custody context, such as the Bricklin Perceptual Scales (BPS), Perception of Relationships Test (PORT), Ackerman-Schoendorf Scales for Parent Evaluation of Custody Test (ASPECT) and Parent Awareness Skills Survey (PASS) tests, have not been evaluated with enough rigor to establish their validity or reliability. These tests do not provide answers. At best, they raise hypotheses in the mind of the evaluator to be validated or invalidated in subsequent explorations.
- The standard psychological tests measuring personality, psychopathology, intelligence or achievement including the Minnesota Multiphasic Personality Inventory (MMPI-2), Million Clinical Multiaxial Inventory (MCMI-III), Personality Assessment Inventory (PAI), Rorschach Inkblot Test, Children's Apperception Test (CAT), Thematic Apperception Test (TAT), Wechsler Adult Intelligence Scale (WAIS-III), and Wide Range Achievement Test (WRAT-3), do not directly address the psycho-legal issues relevant to most children, or parents' child-rearing attitudes and capacities. In a particular case, a standard test may offer information that is related to parent-child interactions, parent functioning or child functioning; but that information should be included in the evaluation *only if* the examiner makes clear the connection between the test results and the issue that is legally relevant in the custody context, and *only if* the test results are empirically supported and integrated with other data about real-life behavior. *[emphasis in original]*
- Some of these standard tests may also measure and confuse psychological distress or dysfunction induced by exposure to domestic violence with personality disorder or psychopathology. While there may be cases in which trauma induced by abuse has a negative impact on parenting in the short term,

it is critically important not to attach a damaging label prematurely to a parent whose functioning may improve dramatically once she or he is safe, and the acute stress has been alleviated, and the trauma treated.

- Specific tests to assess for trauma (Trauma Symptom Inventory (TSI), Draw-a-Person Test (DAP) and others) may be helpful in determining treatment goals and facilitating the healing process of the victim parent and children, but they are not appropriate to determine whether traumatic incident(s) occurred.[181]

The *Australian Standards* also deals with psychometric tools.[182] They say that these tools should only be used for the purposes and populations for which they have published validity and reliability. The tester must have the necessary training and qualifications, the use must be justified by the nature of the issues and must be supported by other means of assessment.

The earlier *AFCC Standards* make similar recommendations.[183]

7. Requirements of an Independent and Impartial Analyses: Factfinding, Including Credibility Assessment, and Recommendations

Assessors should determine what factual assumptions they have relied upon and why. We note that the new Ontario Family Rules specifically require a description of the factual assumptions on which the opinion is based.[184] Though the same provision is found in the proposed new BC Family Rules with respect to experts generally, s. 211 reports are exempt from the provision.[185]

The *AFCC Standards* state that evaluations of allegations of domestic violence require a generally recognized systematic approach in the assessment of such issues. They also deal with the Presentation and Interpretation of data this way:

> 12.2 Articulation of the Bases of Opinions Expressed
>
> Opinions expressed by child custody evaluators shall be based upon information and data obtained through the application of reliable principles and methods. Evaluators shall differentiate among information gathered, observations made, data collected, inferences made, and opinions formed.[186]

The *AFCC Intimate Partner Guidelines* state:

> 11. Analysis of Information. A child custody evaluator strives to organize, summarize and analyze the information collected and assess its sufficiency for determining the implications of intimate partner violence for children and parenting.
>
> ...

12. Synthesis of Information. A child custody evaluator endeavors to explicitly link intimate partner violence-related information with parenting recommendations concerning decision making and child access.[187]

The *Australian Standards* deal comprehensively with assessing risk as part of the assessor's analysis. Here are the principles. (The *Australia Standards* contain many subpoints not included here):

26. Family assessors must make reasonable efforts to obtain sufficient information from the parties, documents or collateral sources to assess the level and nature of risks to the welfare of the children, and to provide assessments of risk.

27. Where family violence is identified as an issue in a matter, the assessor must conduct an expert family violence assessment as part of their report. They should use commonly accepted interpretive frameworks for family violence.

28. Family assessors should only express opinions in areas where they are competent to do so, based on adequate knowledge, skill, experience and qualifications.

29. Family assessors must identify the limitations in or of the data obtained and any implications this has for their assessment and opinions. Where the available information is not sufficient to responsibly form opinions on the parenting arrangements for children, they should decline to offer an opinion.

30. Family assessors should avoid offering opinions to a court on matters that do not directly follow from the court order or the brief for the assessment, or are not otherwise relevant to the purpose of the evaluation from a legal or social science perspective.

31. Family assessors should endeavour to provide assessments that assist the decision making of the parties and/or the Court, based on the family and the situation as they are currently assessed. They should avoid making recommendations that unnecessarily delay or prolong decision making or assessment processes.

32. When presenting their findings or assessments in writing or in oral evidence, family assessors should strive to be accurate, objective and professional in their manner and language.

33. As experts, family assessors are expected to have a broad knowledge of the relevant published peer reviewed research relating to issues for families and children in family law matters. They are also expected to have an understanding of the diversity of this research and the views and findings expressed in it, how it relates to the cases they assess, and the limitations of research in this area.[188]

Endnotes

1 Ministry of Justice, FLA Transition Document, https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/fla/part10.pdf?bcgovtm=buffer; see also British Columbia Branch, Canadian Bar Association, *Family Law Sourcebook,* (2019 Update) Continuing Legal Education Society of British Columbia, Vancouver, at p. 2-80.

2 BC, *Supreme Court Family Rules*, O.C. 303/2009, r 13(1).

3 BC, *Provincial Court (Family) Rules*, O.C. 1444/98, r 11(1.1).

4 Note that some counsel draw a distinction between non-evaluative and evaluative Views of the Child reports, with non-evaluative reports simply recording the child's views with little commentary, and evaluative reports containing the assessor's evaluation of the child's views. Further, we have been advised that some legal professionals take the position that non-evaluative Views of the Child reports are not "assessments" at all and therefore properly fall under s. 202 (receiving the child's evidence) instead of s. 211. A search on Canlii suggests that the distinction between evaluative and non-evaluative Views of the Child reports is perhaps being drawn more frequently by lawyers and academics than by the judiciary, although this may also simply reflect that directions about the content of reports are not being described in published reasons for decisions. In our experience, non-evaluative Views of the Child reports by family justice counsellors are regularly ordered in Provincial Court under s. 211, so it is also possible that this distinction may hold greater significance in Supreme Court or when a private assessor is being retained. See *ALP v CJV*, 2020 BCSC 922 for a recent decision by the BC Supreme Court where an evaluative report was ordered.

5 *LCT v RK*, 2015 BCSC 2378 at para 419.

6 British Columbia, Family Justice Counsellors in Family Justice Centres, https://www2.gov.bc.ca/gov/content/life-events/divorce/family-justice/who-can-help/family-justice-counsellors.

7 British Columbia College of Social Workers, *Child Custody and Access Assessments* (2010), http://www.bccollegeofsocialworkers.ca/wp-content/uploads/2016/09/BCCSW-Standards-ChildCustody-final.pdf.

8 This section owes a debt to Jasmine Nielsen's unpublished paper "S. 211 Report Authors: Experts or Something Else?" (December 2017), which was prepared by Nielsen while a student at the Peter A. Allard School of Law at the University of British Columbia.

9 *R v Mohan,* [1994] 2 SCR 9 [*Mohan*], at para 21.

10 *Ibid* at paras 20-25.

11 *White Burgess Langille Inman v Abbott and Haliburton Co,* [2015] 2 SCR 182 [*White Burgess*].

12 *Ibid* at para 1.

13 *R v Abbey,* 2009 ONCA 624 at para 73 [*Abbey*].

14 *Ibid* at para 90.

15 Ontario and Alberta have explicitly identified analogous family court-appointed assessors as experts, but have also legislated that their reports reports are presumptively admissible. BC has not specifically legislated on this point.

16 *Hamilton v Hamilton*, [1983] BCWLD 1471, BCJ No 2496 [*Hamilton*].

17 *Ibid* at para 24.

18 *Ibid* at para 25.

19 See for example *G(IJGP) v M(K)*, 2016 BCSC 1072, at para 100; *JLH v PJH*, 2017 BCSC 1628, at para 24; *TEA v RLHC*, 2018 BCSC 2515, at para 18.

20 *Goudie v Goudie*, [1993] BCWLD 1459 at para 34 *[Goudie].*

21 For example, in 2006, Justice Johnston concluded that reports prepared under s. 15 were "by and large governed by the same considerations as those referred to in *Abbey* and *Lavallee*" (*C(JL) v J(GR)*, 2006 BCSC 619, at para 33). The same year, Justice Burnyeat, relying on *Goudie,* concluded that "s. 15 reports are not governed completely by the evidentiary rules which would be in effective when dealing with reports requested by one of the parties from an expert" (*Wu v Sun*, 2006 BCSC 1891, at para 6 [*Wu*]).

22 *Goudie*, *supra* note 20 at paras 33-34.

23 *Ibid*.

24 See for example *KMW v LJW*, 2010 BCCA 572 at para 61 [*KMW*]; *Shapiro v Simpson*, 2016 BCSC 2011 at para 102.

25 *White Burgess*, *supra* note 11 at para 1.

26 *Golanka v Golanka*, 2015 BCSC 497 at para 9.

27 *Ibid*.

28 *Kwan v Lai*, 2016 BCSC 1626 at para 45.

29 *Williamson v Williamson*, 2016 BCCA 87 at para 47.

30 *Abbey, supra* note 13 at para 63.

31 The Honourable Donna Martinson and Professor Emerita Margaret Jackson, "Family Violence and Parenting Assessments: Law, Skills and Social Context" (June 2019) pp. 43-52 [*Martinson & Jackson*], http://www.fredacentre.com/wp-content/uploads/2010/09/D.-Martinson-and-M.-Jackson-Report-Family-Violence-and-Parenting-Assessments-Law-Skills-and-Social-Context.pdf

32 *Young v Young*, [1993] 4 SCR 3.

33 *Ibid* at para 87.

34 *Ibid* at paras 210-212.

35 Linda Neilson and Muriel Fergusson, "Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?" (2018) (Fredericton: Muriel McQueen Fergusson Centre for Family Violence Research and Vancouver: The FREDA Centre for Research on Violence Against Women and Children) [*Neilson, Empirical Analysis*], https://fredacentre.com/wp-content/uploads/Parental-Alienation-Linda-Neilson.pdf; Michael Davis and Chris O'Sullivan et al. "Custody Evaluations Where There Are Allegations of Domestic Violence: Practices, Beliefs, and Recommendations of Professional Evaluators" Final Report submitted to the National Institute of Justice by New York Legal Assistance Groups (2011), https://www.ncjrs.gov/pdffiles1/nij/grants/234465.pdf; Professor Nicolas Bala, Dr. Rachel Birnbaum, & Carly Watt, "Addressing Controversies About Experts in Disputes over Children" (2017) 30:1 Can J Fam L 71, https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1012&context=can-j-fam-l.

36 Timothy M Tippins and Jeffrey P Wittman, "Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance" (2005) 43:2 Fam Ct Rev 193, http://www.boulderparentsupport.com/wp-content/uploads/2016/05/custodyevals-ethics.pdf.

37 Hanna Goddard-Rebstein and Amber Prince, "The Limits of Psychological Testing in Parental Capacity Assessment Reports: A Literature Review" Atira Women's Resource Society (December 2016) [*Atira*], https://atira.bc.ca/sites/default/files/AWRS%20-%20Legal%20Advocacy%20-%20The%20Limit%20of%20Psychological%20Testing%20in%20Parental%20Capacity%20Assessment%20Reports.pdf; Brielle Morgan, "Psychologists are using biased tests to assess Indigenous Parents, experts say." The Discourse (June 13, 2018) [*Morgan*], https://

thediscourse.ca/child-welfare/psychologists-using-biased-tests-to-assess-indigenous-parents-experts-say

38 *KW v LH*, 2018 BCCA 204 at para 59 [*KW*].

39 *Dimitrijevic v Pavlovich,* 2016 BCSC 1529 [*Dimitrijevic*].

40 *Ibid* at para 25.

41 *Hejzlar v Mitchell*, 2010 BCSC 1139 [*Hejzlar*].

42 *Ibid* at paras 14-16.

43 *Dimitrijevic, supra* note 39.

44 *Ibid* at para 37.

45 *Martinson & Jackson, supra* note 31 at p. 52.

46 *AL v LW,* 2017 BCSC 964, at para 58, quoting *W (KM) v W (LJ),* 2010 BCCA 572, at para 50; *KMW, supra* note 24 at para 50; see also *Bramwell v Bramwell*, 2004 BCSC 72.

47 *Wu*, *supra* note 21 at para 7.

48 *S(AR) v T(MC)*, 2016 BCPC 345 [*S(AR)*] at para 56.

49 British Columbia, Ministry of Attorney General, Justice Services Branch, Family Justice Services Division, *Judges' Satisfaction with Custody and Access Reports: A Survey of BC Supreme and Provincial Court Judges* (31 March 2005), https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/justice-services-branch/fjsd/judge-survey.pdf.

50 JT Beck "The Impact of Section 211 Reports on Parenting Orders: A Retrospective Analysis of BC Family Law Cases" October 2018 (unpublished) [*Beck*]. This was an unpublished academic paper prepared by Beck while a student at the Peter A. Allard School of Law at the University of British Columbia as a directed research project for course credit. Search criteria included cases decided based on the *FLA* since 2013 using the terms "section 211", "s. 211" and "family." The initial search generated almost 500 cases. Cases were sorted in order of most recent decisions and 172 cases were reviewed from the latest date of August 2018 the earliest date of July 2016. 132 cases were excluded where the court was merely ordering a s. 211 report instead of reviewing one, or where the decisions were too brief or too narrow in scope to be useful to the study.

51 *Goudie*, *supra* note 20 at paras 32-33.

52 The Honourable Donna Martinson, Retired Justice of the British Columbia Supreme Court.

53 *Beck, supra* note 50.

54 *Neilson, Empirical Analysis, supra* note 35 at p. 33.

55 Laura Track and Shahnaz Rahman, "Troubling Assessments," West Coast LEAF June 2012) [*West Coast LEAF*], http://www.westcoastleaf.org/wp-content/uploads/2014/10/2012-REPORT-Troubling-Assessments-Custody-and-Acess-Reports-and-their-Equality-Implications-for-BC-Women.pdf; *Atira, supra* note 37.

56 For a comparison of "Issues Then (2012) and Issues Now (2019)" see the *Martinson & Jackson, supra* note 31 at pp. 27-41.

57 Turkat, I, "Harmful Effects of Child-Custody Evaluations on Children," (2016) 52:4 Court Review 134 at p. 152.

58 *Ibid,* at pp. 154-155.

59 Jonathan W Gould and Allan Posthuma, "The Unsubstantiated Claims of Turkat's Harmful Effects of Child-Custody Evaluations on Children," (2016) 52:4 Court Review 134 at p. 160.

60 Turkat, I, "Child Dead and Parent Charged with Murder After Psychologist Recommends Said Parent to Court," (2016) 52:4 Court Review 134, at p. 170.

61 Bethany Lindsay, "BC psychologist made 'nonsensical' conclusions to dismiss domestic violence claims, new report says," CBC News (November 19, 2019) [*Lindsay*], https://www.cbc.ca/news/canada/british-columbia/allan-posthuma-psychologist-domestic-violence-1.5352600.

62 Jason Hans et al., "The Effects of domestic violence allegations on custody evaluators' recommendations" (2014) 28:6 J Family Psychology 957, https://psycnet.apa.org/record/2014-36049-001; Rachael Field et al., "Family reports and family violence in Australian family law proceedings: What do we know?" (2016) 25 JJA 212, https://www.researchgate.net/publication/304520692_Family_reports_and_family_violence_in_Australian_family_law_proceedings_What_do_we_know; Pence et al., "Mind the Gap: Accounting for Domestic Abuse in Child Custody Evaluations" The Battered Women's Justice Project (June 2012), https://www.bwjp.org/assets/documents/pdfs/mind_the_gap_accounting_for_domestic_abuse_in_child_custody_evaluations.pdf; Samantha Jeffries et al., "Good Evidence, Safe Outcomes in Parenting Matters Involving Domestic Violence? Understanding Family Report Writing Practice from the Perspective of Professionals Working in the Family Law System" (2016) 39(4) UNSWLJ 1355, https://www.researchgate.net/publication/311219956_good_evidence_safe_outcomes_in_parenting_matters_involving_domestic_violence_understanding_family_report_writing_practice_from_the_perspective_of_professionals_working_in_the_family_law_system.

63 *Martinson and Jackson*, *supra* note at pp. 65-73.

64 See also T K Logan et al., "Child Custody Evaluations and Domestic Violence: Case Comparisons" (2002) 17:6 Violence & Victims 719. This study examined two groups of cases, one where domestic violence was a factor and the other where domestic violence was not present. Although the study found differences in court records, there were no significant differences in the custody evaluator recommendations for custody or visitation regardless of whether violence was present. Logan observed at p. 736 that "That lack of attention to domestic violence raises serious questions about evaluator's understanding of the risk of harm for children and parents in cases with domestic violence" and at p. 737 noted the potential for evaluator's recommendations to "contribute to further exposure to conflict and violence and harm to the child."

65 For this case study the participants gave the approximate costs associated with all of their reports.

66 Linda Neilson, "Responding to Domestic Violence in Family Law, Civil Protection and Child Protection Cases," 2017 CanLIIDocs, updated March 2020, at 1.4, https://commentary.canlii.org/w/canlii/2017CanLIIDocs2#!fragment//BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoByCgSgBpltTCIBFRQ3AT0otokLC4EbDtyp8BQkAGU8pAELcASgFEAMioBqAQQByAYRW1SYAEbRS2ONWpA.

67 Nicholas Bala, "Mohan, Assessments & Expert Evidence: Understanding the Family Law Context," (2007) Queen's University Faculty of Law Research Paper Series, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=989761. See also Robert E Emery et al., "A critical assessment of child custody evaluations: Limited science and a flawed system," (2005) 6:1 Psychological Science in the Public Interest, 1-29, https://www.researchgate.net/publication/298866224_A_Critical_Assessment_of_Child_Custody_Evaluations_Limited_Science_and_a_Flawed_System.

68 Leigh D Hagan and Ann C Hagan, "Custody evaluations without psychological testing: Prudent practice or fatal flaw?" (2008) 36:1 Journal of Psychiatry & Law 94.

69 *Atira, supra* note 37.

70 Daniel G Saunders, "Research based recommendations for child custody evaluation practices and policies in cases of intimate partner violence," (2015) 12:1 Journal of Child Custody 71, citing the National Council of Juvenile and Family Court Judges at p. 77, https://deepblue.lib.umich.edu/bitstream/handle/2027.42/113266/Saunders%20DG%20

2015%20-%20Research%20Based%20Recommendations%20for%20Child%20Custody%20Evaluation%20Practices%20and%20Policies%20in%20IPV%20Cases%20-%20JCC.pdf;sequence=1. Saunders also sites a 2011 survey in which evaluators were asked to describe one or more instruments to assess domestic violence. Sixteen percent listed only general measures, most commonly the MMPI. Saunders found that "Evaluators using such general measures were more likely to believe that mothers make false allegations and to award sole or joint custody to the father in a case vignette. They had acquired less knowledge on [intimate partner violence] screening and danger assessment." This is noteworthy given that in our BC sample, assessors consistently failed to use tools designed to assess for domestic violence.

71 *Atira, supra* note 37.

72 Canadian Psychological Association and Psychological Foundation of Canada, "Psychology's Response to the Truth and Reconciliation Commission of Canada's Report," (May 2018) at p. 16, https://cpa.ca/docs/File/Task_Forces/TRC%20Task%20Force%20Report_FINAL.pdf. See also *Morgan, supra* note 37, where a BC assessor, when asked about assessing Indigenous clients, is quoted as follows: "I assess Spanish people, refugees… people who are Chinese. And I'm not Chinese and I'm not Spanish, so why would it be different, you know?… Doesn't matter if the child is blue, navy, orange, yellow…What's important is you get a qualified professional who will take the best interests of the child. That's all."

73 Terry M Pace et al., "A cultural-contextual perspective on the validity of the MMPI-2 with American Indians" (2006) 12:2 Cultural Diversity & Ethnic Minority Psychology 327. See also Jill S Hill, et al. "Decolonizing personality assessment and honoring indigenous voices: A critical examination of the MMPI-2," (2010) 16:1 Cultural Diversity & Ethnic Minority Psychology 108.

74 *Atira, supra* note 37.

75 Family Court Review, *Special Issue: Parent-Child Contact Problems: Concepts, Controversies and Conundrums* (2020) 58:2. This special edition includes discussion about areas of consensus and disagreement among the professionals engaged in alienation research.

76 This list is adapted from Linda Neilson, "Inequality and the Future of Family Law: What Happens When Domestic Violence & Parental Alienation Collide in Family Courts? The Canadian Experience." Presentation to International Society of Family Law, North American Regional Conference (April 25, 2018) [*Neilson, Inequality*]. Note that the original list included "non-adherence to child development & resilience principles" which falls outside of the scope of this review but should be considered by counsel when seeking assessors with the expertise to prepare or review s. 211 reports.

77 CBC News recently reported on such a case. See Tara Carman, "Survivors of domestic abuse told to keep quiet about it in court or risk jeopardizing child custody" (posted September 27, 2020, updated September 28, 2020) CBC Investigates, https://www.cbc.ca/news/canada/domestic-abuse-custody-1.5738149. The story included an interview with one of the authors of this toolkit.

78 Richard A. Gardner, "Recent Trends in Divorce and Custody Litigation" (1985) 29:2 Academy Forum 3 [*Gardner*], www.fact.on.ca/Info/pas/gardnr85.htm.

79 The diagnostic behaviours identified by Gardner included (i) the preferred parent engages in a campaign of denigration against the rejected parent; (ii) the child only gives weak, frivolous, or absurd reasons for rejecting the parents; (iii) the child lacks ambivalence towards both parents, one is viewed as all good and the other all bad; (iv) the child lacks remorse for the poor treatment of the targeted parent; (v) the

child reflexively supports the favored parent; (vi) the child volunteers that rejection of the parent is the child's own idea; and (vii) the child's animosity spreads to the friends and family of the targeted person. See Gardner, *ibid.* and Roy Lubit, "Valid and invalid ways to assess the reason a child rejects a parent: The continued malignant role of "parental alienation syndrome," (2017) 16:1 J Child Custody 42 at p. 3.

80 *Boyd*, *supra* note 75 at p. 3.

81 Joan B Kelly and Janet R Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome," (2001) 39:3 Fam Ct Rev 249 at p. 253, https://tcms.njsba.com/personifyebusiness/Portals/4/1115Handouts/docalienated.pdf.

82 Madelyn S Milchman, et al. "Ideology and Rhetoric Replace Science and Reason in Some Parental Alienation Literature and Advocacy: A. Critique," (2020) 58:2 Family Court Review 340 [*Milchman]*, at pp. 343-344. This article appears in a 2020 special edition of the Family Court Review which canvases many of the complex issues relating to alienation, and includes discussion about areas of consensus and disagreement among the professionals engaged in alienation research. Family Court Review, *Special Issue: Parent-Child Contact Problems: Concepts, Controversies and Conundrums* (2020) 58:2.

83 National Council of Juvenile and Family Court Judges, "Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide," (29 February 2012) at p. 14, footnote 28, https://www.ncjfcj.org/wp-content/uploads/2012/02/navigating_cust.pdf.

84 *Milchman*, *supra* note 82 at p. 344. Milchman notes that inclusion in the WHO's classification system was opposed by a large number of organizations and experts in the child abuse, trauma, and domestic violence fields who signed a "Collective Memo of Concern"; this Collective Memo is available online: http://www.learningtoendabuse.ca/docs/WHO-September-24-2019.pdf.

85 Ibid. at p. 344.

86 Roy Lubit, "Valid and invalid ways to assess the reason a child rejects a parent: The continued malignant role of "parental alienation syndrome," (2017) 16:1 J Child Custody 42, [*Lubit*]; O'Donohue, Lorraine T Benuto & Natalie Bennett, "Examining the validity of parental alienation syndrome," (2016) 13:2-3 J Child Custody 113, https://xyonline.net/sites/xyonline.net/files/2019-10/O'Donohue,%20Examining%20the%20validity%20of%20parental%20alienation%20syndrome%202016.pdf.

87 *Milchman, supra* note 82 at p. 345.

88 *Milchman, supra* note 82 at p. 342.

89 *Neilson, Empirical Analysis, supra* note 35 at p. 10.

90 *Neilson, Empirical Analysis*, *supra* note 35 at p. 12.

91 Boyd, *supra* note 75 at pp. 12-15.

92 *Neilson, Empirical Analysis, supra* note 35 at p. 19.

93 *Neilson, Empirical Analysis, supra* note 35 at pp. 19-22.

94 *Neilson, Empirical Analysis, supra* note 35 at p. 22; see also *McLaren v McLaren*, 2016 BCSC 2458; and *NRG v GRG*, 2017 BCSC 774.

95 *JESD v YEP* 2017 BCSC 495.

96 The child in this case discusses her experience in the Child Participation Panel at BC Continuing Legal Education Association's Access to Justice Conference (March 6, 2020); a video can be accessed through BCCLE Online.

97 The Honourable Donna J Martinson & Caterina E Tempesta, "Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation," (2018) 31:3 Can J Fam L 151; The Canadian Bar Association, "Alternative Report to the United Nations Committee on the Rights

of the Child," (2020) at 14, http://cba.org/CMSPages/GetFile.aspx?guid=fdb96dc7-35e0-4b6d-8918-40ba6607582a.

98 *Martinson & Jackson, supra* note 31 at pp. 18-27.

99 *Neilson*, *Inequality*, *supra* note 76.

100 *NRG v GRG,* 2015 BCSC 1062 at para 287; this case was partially overturned on appeal, including because the trial judge did not fully consider the best interests of the child as required by s. 37 of the *FLA:* see *NRG v GRG* 2017 BCCA 407, at paras 44-46.

101 *Boyd*, *supra* note 75 at p. 17.

102 *CJJ v AJ,* 2016 BCSC 676.

103 *JCW v JKRW*, 2014 BCSC 488, at para 69 to 70; note that in this case there was also an expert report identifying alienation as a concern.

104 *HG v KG*, 2016 BCPC 274.

105 *Williamson v Williamson*, *supra* note 29at paras 47-48.

106 *Mohan*, *supra* note 9.

107 *White Burgess*, *supra* note 11.

108 *Neilson, Empirical Analysis*, *supra* note 35 at p. 9.

109 Nico Trocme, and Nicholas Bala, "False allegations of abuse and neglect when parents separate," (2005) 29(12) *Child Abuse & Neglect* 1333-1345, http://www.leadershipcouncil.orgwww.leadershipcouncil.org/docs/Trocme.pdf.

110 *Lubit, supra* note 86 at p. 4.

111 *Lubit, supra* note 86 at p. 8.

112 *Lubit, supra* note 86 at pp. 8-9.

113 Joan B Kelly and Janet R Johnston "The alienated child: A reformulation of parental alienation syndrome," (2001) 39(3) *Family Court Review* 249-266 at p. 254.

114 *Lubit,* supra note 86 at p. 14.

115 *Milchman*, *supra* note 82 at p. 343.

116 *Lubit*, *supra* note 86 at p. 15.

117 *Martinson & Jackson, supra* note 31 at p. 47, citing an earlier report by D. Martinson, "Independent and Impartial Parenting Assessments," prepared for Assessment of Parenting Assessments After Separation in the Context of Domestic Violence Workshop, presented to the College of Psychologists of British Columbia by Dr. Peter Jaffe (November 21, 2013), http://fredacentre.com/wp-content/uploads/2010/09/The-Hon.-D.-Martinson-Independent-and-Impartial-Parenting-Assessments-November-21-2013.pdf.

118 *Smith v Smith*, 2014 BCSC 61, at para 12.

119 *AJB v JM*, 2019 BCSC 2335, at para 22.

120 *Ryan v Reid*, 2002 BCSC 872, at paras 12-14.

121 *Symington v Simor*, [2000] B.C.J. No. 2688 (S.C.) at para 12. See also *DS v PS*, 2005 BCSC 1047, at paras. 23-25; and *DS v EPS,* 2011 BCSC 1102, at paras 56-58 where reports were not ordered in acrimonious proceedings due to the potential detrimental impact on the child of participating in the preparation of the report. Interestingly after a review of this line of cases, and others, Madam Justice Fleming, in *REQ v GJK,* 2015 BCSC 1786, ordered a s. 211 report "if [the child] agrees to participate" and Madam Justice Morellato made a similarly qualified order in *HVG v LET and ET Inc*, 2017 BCSC 1324.

122 2019 BCSC 1799, at paras 12-18.

123 *NR v NP*, 2017 BCSC 1962, at para 28.

124 At the time of writing, a committee of lawyers, psychologists and a Provincial Court Judge have prepared a draft Model Order for s. 211s which is being offered as a resource to counsel; it is unclear at the time of writing as to whether it will be formalised in some way. We have provided written submissions to the committee setting out why we do not endorse the Model Order in its current form, as we feel it does not include adequate protections for clients experiencing family violence. Counsel may therefore wish to either craft their own order or seek modifications or additions to the draft Model Order.

We have provided an in-depth discussion of assessor standards in Appendix A which may be useful in this regard.

125 *Atira*, *supra* note 37.

126 Peter Jaffe, Dan Ashbourne and Alfred A Mamo, "Early Identification and Prevention of Parent-Child Alienation: A Framework for Balancing Risks and Benefits of Intervention," (2010) 48:1 Fam Ct Rev 136, https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1744-1617.2009.01294.x.

127 *NL v DL*, 2018 BCSC 1580, at para 189.

128 Todd R. Bell, Anne Demeulemeester and & Lindsey Cruickshank, "The ABC's of Expert Evidence," *Family Law Basics – 2017 Update*, Paper 2.1 (Vancouver: CLEBC, 2017) at 2.1.15.

129 *NJ v SJ,* 2018 BCSC 2352, at paras 220-225.

130 *Ibid*, at para 224.

131 *Dowell v Hamper*, 2019 BCSC 1266.

132 *Ibid*, at para 65.

133 *Ibid*, at para 90.

134 *Ibid*, at paras 91-93.

135 *NL v DL*, 2018 BCSC 1580, at para 189.

136 *SMM v JPH*, 2019 BCSC 472.

137 *Bradford v Bradford,* 2017 BCSC 661.

138 *Sampley v Burns*, 2017 BCSC 622, at para 44.

139 *Shapiro v Simpson*, 2016 BCSC 211.

140 *HK v WK*, 2017 BCSC 1817, at paras 101-102.

141 *RJM v ANM*, 2018 BCSC 698, at para 49.

142 *RSD v KD,* 2018 BCSC 2416, at paras 61-62.

143 *Ibid*, at paras 70-71.

144 *Bradford v Bradford,* 2017 BCSC 661*,* at para 97.

145 *HK v WK,* 2017 BCSC 1817, at para 100.

146 *NRG v CRG*, 2015 BCSC 1062.

147 *SRM v NGTM*, 2020 BCSC 468 at para 108.

148 *Ibid*, at para 109.

149 *Ibid*, at para 110.

150 *NL v DL*, 2018 BCSC 1580, at para 187.

151 *S(AR), supra* note 48, at para 53.

152 *West Coast LEAF, supra* note 55, at p. 10.

153 *Hejzlar, supra* note 41, at para 15.

154 *Hejzlar, supra* note 41, at paras 12 and 15.

155 *PGE v HRC,* 2016 BCSC 1316, at para 37.

156 *LCT v RK*, 2015 BCSC 2378, at para 275.

157 *NRG v CRG*, 2015 BCSC 1062.

158 Jacques Gallant, "Expert who gave more than 100 assessments in Ontario child protection cases lied about credentials for years, judge finds," (updated July 31, 2019), The Star, https://www.thestar.com/news/gta/2019/07/31/expert-who-gave-more-than-100-assessments-in-ontario-child-protection-cases-lied-about-credentials-for-years-judge-finds.html.

159 *Lindsay*, *supra* note 61.

160 David A Martindale, "Model Standards for Custody Evaluators" (2006) [*AFCC Standards*], Association of Family and Conciliation Courts [*AFCC Standards*], www.afccnet.org/Portals/0/ModelStdsChildCustodyEvalSept2006.pdf.

161 Association of Family and Conciliation Courts, "Guidelines for Examining Intimate Partner Violence: A Supplement to the AFCC Model Standards of Practice for Child Custody Evaluation" (2016) [*AFCC Intimate Partner Guidelines*], https://www.afccnet.org/Portals/0/Center%20for%20Excellance/Guidelines%20for%20Examining%20Intimate%20Partner%20Violence.pdf.

162 National Council of Juvenile and Family Court Judges, "Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide" (29 February 2012) [*US Judge's Guide*], https://www.ncjfcj.org/wp-content/uploads/2012/02/navigating_cust.pdf.

163 National Institute of Justice, "The Need for Mandatory Domestic Violence Training for Court-Appointed Custody Evaluators" (2017), https://nij.ojp.gov/topics/articles/need-mandatory-domestic-violence-training-court-appointed-custody-evaluators.

164 Family Court of Australia, Federal Circuit Court of Australia, and Family Court of Western Australia, "Australian Standards of Practice for Family Assessments and Reporting" (2015) [*Australian Standards*], http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/asp-family-assessments-reporting.

165 *Martinson & Jackson*, *supra* note 31; discussion about the importance of standards with respect to bias can be found at pp. 16-17; standards with respect to family violence qualifications at pp. 31-32; and standards more generally at pp. 53-55.

166 *AFCC Intimate Partner Guidelines, supra* note 161 at section 3, p. 6.

167 *Australian Standards, supra* note 164 at section 6(e) at p. 11.

168 *US Judge's Guide, supra* note 162 at p. 16.

169 *AFCC intimate Partner Guidelines, supra* note 161 at pp. 5-6.

170 *AFCC Intimate Partner Guidelines, supra* note 161 at p. 2.

171 *AFCC Intimate Partner Guidelines, supra* note 161 at p. 8.

172 *Australian Standards, supra* note 164 at section 34 at p. 28.

173 *AFCC Standards, supra* note 160 at pp. 26-27.

174 The Honourable Donna J Martinson & Caterina E Tempesta, "Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation," (2018) 31:3 Can J Fam L 151; The Canadian Bar Association, "Alternative Report to the United Nations Committee on the Rights of the Child," (2020) at 14, http://cba.org/CMSPages/GetFile.aspx?guid=fdb96dc7-35e0-4b6d-8918-40ba6607582a.

175 *Australian Standards, supra* note 161 at pp. 16-18.

176 *AFCC Intimate Partner Guidelines, supra* note 161 at pp. 9-12.

177 *Australian Standards, supra* note 164 at section 11a, p. 15, para 11.

178 *US Judge's Guide, supra* note 162 at p. 19.

179 See also The Honourable Donna Martinson, "The Family Law Act and Family Violence: Independent and Impartial Parenting Assessments," (2013), prepared for a B.C. College of Psychologists' education program, https://www.bcasw.org/wp-content/uploads/2013/12/Independent-and-Impartial-Parenting-AssessmentsDec15.pdf.

180 *US Judge's Guide, supra* note 162 at p. 19.

181 *US Judge's Guide, supra* note 162 at pp. 20-21.

182 *Australian Standards, supra* note 164 at p. 15, para 12.

183 *AFCC Standards, supra* note 160 at 6.3 and 6.4, pp. 17-18.

184 *Family Law Rules*, O Reg 114/99, s 20(2)(6)(ii).

185 Proposed BC Provincial Family Court Rules 134(f)(1) and (8).

186 *AFCC Standards, supra* note 160 at 12.2, p. 24.

187 *AFCC Intimate Partner Guidelines, supra* note 161 at pp. 14-15, paras 11-12.

188 *Australian Standards, supra* note 164 at pp. 23-27.

This *Section 211 Toolkit* draws on an analysis of BC s. 211 reports prepared by Linda Coates PhD and Ellen Faulkner, PhD, "Turning Victims into Perpetrators: A Critical Analysis of Custody and Access Assessment Reports" (2020), currently unpublished.

Rise
WOMEN'S LEGAL CENTRE

Rise Women's Legal Centre is a community legal centre striving to create accessible legal services that are responsive to the unique needs of self-identifying women, particularly those who are survivors of violence, abuse and unequal power dynamics.

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Rise Women's Legal Centre respectfully acknowledges that our work takes place on the traditional, ancestral, and unceded homelands of the **Skwxwu7mesh** (Squamish), **Tsleil-Waututh** (Burrard), and **xʷməθkʷəy̓əm** (Musqueam) Nations