A LAWYER'S GUIDE TO KEEPING WOMEN AND CHILDREN SAFE IN BC'S FAMILY LAW SYSTEM

Rise
WOMEN'S LEGAL CENTRE

WITH GENEROUS SUPPORT FROM WOMEN AND GENDER EQUALITY CANADA

Women and Gender Equality Canada
Femmes et Égalité des genres Canada

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Are We Ready to Change? A Lawyer's Guide to Keeping Women and Children Safe in BC's Family Law System

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

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.

Photography by Melody Charlie
Graphic design by Nadene Rehnby

Rise WOMEN'S LEGAL CENTRE

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.

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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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Introduction

One of the consequences of having been collectively involved in anti-violence work in British Columbia and Canada for 30 years, which has included front-line advocacy and support; activism; community based-research; academic research; consultations; law reform and policy initiatives; rallying on the courthouse steps; and now being an officer of the court in family law practice, is an appreciation of the challenges of addressing family violence and in particular violence against women and children who are trying to access the legal system.

There are many tragic examples in British Columbia of spousal homicide and/or a spouse and their children being killed following a relationship breakdown or following the parties' involvement in family law court.

One such tragedy recently claimed Chloe and Aubrey Berry. Six-year-old Chloe and her four-year-old sister Aubrey were found dead in an Oak Bay, BC, apartment on Christmas Day 2017. The sisters were scheduled to have an overnight visit with their father, Andrew Berry. Their parents, Sarah Cotton and Andrew Berry, were separated. Andrew Berry was convicted of murdering his two daughters and was sentenced to life in prison with no chance of parole for 22 years.

In her victim impact statement, Sarah Cotton stated:

> *Anything I say does not articulate the depth of my grief and loss as this is a nightmare that I can never wake up from. Since December 25, 2017, I have tried to comprehend an egregious act that is incomprehensible.*
>
> *This trial was the antithesis of the healing process. I was retraumatized by all of the details that were revealed and made public through the media. I would brace myself every day for new information that I was not previously aware of.*
>
> *...*
>
> *I am concerned with what happens next as I fear for my safety if I have contact with Andrew.*
>
> *...*
>
> *I dread the day I have to begin attending multiple parole hearings. The pain, trauma and psychological harm will only continue if this has to be revisited every few years.*

...

Chloe and Aubrey's deaths cannot be in vain. My children had no power or understanding of what was being done. They had a right to feel and be safe.[1]

The horrific deaths of Chloe and Aubrey must not be in vain.

We Have Been Here Before (Many Times)

In April 1996, in Vernon, BC, Rajwar Kaur Gakhal was murdered by her estranged husband. She had made complaints to the RCMP that he had been threatening her, but these complaints "fell between the cracks." Her ex-husband came to the Gakhals' family home and fired 28 shots from his gun killing Rajwar and nine other members of her family who had gathered for a family wedding. An investigation followed the "Vernon Massacre," and Justice Josiah Wood of the BC Supreme Court made "many recommendations to improve safety for domestic violence victims."[2]

In June 1992, just four years before the Vernon Massacre, former justice Wally Oppal, presiding over a commission of inquiry into policing in British Columbia, had also made recommendations, highlighting the following:

> *Police play a critical role in stopping violence against women. Since they are invariably the first people on the scene of an incident, their attitudes, policies and procedures have a direct bearing on how we as a society deal with these very serious problems. Women's groups have registered a number of complaints... While many conscientious officers are carrying out the terms of these policies, it has been our experience that many officers simply are either unaware or are unwilling to take more proactive roles.*[3]

BC has seen many other, similar tragedies. Some examples are:

- On September 4, 2007, in Victoria, Yong Sun Park, her son, and her parents were all stabbed to death by her husband, Peter Lee, who had only three weeks earlier been released on bail after he was charged with assaulting his wife. Park and Lee were going through a divorce at the time of the murder.[4] An inquest occurred; the Lee inquest resulted in 14 recommendations to the police and legal system.[5]

- On October 19, 2006, in Port Coquitlam, Gurjeet Ghuman was shot twice point-blank in the head by her estranged husband as she dropped off her daughter. Her ex-husband had been charged with assaulting her. She identified in the media that things began to "unravel" once she sought a divorce from her husband that summer. Gurjeet survived but is now blind.[6]

- In 2003, Sherry Heron and her mother, Anna Adams, were murdered at Mission Memorial Hospital by Sherry's estranged husband. Sherry had a restraining order in place while she was in the hospital.[7]

- In 2003, in Nanaimo, Denise Purdy was stabbed to death by her estranged husband. A restraining order was in place at the time of the murder.[8]
- In 2002, in Quatsino, Sonya Handel's six children were drugged, strangled, and shot and left to die in their burning home by their father, as "part of a multipronged plan to punish his wife" who had been talking about leaving him.[9]

The following common recommendations, critiques, and commentary emerged from these horrific murders:

1. Municipal police forces, the RCMP, and various legal systems (family and criminal) all need to coordinate to provide seamless services and protection to survivors of violence.
2. Protection or restraining orders need to be enforced and breaches of orders need to be consistently addressed.
3. The legal system and police systems need training on family violence and specifically violence against women and children.
4. Funding and resources for programs and community services, specifically resources for organizations working with women and children experiencing violence, need to be secured as core funding and provided in coordination with law reform initiatives.

In addition to these common themes, we also note the recent calls to ensure that the legal and police systems acknowledge and address systemic racism and challenge policies, protocols, practices, and law that are inherently racist. Specifically, the legal and police systems need to address anti-Indigenous racism, anti-Black racism, and the impacts of such systems on all racialized communities.

Essentially the same or similar recommendations are made every time such inquests, commissions, and inquiries occur. However, the legal system has so far remained unable or unwilling to proactively make the necessary changes to create safety for survivors of family violence, and in many cases accessing the legal system increases the level of risk that survivors of violence face.

This remains true notwithstanding the many positive changes that were made to BC's family law legislation in 2013, changes that were supposed to strengthen protections for individuals experiencing family violence. Although the *Family Law Act* (*FLA*) places greater emphasis on family

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>
> — Sarah Cotton

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violence than its predecessor legislation, the legal system's education, attitudes, and assumptions about gender roles and violence have not kept pace with legislative changes, ultimately undermining the potential of this progressive legislation. We note that this report is being published concurrently with amendments to the *Divorce Act* which also strengthen and expand the definition of family violence. While these are changes are positive and hopeful, we remain concerned that, like the *FLA*, the potential of the provisions in the *Divorce Act* will be attenuated through substantive legal interpretation, pervasive myths about how violence operates, and gaps in funding and coordination of services.

Listening to the Experiences of Survivors of Family Violence

Between 2018 and 2019, we conducted 27 focus groups in 25 communities across BC and spoke to more than 160 women. Most had lived through family violence and the court system; the rest were the front-line workers who supported them. We also conducted 31 key informant interviews, conducted surveys with both family lawyers and focus group participants, and hosted five round-table discussions with interdisciplinary experts.[10]

The first part of this report focuses on what we heard from women, front-line workers, and experts, including many members of the family bar, about what lawyers can do better. Unless we listen to what survivors of family violence tell us and respond with changes to legal practice, the lives of women and children after family breakdown will remain precarious.

The second part outlines some practical considerations for lawyers around screening and safety planning, and the third section highlights areas of the *FLA* that would benefit from thoughtful analysis, law reform, and/or strategic litigation.

This project, and in particular the voices of women survivors, provide yet another opportunity for the legal system to improve its response to family violence.

PART 1

Guidance for Lawyers from Women Survivors

Listen to Survivors

We need to listen to survivors of family violence. The women we spoke to as part of this project clearly identified the substantial failure of lawyers and other members of the justice system to truly listen to their experiences of family violence. Women shared their experiences of lawyers failing to listen openly, consistently, without judgment, and on an ongoing basis. Lawyers need to foster trust with survivors of violence. There can be serious consequences for failing to listen, as women may be less likely to disclose violence and more likely to compromise in their instructions. As lawyers we need to understand and appreciate that by not listening to women and children, we may be putting them at risk of further harm.

Positive experiences with lawyers

Many women recounted positive experiences they had working with their lawyers. The characteristics that were consistent within the positive descriptions were:

- **Lawyers that women felt they could communicate with**
- **Lawyers who displayed compassion and willingness to help**
- **Lawyers they felt were on their side**

Negative experiences with lawyers

Unfortunately, many more women spoke of negative experiences they had with their lawyers. The most consistent negative experiences with lawyers that women described were:

- **Feeling rushed by their lawyer**
- **Not being taken seriously**
- **Feeling like their lawyer was not on their side**
- **Feeling like their lawyer was not a safe person to go to because they did not understand their experiences**

Protect Victims

There is a fundamental disconnect between the lived reality of experiencing family violence and the procedures and protocols the legal system offers as remedies to address violence against women and children. Family law, criminal law, and supporting practice directives do not address the substantive inequality and disproportionate impact of family violence on women and children. The legal system frequently works to neutralize violence against women and children, and in the process provides responses that are inadequate to the lived reality of survivors of violence. The failure to provide a substantive and gendered analysis perpetuates the myth that family violence impacts all parties in family law matters equally, and often works to obscure violence altogether.

Some of the other most persistent myths that we observed included the following:

- **Family violence ends after separation.** We see this myth at work in cases where lawyers and judges are overly optimistic that parents will be able to put the past behind them and start cooperating even in the face of evidence that the violent family member has been unwilling to cooperate in the past, and has given no evidence of a change in attitude or behaviour. Courts often make orders requiring that the violent family member and the victim consult regularly or come into regular contact when facilitating exchanges of children. The reality is that the period after separation is often the time of highest risk for the victim[11] and exchanges of children may be flashpoints for the abusive parent to control, monitor, or harass the victim. In addition, lawyers and judges may give insufficient weight to historical violence, or may see separation as the cure to violence.

- **Violent husbands can still be good fathers and therefore shared or 50-50 parenting is always in the best interests of the children.** Even though there is no presumption of 50-50 parenting in the *FLA*, case law reviews[12] and conversations with lawyers, women, and front-line workers suggest that many judges may still view shared parenting as a goal and emphasize maximizing time between the children and both parents over safety. Social science research suggests that there is significant overlap between abuse of a spouse and child abuse,[13] and that even indirect exposure to family violence can be damaging for children.[14]

- **Psychological or emotional violence is not as serious as physical violence.** Many women describe psychological violence as more harmful in the long term. Moreover, coercive and controlling behaviours, a form of psychological violence, can precede and predict the most serious forms of physical violence, including murder.[15] However, non-physical forms of violence seem to be the most challenging forms of violence for the legal system to recognize, and consequently these forms of violence are more often ignored or minimized.

- **Violence is, at least partially, the responsibility of the non-violent family member.** There are many ways that this myth plays out. Some examples of how this occurs include the following:
    - The use of mutualizing language (for instance, an assault is frequently described in evidence and in judgments as a "fight," an "argument," or a "high conflict relationship," all of which imply that the non-violent family member is equally responsible for incidents of violence);
    - The distraction from family violence claims through retaliatory claims of parental alienation, which work to shift focus away from the violent family member's conduct and 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 an unsafe parent; and
    - The claim that the non-violent family member "provoked" the violence in some way. The only person responsible for violence is the person engaging in it. Orders should be crafted to first protect the victims, and then to ensure that the person engaged in violent behaviours is responsible for demonstrating change, rather than requiring victims to manage the violence or return to court regularly to report new incidents.

Use a Trauma and/or Violence Informed Response

We need a trauma and/or violence informed response from lawyers and the legal system.[16] This project has emphasized the need to look at all potential practices, processes, procedures, directives, and law reform initiatives through the lens of those who have experienced or continue to experience trauma and violence. Without a trauma and/or violence informed analysis, the legal system is prone to recreate services that are harmful and inaccessible to survivors.

The *Final Report of the Truth and Reconciliation Commission of Canada*[17] encapsulates the historical, long-standing, and wide-ranging impact of systemic and individual trauma and violence on Indigenous people, and provides important insights about how these impacts manifest. We acknowledge that there is also much critique of the TRC report and that in spite of the report there is still a widespread failure to recognize the need for healing and accountability.

The legacy of trauma and violence on the body, mind, and spirit do not disappear. They are not temporal or linear experiences. They influence the whole person, the whole community. The experience of trauma and violence impacts how a survivor moves in the world, and these impacts do not stop once the legal system is engaged. The legal system has been slow to engage this analysis even though front-line anti-violence workers, Indigenous communities, and trauma and violence informed specialists have been educating on these issues for decades.

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The administration of justice fails in its truth-finding role if survivors are unable to tell their stories (i.e., their facts and evidence) due to systemic barriers. Understanding and learning practical tools of trauma and/or violence-informed practice can improve our ability to support survivors in sharing their experiences. For example, survivors of trauma and/or violence are unlikely to share their experiences of their abuse in a linear set of facts that move smoothly from A to Z. In addition, trauma and/or violence may cause post-traumatic stress disorder, which may impact the client's ability to re-engage with traumatic events.

The quality of social responses from professionals like police officers and lawyers can have a significant impact on people who are experiencing violence. The actions of social responders, whether they are intentional or not, can play a critical role in contributing to or undermining a person's safety. People who experience positive social responses when they report violence tend to recover more quickly and fully, are more likely to report in the future, and are more likely to work with authorities. People who receive negative responses are less likely to disclose violence again in the future, are less likely to engage with authorities, and are more likely to receive diagnoses of mental disorder.[18]

Throughout this project we heard that many survivors of trauma and/or violence have not been believed or have been dismissed when they have disclosed their experiences. Just under half of the 27 women who responded to our focus group follow-up survey indicated that their lawyer advised them not to talk about family violence in court. This may impair their ability to rely on the justice system to provide adequate safety and protection in the future, or to trust that the courts can offer them a fair, equitable legal process.

The legal system, and family law system in particular, will need to reflect on the potential risk that may occur to women and children if family violence is only seen through the lens of legal strategy versus safety and harm.

"[Lawyers] didn't ask anything about violence in any way shape or form. And … at that time I would have said "no" if they asked me if I had been abused. Because I was imagining a woman with bruises. If I had been given a checklist of behaviours I would have checked off a whole bunch of them: 'Has he tried to force sex on you? 'Yes'"

Minimize the Gaps

We need to minimize gaps between the various components of the legal system, specifically the connections between the family law and criminal justice systems, and including the coordination and management of court, municipal police services, the RCMP, and non-legal resources for women and children survivors. Women and children are falling through the gaps; in many cases their safety may only be a matter of luck.

While it may be a long time before BC has a unified family court system or specialized courts, lawyers can help ensure that fewer clients fall through the gaps by being aware of other community resources.

This project highlights the immense benefit women and children experience when they have continuity of support and advocacy during their family law cases. The reality is that most women who are aware that such services exist will use the services, support, and advocacy of various front-line organizations and clinics to assist them throughout their legal or police matter.

Regrettably, however, many family lawyers are unaware of the many community programs that can support survivors or continue to be reluctant to work with anti-violence workers and advocates to support their clients through the legal system. An advocate or support worker will likely sustain a longer relationship with the survivor, and they may have a broader range of services to provide women and children. There are significant benefits to such a coordinated response that ultimately centres the needs of women and children experiencing violence, while building in long-term consistent support for non-legal resources.

Working in a coordinated manner with anti-violence workers and advocates to provide legal support and assistance to vulnerable and at-risk family law clients is beneficial to both the clients and family lawyers. In particular, unbundled limited scope retainers, legal aid files, and self-representation files can be coordinated with advocates to minimize the gaps in service provision and to further alert advocates to safety concerns that may arise.

Many organizations also have workers who can assist with bridging cultural gaps. When there are cultural differences between the client and the lawyer, a support person may help the client to feel empowered and ultimately assist in the legal proceeding. Shahnaz Rahman, the executive director of Surrey Women's Centre, described to us the value of having a community-based support worker for women fleeing violence and experiencing multiple barriers. Rahman explained, "Workers empower clients with information around the legal systems … they understand the cultural dynamics and the challenges survivors face in terms of dealing with extended families in the context of violence."

Many organizations also have workers who can assist with bridging cultural gaps. When there are cultural differences between the client and the lawyer, a support person may help the client to feel empowered and ultimately assist in the legal proceeding.

Advocates can be of assistance with family files in the following ways:

- Preparing a comprehensive timeline of the client's facts;
- Preparing draft affidavits or outlines;
- Empowering women to be clear about their instructions and what they need from their lawyer and the legal system;
- Supporting women through the court process by physically attending or being present to provide support before, during, and after court appearances;
- Preparing and organizing documents;
- Assisting in obtaining other services — counselling, shelter, financial assistance, etc.;
- Securing legal aid for clients;
- Developing a safety plan with women;
- Addressing the safety needs for women and children; and
- Providing interpretation and culturally appropriate support.

When working with an advocate there are, however, some limitations and parameters that need to be addressed:

- Authorizations to communicate about a client's file and the scope of any authorization;
- Limitations and boundaries of working on a coordinated case;
- Privilege;[19] and
- Potential conflicts.

Use an Intersectional Analysis

We need to have an intersectional analysis of family violence. This project reflects that, while all women may face violence, their experience of violence, and their access to the legal system and related resources are profoundly different depending on such factors as their racialization, gender identity, sexuality, class, ability, language, and immigration status.

Violence can affect anyone but the way in which it manifests will be different. For example, the impact of racism and history of colonization fundamentally shape the relationship between Indigenous, Black, and racialized communities and the legal system and law enforcement.

Some women in the focus groups conducted by Rise described the cultural issues that factored into their experiences of family violence, including living in a multi-family home. One Sikh woman described that her lawyer asked her no questions and made no attempt to understand her culture, information which she felt was fundamentally necessary to understand what she was experiencing. Lawyer Krista James, national director of the Canadian Centre for Elder Law, explained that for some women, the shame that follows family breakdown is a huge barrier to accessing help. She also noted how hard it could be for women to share their experiences when they came "from cultures and communities where professionals are not necessarily trusted people."

Violence in other communities may be experienced in different ways. In the LGBTQ2S+ and gender diverse community, coercive and controlling violence may manifest in outing or misgendering a person or cutting off their access to safe spaces and resources. The victim's ability to receive support will be affected generally by the broader systems of homophobia and heteronormativity, and targeted hate crimes are another reminder of the multiple challenges LGBTQ+ survivors face. Research continues to emerge regarding the complex dynamics and specific impacts for LGBTQ2+ survivors of violence.

For people with disabilities, violence may look like withholding medication, threatening to harm a service animal, or telling someone they're a bad parent because of their disability. Systems of oppression can always be leveraged by abusers. For many people their identities, and therefore the systems that oppress them, will overlap.

Formal equality does not address the impact of systemic and institutional inequality, and we can see this quite clearly and most recently with the COVID-19 pandemic and the resulting disproportionate impact on people of colour, women, and people living in poverty.

Being aware of and responsive to different cultural lenses and operating from a place of cultural humility are important considerations in addressing the diversity of experiences of survivors of violence. However, cultural sensitivity and diversity training alone do not fix the underlying systems of oppression and racism. Systems need to do the hard work of being responsive and accountable.

Be Part of an Ideological Shift

We need an ideological shift in the legal system that is informed by the overwhelming research on intimate partner violence, which this project has yet again captured.

One of the most significant barriers for the family law system is the recognition and acceptance that women and children continue to be disproportionately impacted by family violence and more specifically by intimate partner violence. The family law system continues to operate as if this is a rare and limited occurrence, a private act with no broader societal dynamics and institutions that support and permit the violence and control.

Ultimately, this project calls on lawyers and the justice system to not only commit to the positive obligation to screen and assess for family violence but also to ensure that once family violence has been disclosed, the system provides a meaningful and protective response.

This project asks lawyers and the justice system to contemplate and consider best practices and practice directives that will support women's and children's safety and security while they navigate their legal rights and entitlements in family court. If women negotiate settlements or surrender their rightful legal entitlements due to fear of ongoing abuse against them or their children, then the system has failed to provide access to justice.

Survivors of family violence in this project are seeking access to justice. They have given voice to their experience and their truths — truths that are already reflected in academic research, case law, and statistics. Women around BC have told us that they are unsafe, fearful, and do not believe the courts or their lawyers will hear them, let alone believe them. Many women do not have faith in the administration of justice.

Now it is up to us — are we ready?

PART 2

Practical Considerations for Lawyers

Family Violence Screening

Section 8 of the *Family Law Act* requires that "dispute resolution professionals" engaged in the settlement, negotiation or mediation of family law matters have a positive legal duty to assess for family violence.

Specifically, s. 8 requires that family dispute resolution professionals "must assess" for the presence of family violence. It if "appears" to them that family violence is present, they must determine if the "extent" to which family violence would adversely affect both the "safety" of the party and their "ability" to negotiate a fair agreement.

The elements of assessment require dispute resolution professionals to engage on multiple levels with their client to make these determinations. Family violence education for lawyers provides screening tools or checklists that lawyers can use to assist them in the assessment,[20] but these must be complemented by a relationship of trust and a willingness to keep asking questions throughout the course of the file.

Screening for violence should not be something that is done once, but should be seen as an ongoing process and obligation, both because clients may not disclose immediately and because a client's level of risk and safety may change over the course of the file. A full assessment of family violence and the client's safety will only be possible if a client has the security and ability to share their lived experiences and have the assurance that they will be "seen" by their lawyers.

Despite the legislation in BC imposing a positive obligation on lawyers to screen for family violence, many women we spoke to said that their lawyers did not ask them questions to assess their safety. When safety concerns did arise, many women described their lawyers as dismissive. Further, women who experienced non-physical forms of violence, particularly financial and emotional, felt that their lawyers did not understand their experiences or their ongoing safety risks. Of the women who participated in our research, some chose not to disclose violence to their lawyer.

Our survey results related to screening for family violence and lawyers' responses:

- 59.3% of research participants said they were asked questions about family violence by their lawyer.
- Some participants did not disclose violence to their lawyer, with a few of the reasons being "scared," "feared consequences," and "I felt too much shame."
- 44% of respondents were advised by their lawyer not to bring up family violence in court, with reasons given including:
  - "he said judges don't like it"
  - "said it wasn't important, said that my ex would use it to get custody of my son, said it wasn't severe"
  - "they felt it could be used against me"

Family violence is under-reported for many reasons, including concern about the other party, negative experiences with the legal system, fear of increased abuse, or previous threats of harm should they report. Lawyers should recognize that some clients will not want to disclose information related to violence, and if they do, the client may not want that information incorporated in any way into the legal proceedings. A few women explained that they did not see that they were a survivor of violence by their partner until later. Regardless of the legal pathway that a client will choose, screening for family violence places lawyers in a better position to understand their clients while working to empower them by providing the best legal information available for their situation.

Practically, an assessment of family violence requires that we listen carefully to what our clients are telling us. Lawyers are not trained to listen or to create safe spaces for listening. Lawyers are trained to spot issues and to disregard evidence that is not "relevant" to the issues they expect to resolve. If lawyers do not have a fulsome understanding of family violence, they may not look beyond their own limitations of knowledge and training.

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Safety Planning — Practical Considerations

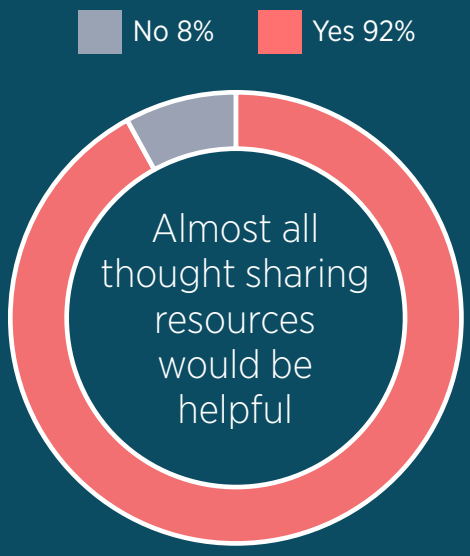
Once an assessment of family violence has occurred and the presence of violence is identified, lawyers should discuss safety planning with their clients as it relates to their legal file. They should also encourage clients to engage with resources that can help them prepare a more comprehensive safety plan for themselves and their children. Some anti-violence organizations also provide written resources to help with safety planning.[21] Often family lawyers will refer their clients to advocates or support workers for safety planning and this can be one of the single most important steps that lawyers can take to protect their clients.

Lawyers referring clients to advocates or support workers to prepare a safety plan should take the extra time to meaningfully connect clients with advocates to ensure continuity of service. Some clients may not require any assistance in making the connection, while some clients may need more support to do this. In addition, lawyers, throughout the life of the family law file should check in to ensure that their client is adapting and revising their safety plan as needed. Safety planning is not stagnant and should be revised as needed to best address whatever the current risks may be for your client.

Survivors want referrals to community resources from their lawyers

Did your lawyer connect you with community resources?

Do you think it would be helpful if lawyers briefly shared information about available community resources?



Safety planning is not just about handing a pamphlet to a client. It is an active process to prepare for the possibility of instances where the violence may escalate and to activate the system of immediate support your client will be able to utilize for her safety and the safety of her children. Lawyers need to look at the ways that engagement with the legal system may place the client at risk and plan in advance.

Here are some areas you should be aware of and ways that you can assist your client with the safety planning process in your practice:

- **COMMUNICATIONS:** How are you going to communicate safely with your client? Does your client's partner have access to her email/phone? Does she share a device, or does her device sync to a shared device such as a tablet, which might allow him to access her "sent" emails? Is it safe for you to leave voice mails at the phone number she has given you?

- **SERVICE OF DOCUMENTS:** How and when will documents be served on the opposing party? Where will your client be when their ex is served? Does she need to go to a safe location or ensure another adult is with her on the day service is expected to take place?

- **COURT PROCEEDINGS:** Is there a support person who can walk with your client from her car or transit stop to the courtroom, so she isn't alone with the violent family member in the courthouse hallways? Is there a safe space where she can sit in the courthouse without coming into contact with him? Do you need to request that a sheriff be present in the courtroom? Is there a virtual process you can access so that she can stay in another location?

- **ORDERS:** Will the court order you are seeking put your client into regular contact with the violent family member, for example to facilitate exchanges or to consult about parenting responsibilities? These times are often used to continue or escalate abuse. Are there ambiguities in the wording of the order that the violent family member can exploit?

- **PROTECTION ORDERS:** Is your client in a safe and protected space when you are seeking the order? What will your client do if the protection order is not granted? Strategically, an application for a protection order or conduct order needs to be planned carefully in light of the client's risk factors, supports, access to resources, barriers, history and nature of violence and safety plan.

- **FINANCIAL DISCLOSURE:** In cases where the site of violence is financial control or abuse, the act of seeking financial disclosure may trigger a violent response. Is your client worried or concerned that there may be repercussions if she seeks financial disclosure?[22] What are the risks and how can she ensure that she is well protected when making this request?

Safe(r) Practices

In addition to conducting family violence screening with every client, here are some practical ways to promote safety in your practice:

- Schedule enough time for the appointment and be on time. One of the ways that power manifests itself in professional systems is through arbitrary and interminable waiting times.[23] If the client is having trouble making it to appointments due to work, transit, or childcare requirements, is there another time or location that would work better?
- Create a structure for your interview; explain what you are doing and why. Continue to signpost as you move through the interview. Your client may have been living in, or may still be living in, a chaotic situation and understanding the structure of the meeting can help reduce anxiety.[24]
- Explain the broad legal definition of family violence, and that screening is something that happens with every client. This can help normalize the process.
- Take extra care when explaining confidentiality. Many women who are in the process of leaving a violent ex-spouse are constantly managing their safety, including the risk associated with their ex finding out they have sought legal help. Ensure that your client knows you will not share information with the opposing party until she is ready and has a safety plan.
- Be non-judgmental. Take the time to listen without minimizing the client's story or cutting them off. Amber Prince, then a lawyer at Atira Women's Resource Centre, explained her approach to providing support: "We take the view that we should provide non-judgmental support. That is not judging women for their choices or their circumstances when they are walking through the door. (We are) trying to create a dynamic of sitting down and having a conversation together, and we are here to support women with what they need in making their own decisions."
- Let the client know they can take a break at any point or answer questions at a later time — recognize that many women have had to repeat their stories many times to police and other service providers. Acknowledge that the questions you are asking are difficult.

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Many women who are in the process of leaving a violent ex-spouse are constantly managing their safety, including the risk associated with their ex finding out they have sought legal help. Ensure that your client knows you will not share information with the opposing party until she is ready and has a safety plan.

- Identify and acknowledge the ways in which the client has already been working to keep herself and her children safe. Examples may include seeking help from friends or professionals, making plans to leave, and putting her children first.
- Recognize that your client may not have had a lot of agency to make decisions about her life for a long time. Ensure that she clearly understands all of her options and make sure she is able to give you clear instructions.
- Obtain free literature on domestic violence and community resources from organizations like Legal Aid BC and have these materials available in your waiting room or provide them to clients as part of your regular client follow up.

As family lawyers, we have a professional and legal obligation to have undivided loyalty to our clients; we are required to seek training or the assistance of other professionals when we are dealing with subject matters that we may not have a background in, such as accounting, tax implications or corporations. Family lawyers would be acutely aware of the repercussions to a client's family law case if they were not informed about or able to challenge a business valuation. However, family violence has not become recognized as a subject matter or knowledge base that is equally valued, or that is seen as foundational to the outcome of family law cases. There is far less training about family violence for lawyers available, which means that lawyers have to be more proactive in seeking it out.

PART 3

Legislative Gaps and Strategic Litigation

A comprehensive family violence definition, a positive duty to assess for violence, and an expansion of the best interest of the child factors were key initiatives to modernize the current *Family Law Act*. The inclusion of an expanded family violence regime within the *FLA* has provided the basis for identifying a wide range of behaviours as family violence.

At the same time, inconsistent interpretation and a failure to prioritize safety when violence is found means that the *FLA* is not yet fulfilling its potential. We have identified a number of gaps in the legislation and issues arising in family violence cases that are deserving of nuanced analysis by family lawyers, and that could benefit from law reform or a strategic approach to litigation.

Promoting Safety (s. 8 and s. 37)

While many lawyers may meet the *FLA's* obligation to assess for family violence, the legislative requirements are sparse when it comes to enhancing or preserving a client's safety throughout the life of the family law case.

Once a dispute resolution professional has assessed that there is family violence present, determined that it will affect the ability of the client to negotiate fairly in any settlement, and discussed various types of dispute resolutions with the client, the dispute resolution professional's obligation has been met — or has it?

What is the consequence of not having a positive obligation to promote safety throughout the life a family file? If a person's lawyer does not assess for family violence at all or "strategically" advises them to not raise family violence during the court process, how are issues of potential risk, harm and unfair outcomes addressed for survivors of violence?

What happens when survivors are asked to disclose violence but there is no plan for the legal system to address the abuse or act protectively? Or even worse, when clients are asked to disclose knowing that they are not likely to be believed and may be put at greater risk through their interaction with the system?

The *FLA* does not require dispute resolution professionals to do any of the following:

- Implement safety measures for the remainder of the client's legal action;
- Raise the issue of family violence and any resulting impacts that may flow from having disclosed family violence in court; or
- For lawyers who are retained by perpetrators, to take any further steps to address safety.

If the positive obligation to assess family violence is not expanded to include a corresponding obligation to ensure survivors and children remain safe throughout the legal system, the goals of the *FLA* will not be achieved.

The obligation to ensure safety is more explicit in s. 37 of the *FLA,* which states that an agreement or order is "not in the best interests of the child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being." This definition excludes any consideration of the safety of a *parent* who is experiencing violence, except to the extent that children may be harmed by witnessing such violence.

Promoting safety and security to "the greatest extent possible" implies that lawyers and courts should be engaged in ongoing risk assessment. However, one of the concerns that we identified through this project is that lawyers and judges frequently require significant proof of abuse before taking risk seriously. As a result, women and children may have to suffer significant or prolonged violence in order to make the case that they need a remedy.

Even when courts accept that family violence has occurred, this doesn't necessarily impact the final parenting arrangements. Victims of abuse may be required to continually interact with the abusive parent to facilitate parenting time and to ensure that the violent family member is able to participate in parenting decisions. Many women we spoke to in the course of this project felt that the legal system privileged shared parenting over safety. Academics Susan Boyd and Ruben Lindy came to a similar conclusion when reviewing early case law made under the *FLA.*[25]

What happens when survivors are asked to disclose violence but there is no plan for the legal system to address the abuse or act protectively? Or even worse, when clients are asked to disclose knowing that they are not likely to be believed and may be put at greater risk through their interaction with the system?

If courts are unable to address the risk of violence and can only respond to violence once serious abuse has already occurred, then incidents of extreme violence are inevitable, and we are not protecting children's safety to the greatest extent possible. Lawyers should therefore give careful consideration to how risk can be identified and proven, including through recourse to experts, as well as how to give a robust and meaningful interpretation of protection "to the greatest extent possible."

Proving Harm (s. 1 and s. 38)

The definition of "psychological or emotional abuse" in s. 1 of the *FLA* appropriately identifies problematic behaviours including "intimidation, harassment, coercion or threats." This definition does not require proof that harm actually occurred, but rather it requires evidence that the violent family member engaged in violent behaviours.

When it comes to assessing family violence under s. 38, actual harm to the child is only one of nine factors for the court to consider.

However, in *LS v GS*, the BC Supreme Court warned against labelling conduct as "family violence" where "there is no evidence that the children have suffered any physical or emotional harm as a result of the claimant's conduct."[26] While the facts of this case did not support a finding of family violence, this statement of the law, if applied on different facts, has the potential to increase the burden on women to provide proof of harm in order to establish that violence has taken place. Proof of harm may be particularly hard to establish in cases of psychological violence, which leaves no physical scars.

In *AB v CD* the BC Court of Appeal recently found that, although the father's refusal to acknowledge the child's gender was clearly hurtful, there was "insufficient evidence… that [the father's] conduct was grounded by an *intent to hurt* [the child]" — apparently reading in a requirement for "intent" to harm that is not present in the *FLA*.[27]

By reading in requirements that a victim of family violence has to prove that harm has occurred, or that the violent family member intended to cause harm, BC courts risk undermining the broad protective purpose of the *FLA* and creating additional evidentiary hurdles for those requiring protection. Lawyers should be alive to these nuances when addressing questions of family violence.

In our view the proper focus is on preventing or prohibiting *behaviours* that meet the definition of family violence and promoting safety of the victims. Courts should not require victims to wait until harm has already occurred to be able to seek safety from the legal system, nor should they fail to give protection simply because a violent family member says they didn't intend the harm that flowed from their actions.

Failure to Include Indigenous Culture in the Best Interests of the Child Test (s. 37)

Despite many positive additions to the *FLA*, we are advised that many Indigenous women and communities were not given the opportunity to take part in the consultations leading to the enactment of the *FLA*, and that concerns raised by Indigenous women and communities were not taken into account in reforms to the Act.

Despite the inclusion of Indigenous heritage in the list of parental responsibilities to be shared or divided between the parents in s. 41 of the *FLA,* the best interests of the child test does not include preservation of a child's Indigenous culture or heritage or provide a mechanism for judges to consider what the best interests of the child might look like using an Indigenous world view.[28] Section 209 of the *FLA* requires that in cases where an application for guardianship is made respecting a treaty First Nation child, their nation must be served, but this fails to provide the same protection for the many Indigenous children who do not belong to a treaty First Nation. These omissions remain a significant weakness of the *FLA*.

In 2019, BC passed the *Declaration on the Rights of Indigenous Peoples Act,* which affirms the application of the United Nations Declaration on the Rights of Indigenous Peoples to the laws of British Columbia. We recommend that BC take steps to work with Indigenous people and their communities to ensure that the *Family Law Act* is updated to reflect this new legal imperative. In cases involving Indigenous clients or children, counsel should consult with Indigenous communities and experts, and ensure that appropriate information is before the judge as part of meeting the best interests of the children.

Variation of Orders (s. 47)

Changes to parenting orders (and most other family law orders) require the person requesting the variation to show that there "has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person."

This test poses special problems when women do not disclose family violence at interim applications or at trial, particularly where they have been advised not to disclose family violence by their lawyer. Where women have not been screened for family violence or have been discouraged from discussing family violence in the context of court proceedings, the court may make parenting decisions that do not promote the safety of the children and quickly lead to more problems.

In these circumstances, women may contact new counsel asking for a change in the order, only to be told that the history of violence that they now want to rely on was known at the time of their original court process and therefore cannot be used to demonstrate a "change in circumstances."

In sexual assault trials, the myth of "delayed disclosure" has been largely discredited.[29] In *R v DD,* the Supreme Court of Canada held:

> *[Th]ere is no inviolable rule on how people who are victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to adverse inference against the credibility of the complainant.*[30]

It is widely acknowledged that many of the same factors prevent survivors of family violence from disclosing. While the test for variation of family orders does not, strictly speaking, call into question the victim's credibility, it does create a legal barrier to ensuring safety of women and children. We would argue that the "change in circumstances" test should be used with some flexibility when determining whether a variation should be permitted in circumstances where disclosure of violence has been delayed.

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Mobility Applications

Mobility applications under the *FLA* have a highly gendered aspect, with the vast majority of cases being brought by women. In *Stav v Stav*, the BC Court of Appeal held:

> *Allowing an investigation into the reasons for the move was also viewed as opening the door to unjustifiably restricting the mobility rights of custodial parents, who are most often women. In other words, allowing the reasons for the move to factor into the equation had the potential for turning a mobility issue concerning the best interests of the children into a gender issue.*[31]

The court went on to quote the High Court of Australia, which opined, "[I] n practical terms, court orders restraining movement of a custodial (or residence) parent ordinarily exert inhibitions on the freedom of movement of women, not men."

The need for women to relocate due to family violence appears to be particularly acute in BC's rural and remote communities, where there are fewer housing, employment, and educational opportunities, and fewer services for women who have separated from a violent family member. Women in small communities may also find it much harder to avoid running into a violent family member. Women who participated in focus groups with the BC Society of Transition Houses' Getting Home project identified the inability to relocate due to family court orders as a concern.[32]

Courts are not required to prioritize women's and children's safety when considering mobility, except to the extent that this falls within the best interests of the child. As noted previously, these factors do not include the safety of a *parent* independent of the safety of the child. This failure can negatively impact women who are fleeing violence, where the end of a relationship with their violent partner is the incident that triggers a loss of housing, the need for further education, and the need to relocate to establish economic security.

Although s. 66(2) of the *FLA* allows parents to apply to waive notice of relocation due to family violence, we could not locate a single reported decision in which someone relied on this provision to waive notice of relocation in the seven years that it has been in force, and only two unpublished decisions.[33] Given the prevalence of violence in small communities, the paucity of cases suggests that there are serious procedural, legal, or safety barriers to the use of this provision.

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Limitations on Interim Distribution of Property (s. 89)

One of the main limitations for women survivors in accessing the legal system is their inability to retain legal counsel.

In the event women own shared family property, even if they are unable to access the funds because the assets are in control of the opposing party, they may be ineligible for legal aid or subsidized legal services. Moreover, women in heterosexual relationships are likely to earn less than their spouses and are more likely to take on a disproportionate share of unpaid labour and caregiving. As a result, they are less likely to be able to pay for a lawyer directly.[34]

These factors, combined with higher rates of family violence against women, and the fact property division can only be achieved in Supreme Court, mean that many women walk away from their economic entitlements.

Section 89 of the *FLA,* which provides for orders for interim distribution of property, appears to remain inaccessible and underutilized. The costs of bringing this type of application can be very high, and it may be difficult to obtain counsel to work on this issue on a pro bono basis if the client is unable to pay a retainer at the start of the case.

Although not accessible for many women, for some, interim distribution may provide enough funds to be able to access limited legal advice in order to obtain support payments or protective orders or to address ongoing financial matters.

Child Support (ss. 149, 150, 151, and 152)

Although child support obligations are set out in sections 149 through 152 of the *FLA,* they are also still determined to a large degree by the *Federal Child Support Guidelines.*[35]

The *FLA* and *Child Support Guidelines* place the primary burden of applying for child support onto the parent who cares for the children the majority of the time. Where the payor parent's income increases, it falls to the recipient parent to bring the matter back to court for further applications to increase child support. Where the payor parent fails to provide full disclosure of their income, the evidentiary burden of proving that income for the purpose of imputation often falls to the recipient parent, despite their being ill-placed to provide such proof. Where a recipient parent fails to seek child support early enough and diligently enough, this factor may be counted against them when a court determines whether to pay retroactive child support,[36] although the focus of the inquiry has recently shifted from whether they had a reasonable excuse for the delay to whether the delay is "understandable" taking into account social context.[37]

Despite a legal obligation to provide financial disclosure, the "failure to disclose material information is the cancer of family law litigation."[38] A payor's refusal to provide accurate information about their income and assets can seriously delay court applications and decisions and may ultimately defeat the recipient spouse's ability to support their child.

Lawyers should be alive to the provisions in the *FLA* for enforcing child support in a timely way. Where inadequate financial disclosure has been provided, courts should be asked to draw an adverse inference under section 213(2)(b) of the *FLA.*[39]

The Supreme Court of Canada recently noted the gendered nature of barriers to seeking child support in the context of a BC case in *Michel v Graydon*,[40] stating:

> *[I]t remains true that gender roles, divorce, separation, and lone parenthood contribute to child poverty and place a disproportionate burden on women. A bar against applications for historical child support means children have gone without their due, and the law provides no remedy for the hardship this has created for the children and their caregivers, most of whom are still women…*
>
> *Women in relationships are more likely to suffer intimate partner violence than their male counterparts (see Statistics Canada, Family violence in Canada: A statistical profile, 2018 (December 2019), at p. 24, indicating that in 2018, women accounted for 79 per cent of intimate partner violence victims in police-reported assaults). As a result, they are more likely to leave their home and belongings — and their financial security — behind and to seek shelter or become homeless. A 2014 Statistics Canada analysis reported most women in shelters for abused women in Canada identified their abuser as a current or former partner; just over half of these were admitted with their children (Shelters for abused women in Canada, 2014 (2015), at p. 6). The impact of unstable housing and the lack of legal or financial resources on a person's ability to bring any kind of legal claim is evident. The impact of a history of violence on a person's emotional health and their consequent potential fear, unwillingness to engage with their past abuser, or inability to do so are just as apparent. In addition to this, "some abusive fathers may use the child support process as a way to continue to exercise dominance and control over their ex-wives" (D. Bonnet, "Recalculating D.B.S.: Envisioning a Child Support Recalculation Scheme for Ontario" (2007), 23 Can. J. Fam. L. 115, at p. 144).*
>
> *Given these circumstances, women will often face financial, occupational, temporal, and emotional disadvantages. Moreover, access to justice in family law is not always possible due to the high costs of litigation. In this larger social context, women who obtain custody are often badly placed to evaluate their co-parent's financial situation and to take action against it.*[41]

Michel v Graydon clarified that section 152 of the *FLA* creates a means for courts to retroactively change any child support order, even if the child beneficiary is no longer a dependent at the time of the application.[42] This decision opens the door for recipient parents in BC to claim retroactive support in cases where the payor parent has failed or refused to disclose increases to their income over a lengthy period of time while the children have grown up.

Promisingly, *Michel v Graydon* also suggested that it may be time to revisit the interpretation of the "material time" when an application is brought, although the Supreme Court indicated that it would need to hear specific issues on this point of law.[43] If successful, such a case would permit parents and children to seek initial orders for child support even after their children had reached the age of majority, eliminating yet another barrier to child support. This would be particularly helpful in cases where the payor parent's whereabouts were unknown while the children were growing up, or where family violence concerns prevented the recipient parent from acting earlier.

Given the high burden placed upon recipient spouses to seek child support, we strongly support the increase of administrative programs like Kelowna's Child Support Recalculation Service to ensure that women are able to obtain timely increases in child support without recourse to court.

Protection Orders (s. 182)

Protection orders are the most significant and meaningful remedy provided to survivors of violence in the *FLA.* Since the *FLA* came into force in 2013, however, there appears to have been a steady erosion in the breadth of the protection afforded by the protection order regime.[44] In practice, protection orders appear to be less accessible and more limited as a viable protective remedy than may have been intended. Although we do not have access to statistics on how the use of protection orders may be changing over time, conversations with women and family law lawyers tend to suggest the following:

1. Where protection orders are granted, they are increasingly very short in duration. This means that women may be required to attend court frequently to keep renewing their protection order, often on the very same evidence, bringing them into further contact with the individuals they are seeking protection from and draining their emotional, financial, and legal resources.

2. Courts appear to be increasingly resistant to granting protection orders on an *ex parte* basis, despite the *FLA* explicitly permitting protection order applications to be brought without notice in s. 186. Instead, women are often told to serve their ex on "short leave" and then return to court.

3. Police frequently do not respond by laying charges when protection orders are breached. Numerous women have described instances where their protection order was breached

> and police ignored the breach, gave multiple warnings to the violent family member without taking concrete action, or treated breaching the protection order as the trigger for seeking a peace bond as opposed to enforcing the protection order in its own right. When we discussed these concerns with police, they advised that when they did lay charges for breaching protection orders, Crown counsel often did not proceed with the charges.

The protection order regime needs to proactively and presumptively respond to family violence.

First, there needs to be more nuanced consideration of what circumstances justify *ex parte* applications for protection orders. The provincial legislature indicated in s. 186 that an application "may be made without notice" but gave no guidance as to when *ex parte* orders would be appropriate in this context. Despite the plain wording of the statute, we heard many examples of individual judges who indicated an unwillingness to hear applications on a without notice basis, including situations where judges may have made the decision to dismiss a without notice application prior to hearing any evidence about the family violence that justified the need for the *ex parte* application.

Failing to consider evidence of family violence may be a reviewable error. In *Bukhari v Shah*, Madam Justice Iyer for the Supreme Court of BC held that "the judge committed an error in law in failing to consider the submissions of counsel, failing to consider relevant evidence, and failing to make the relevant findings of fact before arriving at a decision" where the Provincial Court judge refused to hear an application to waive notice of relocation on an *ex parte* basis under s. 66 of the *FLA*.[45]

Many women seeking protection orders, and who meet the relatively high burden of demonstrating on a balance of probabilities that they are entitled to a protection order, are afraid that bringing the court application and publicly disclosing family violence will trigger retaliation and further abuse. Requiring them to effect service prior to having a protective order in place increases their level of risk. Protection orders that merely prevent a family member from having contact with their ex-spouse should be presumptive and barriers to obtaining such orders *ex parte* should be lowered. The prejudice suffered by an individual who is prevented from having non-consensual contact and communications with a person who is afraid of them should not be

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considered greater than the prejudice suffered by the victim who has to manage their own safety alone because the state has failed to provide a basic level of protection.

The *FLA* in s. 186(2) also provides the ability for family members who have a protection order made to return to court to challenge the order on a "without prejudice" basis. Judge Marchand in *CAB v MSB*[46] recognized the necessity for courts to have the ability to grant without notice orders when protective concerns outweighed hearing from all of the involved parties:

> *Judges are generally leery of granting* ex parte *orders of any kind. Fortunately, there are many ways that a judge can manage the risks associated with granting an order without notice to and before hearing from all parties with relevant and material information. Judge Frame utilized one such tool in this case when she required that her* FLA *protection order be reviewed by the court four weeks after the order was made. Another safety mechanism is that the affected party is always at liberty to apply to set aside an* ex parte *order...*
>
> *...*
>
> *The paramount objective of both Part 9 of the* FLA *and s. 98 of the* CFCSA *is the protection of vulnerable people. In appropriate circumstances, the protective objective outweighs the objective of making decisions only after hearing the best evidence from all parties with relevant and material information, including a child in care such as L.B. So, while I do not minimize the importance of giving notice to and/or hearing from children in care, in cases such as the present, in my view the court must be free to make a protection order under the* FLA *when the circumstances call for that step to be taken.*[47]

Second, greater emphasis should be placed on the time frame outlined in s. 183(4), which provides for a one-year protection order unless the court orders otherwise. Short-term orders require that the survivor repeatedly return to court to renew their protection order. Multiple court appearances can be costly and time-consuming, can burn through a client's legal aid hours, and can place the client in a situation where they continually feel at risk because they don't know whether the protection order will be extended or not. Court appearances can also place survivors into regular physical proximity with the violent family member, causing significant stress and anxiety.

Wherever possible counsel should seek longer orders, with the one-year default being applied or exceeded unless there are compelling reasons to make short-term orders. Even where applications are made without notice, longer-term orders should be the norm, with provisions for the opposing party to bring the matter back to court on short notice and on a without prejudice basis as set out in s. 186(2) of the *FLA*. When protection orders expire quickly and the parties are required to come to court after short periods of time, the opposing party has often not had time to prepare to challenge the protection order by finding a lawyer or gathering their evidence. A long-term order that provides a clear mechanism for the opposing party to set the matter for hearing once they

Women should also plan for situations where their protection order is breached and the police or RCMP do not respond, as many women shared such incidents occurring. A comprehensive safety plan will be critical, and lawyers should refer women to community resources to help think through these different potential occurrences.

have had the opportunity to properly prepare can help to minimize the number of additional court appearances that are required to resolve the issue.

Women should be encouraged to maintain physical copies of their protection order with them at all times in case they need to be able to share it with police. In the event that women are unable to call the police or RCMP, they should ensure that support people have copies of the order and know when they should contact authorities on the women's behalf.

Women should also plan for situations where their protection order is breached and the police or RCMP do not respond, as many women said this had occurred. A comprehensive safety plan will be critical, and lawyers should refer women to community resources to help think through these different potential occurrences.

Views and Needs of the Child Reports (s. 211)

A full discussion of the challenges relating to the views and needs of the child reports, often referred to as "s. 211 reports," is beyond the scope of this guide. Given the complexity of the topic, we have prepared a separate toolkit for lawyers that provides greater detail about our findings when a sample of 27 s. 211 reports was reviewed by Linda Coates and Ellen Faulkner as part of this project.[48] What follows is a brief summary.

What is particularly striking about the s. 211 regime is the lack of safeguards and accountability within this system and its failure to promote safety for survivors of family violence. This is particularly true where assessors other than family justice counsellors are engaged, since as provincial employees, family justice counsellors have standardized training and rules that govern their practice.

At the time of writing, there are no provincial 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."[49]

The ordinary rules relating to the admission of expert evidence, established by the Supreme Court of Canada in *R v Mohan*[50] *(Mohan)* and *White Burgess Langille Inman v AB*[51] *(White Burgess),* are less likely to be applied in the context of s. 211 reports.[52] These leading authorities on the admissibility of expert opinion evidence have established the following key principles. The opinion must be:

- Necessary to assist the trier of fact;
- Logically relevant to the issues under consideration;
- Presented by a properly qualified expert; and
- Not subject to any other exclusionary rule of evidence.[53]

Once these four conditions are met, the judge must still exercise an overarching gatekeeping role to ensure that the benefit of admitting the expert opinion evidence outweighs any harms arising from its admission.[54]

The rationale for not treating s. 211 reports as expert reports in the ordinary course of litigation appears to be informed by a line of cases starting in 1983 that dealt with s. 15 reports by family justice counsellors under the prior regime in the *Family Relations Act*. These reports were found not to be expert reports because they were understood as "not dealing with matters outside the skills and perceptions of ordinary reasonable people."[55] The reasoning in this line of cases was established prior to the rules of modern expert evidence being set out in *Mohan* and *White Burgess*, and related to reports that did not include the battery of psychological testing and specialized knowledge that may be included in full s. 211 reports today.

Section 211 reports are generally presumed to be objective, since they are ordered by the court, and this is one of the primary justifications for the special status afforded these reports. However, the fact that an assessor is not connected to either of the parties does not prevent them from holding personal or professional biases, either towards particular groups of people or towards certain theories that an assessor favours over others.

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[56] and when applied to marginalized clients.[57] Moreover, research shows that when assessors do not have specialized training in family violence, they are more likely to ignore the risks associated with it.[58] With only a single expert giving evidence, the opportunity to meaningfully challenge their methodology may be lost, even if the assessor remains impartial with respect to the two parties.

The primary means of ensuring that unfair or biased reports are given little weight is through cross-examination. From a systemic perspective, the reliance on cross-examination as the primary means of identifying problems in s. 211 reports is extremely problematic. Cross-examining an

experienced expert is frequently a challenging prospect for counsel, let alone a self-represented litigant, and cross-examining without sufficient skill or information can be detrimental to one's case. 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.

The lack of meaningful safeguards in this process can cause special problems for women who have experienced violence, and violence frequently "vanishes" once s. 211 reports are ordered. Coates and Faulkner found numerous concerns in the 27 s. 211 reports reviewed for this project.[59]

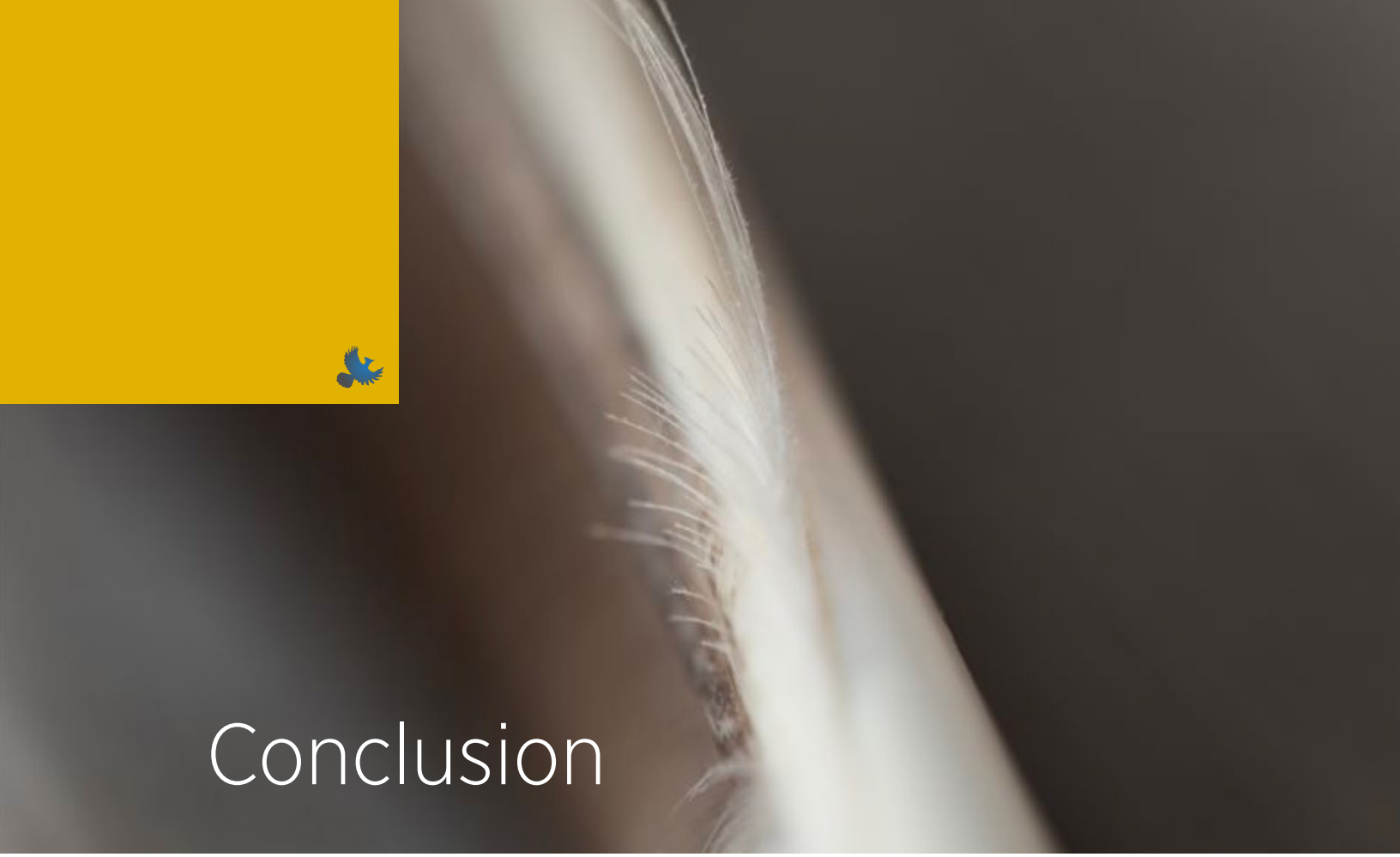
- Significant allegations of family violence were disclosed in all reports, but none were dealt with in a thorough way by any of the assessors.
- Resistance to violence was frequently dismissed by reformulating it into a qualitatively different kind of negative personality trait (such as mental illness, including anxiety or depression) or into negative behaviours (such as hostility, parental alienation, and abuse). Positive and protective responses to violence, such as calling the police, preventing children from seeing a violent parent, or even nurturing the children were also pathologized.
- Assessors interpreted emotions differently depending whether the emotions were a mother's or a father's, constructing mother's emotions to increase their level of responsibility and father's emotions to decrease their responsibility. When Coates and Faulkner analyzed a random subset of reports, they found that assessors also subtly undermined the mother's credibility through use of the phrase "alleged" at a rate far higher than for fathers, even though none of the facts for either party had been proved.
- Assessors gave inaccurate descriptions of violence, including descriptions that minimized and/or mutualized violence, structured reports as he-said-she-said, excluded key evidence, failed to give clear descriptions of violence, failed to give clear timelines, failed to assess for perpetrator strategies, and used psychological testing to cast doubt on the victim's veracity.

Given the lack of procedural safeguards and the serious consequences for clients, counsel should take special care to ensure not only that orders for s. 211 reports require that family violence be included in the report, but that any assessors chosen to author the reports have significant *specialized* knowledge in this area.

- Assessors used no tests to assess for violence or safety, despite violence being alleged in all cases. The tests administered were not designed to determine the 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. They did not once 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 individuals engaging in family violence or for individuals exposed to family violence; or identify potential problems with interpretation of the tests. This is particularly concerning given that 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."[60]

We strongly recommend the development of provincial standards and guidelines that would govern the production of all s. 211 reports and protect all clients. Given the lack of procedural safeguards and the serious consequences for clients, counsel should take special care to ensure not only that orders for s. 211 reports require that family violence be included in the report, but that any assessors chosen to author the reports have significant *specialized* knowledge in this area. Further, in some cases it may be wise to consider hiring an expert in violence under the ordinary expert regime rather than under s. 211.



Conclusion

Where do we go from here?

Eight years after the implementation of the *FLA,* BC's family law system continues to fail many women and children who are seeking safety from family violence. The systemic failure to centre the experiences of survivors results in legal procedures, processes, and legislation that are ill-equipped to address the complexity and intersectional analysis that is required in cases of intimate partner violence, specifically violence against women and children. Legal responses are frequently applied in the absence of a trauma and violence informed lens, without giving consideration to power relations both personal and institutional, and with embedded victim-blaming ideologies. At best, this project underscores that the family law system as a whole is failing to live up to *FLA's* promise to meaningfully respond to family violence. At worst, contact with the legal system is actively exacerbating the risk that women and children face.

Many women survivors of violence have shared with us that they are not using the family law system to access their rightful legal entitlements or benefits because to do so would put them at further risk of harm. If women feel unsafe to seek their legal rights, the legal system in essence further disempowers women while simultaneously empowering perpetrators of violence against women and children.

We have to be alert as lawyers and members of the legal system that there are valid reasons survivors of violence may not disclose the abuse or violence they have experienced. Women's experience of the legal system is fraught with mistrust for many reasons. The failure of many individuals within the legal system to believe women facing violence is reflected in the significant under-reporting of violence and limited disclosure of family violence. Women fear not being believed when they disclose violence because they have not been believed. Women fear not being listened to when they disclose violence because they have not been listened to. Throughout this project we found that women have a valid basis for these fears.

The overriding failure to protect the safety of women and children has already impacted the trust and belief BC women have in the legal system. To move forward, we must listen to the voices of the women in this project and the ones who have come before them and implement new and better practices that protect women in the legal system and beyond. If we do not take real and concrete action to challenge and reform the legal system, these women's stories will remain reports on shelves, inquiries and inquest recommendations will remain unfulfilled, and lives will remain caught in systemic limbo.

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The time to make change is now — it has always been now.

Endnotes

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21 Some useful resources can be found at Ending Violence Association of BC at https://endingviolence.org and Women's Shelters Canada at https://www.sheltersafe.ca/staysafe/#plan.

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25 See *Boyd, supra* note 12. This pattern was consistent with what women told us during their interviews, and has also been observed when assessors prepare custody and access reports. For example, see T K Logan et al., "Child Custody Evaluations and Domestic Violence: Case Comparisons" Violence & Victims 17, no 6 (2002): 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 evaluators' understanding of the risk of harm for children and parents in cases with domestic violence" and at p 737 noted the potential for evaluators' recommendations to "contribute to further exposure to conflict and violence and harm to the child."

26 *LS v GS,* 2014 BCSC 187, (aff'd 2014 BCCA 334) at para 26.

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28 In contrast, Canada's new *Divorce Act*, which came into effect on March 1, 2021, does include "the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage," in the best interests of the child test in section 16(3)(f).

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33 *Heppner v Heppner,* BCPC, July 4, 2014 (Court File No 14570 Williams Lake Registry); *Bukhari v Shah*, BCSC, February 13, 2020 (Docket E192926, Vancouver Registry) (unpublished).

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36 *DBS v SRG,* 2006 SCC 37 paras 101–104.

37 *Michel v Graydon*, 2020 SCC 24, para 111.

38 *Cunha v Cunha* (1994), 99 B.C.L.R. (2d) 93 (SC) at para 9, quoted in *Leskun v Leskun*, 2006 SCC 25 at para 34.

39 The law relating to adverse inference was recently reviewed by the BC Supreme Court in *VR v RZ*, 2019 BCSC 658, paras 33–37.

40 *Michel v Graydon supra* note 37.

41 *Ibid.*, paras 90–96.

42 *Ibid.*, para 20.

43 *Ibid.*, para 14.

44 This seems to be the general experience of practitioners who offer assistance with protection orders; however, we have been unable to find that any institutional bodies such as government, courts, or police have been keeping statistics that would confirm or refute this trend.

45 *Bukhari v Shah*, *supra* note 33.

46 *CAB v MSP*, 2015 BCPC 12.

47 *Ibid.*, paras 42 and 44.

48 To learn more, please refer to our project report: Haley Hrymak and Kim Hawkins, "Section 211 Toolkit" (2020), Rise Women's Legal Centre.

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

50 *R v Mohan,* [1994] 2 SCR 9 *[Mohan]*.

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

52 In 2017, the BC Court of Appeal held in *Williamson v Williamson*, 2016 BCCA 87 at para 47, 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.

53 *Mohan, supra* note 50*,* paras 20–25.

54 *White Burgess, supra* note 51.

55 *Hamilton v Hamilton*, [1983] BCWLD 1471, BCJ No 2496 at para 24.

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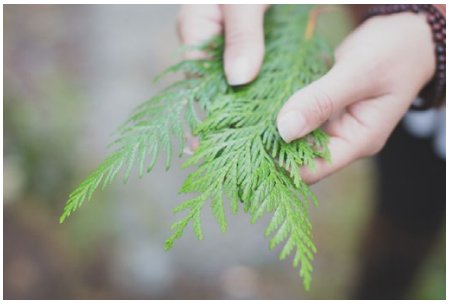
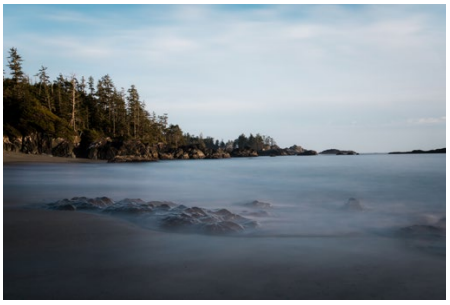
ABOUT THE PHOTOGRAPHER

MELODY CHARLIE Born and raised in Ahousat and proudly calling Nuu-chah-nulth home, I have been capturing light beams and beings since the early 1990s. Having worked most of my life in healing, I am naturally drawn to the strengths and medicines of Indigenous beings across Turtle Island. Culture, songs, ceremony and learning my language offered some much needed healing after the loss of my children's father. Losing him became a journey of finding me. Finding me led to the strengths and stories of First Peoples, through the lens, straight to the heart and back to our roots. melodycharlie.com

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.

For more information about Rise, visit **womenslegalcentre.ca**

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.