



# Family Violence & Family Law Brief

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## **The 2021 Divorce Act: Using Statutory Interpretation Principles to Support Substantive Equality for Women and Children**

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**The 2021 Divorce Act:  
Using Statutory Interpretation Principles to  
Support Substantive Equality for  
Women and Children in Family Violence Cases**

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*At Simon Fraser University, we live and work on the unceded traditional territories of  
the Coast Salish peoples of the x<sup>w</sup>məθkwəyəm (Musqueam), Skwxwú7mesh (Squamish),  
and Səlílwətał (Tsleil-Waututh) Nations.*

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# The 2021 Divorce Act: Using Statutory Interpretation Principles to Support Substantive Equality for Women and Children in Family Violence Cases

## Overview

Applying well-established principles of statutory interpretation to the 2021 *Divorce Act*<sup>3</sup> (the *Divorce Act*) is a critical component of implementing and enhancing the substantive equality rights of women and of children generally and particularly with respect to family violence. Helpfully, in the September 2020 Supreme Court of Canada decision, *Michel v. Graydon*,<sup>4</sup> the Court reviewed and applied the relevant statutory interpretation principles, and those principles were expanded upon in the concurring judgements of Chief Justice Wagner and Justices Abella, Karakatsanis and Martin. They did so while interpreting a child support provision found in British Columbia's *Family Law Act* (FLA).<sup>5</sup> All of the principles of statutory interpretation reviewed by that Court in relation to the interpretation of the child support provisions of the FLA apply equally to the interpretation of the family violence provisions in all Canadian family law legislation including the *Divorce Act*.<sup>6</sup> This Learning Brief reviews those principles and suggests ways to apply them in family violence cases.

In *Michel v. Graydon* the Honourable Judge Smith of the B.C. Provincial Court ordered a retroactive variation of child support under s. 152 of the FLA though the child was not a "child of the marriage" – no longer under the age of 19 - when the application was made.<sup>7</sup> He did this based on clear evidence that the father had deliberately hidden income relevant to child support at the time when the child did meet the definition of child of the marriage. In doing so, Judge Smith considered the overall purpose of the child support provisions of the B.C. Act - ensuring that children have the child support to which they are entitled from both of their parents. That decision was overturned by the British Columbia Supreme Court; the Court of Appeal agreed with the Supreme Court. The Supreme Court of Canada set aside the decisions of the BC Supreme Court and Court of Appeal and restored Judge Smith's decision.

The *Divorce Act's* family violence provisions are, overall, focused on ensuring a common understanding of the depth and breadth of the nature of family violence, including direct and indirect exposure of children to it, as well as the harmful impact it can have on the safety, security and well-being of women (as family members) and children. They specify that the views and preferences of the child are relevant in all cases, with no exceptions for cases involving violence and/or parental alienation. There are no presumptions about what is in a child's best interests, no presumption of equal parenting and there is no general maximum parenting time/contact principle: a child shall have only as much time with a parent as is consistent with the best interests of the child, which in turn gives primary consideration to the child's physical, emotional and psychological safety, security and well-being.

In June 2021 in *Colucci v. Colucci*,<sup>8</sup> a unanimous Supreme Court of Canada provided an important example of how the family violence sections of the *Divorce Act* inform the interpretation of other sections. In commenting on the trend towards a culture of negotiation, the Court referred to s. 7.3 requiring parties, when appropriate, to resolve family law disputes through family dispute resolution processes. It then stated that, “Parents should be encouraged - *absent family violence or significant power imbalances* – to resolve dispute themselves outside the court structure...” (emphasis ours).<sup>9</sup> The words “absent family violence or significant power imbalances” are not in the *Divorce Act* section but, using a purposive approach which takes into account the Act’s scheme and objects, the Court concluded that it must be interpreted this way. That statement applies directly to the duty of legal advisors to encourage dispute resolution in s. 7.7(2); legal advisors must only encourage resolution outside the court structure absent family violence or significant power imbalances. Complying with this duty requires an assessment by the legal advisor to determine whether family violence is an issue and if there are any significant power imbalances.

This Brief provides a guide to statutory interpretation of relevant provisions which has four Parts. Part I identifies the principles of statutory interpretation reviewed in *Michel v. Graydon* and adapts them to apply to family violence. Part II considers the scheme and objects of the *Divorce Act* as discerned from the Act itself and legislative statements of objectives. Part III looks at relevant social and historical context information. This is an important exercise because it is a principle of statutory interpretation that Parliament is taken to know the social and historical context in which it makes its intention known. Part IV considers Canada’s international obligations relating to family violence as Parliament is presumed to take them into account.

Because of the relevance of the scheme and objects of the Act relating to family violence, this Learning Brief refers to several stated objectives taken from: (1) the Federal Department of Justice’s *Divorce Act Changes Explained*;<sup>10</sup> and (2) the earlier document, Legislative Background: *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act* (Bill C-78 in the 42<sup>nd</sup> Parliament).<sup>11</sup> (The underlining within each such reference is ours and our own emphasis is in italics.)

We find persuasive the interpretation of the parenting provisions of the new *Divorce Act* by the Ontario Superior Court of Justice in its March 2021 decision in *S.S. v. R.S.*<sup>12</sup>, one that is consistent with what is said in *Michel v. Graydon*. The Court described its overall approach as follows:<sup>13</sup> (1) uses an interpretation consistent with children’s human rights and Canada’s obligations under international law; (2) calls on courts to recognize, respect and reflect each child as an individual distinct from their parents, and to empower children to be actors in their own destiny; (3) in practice requires judges to probe each child’s lived experiences, to meaningfully consider their views, and to craft an order that promotes the child’s best interests and overall wellbeing; and (4) recognizes the family violence provisions as empowering courts to protect children from unique forms of violence that can have devastating long term impacts.

This Learning Brief also complements important work done on statutory interpretation before *Michel v. Graydon* was decided by Dr. Linda Neilson and Professor Emerita Susan Boyd.<sup>14</sup>

## Part I – Principles of Statutory Interpretation Applied to Family Violence Cases

### KEY POINTS:

1. Determine the legislative scheme and objects;
2. Identify the social and historical context;
3. Treat children as full rights bearers;
4. Consider responsibilities of parents and courts;
5. Determine Canada's International Obligations to women and to children.

This Part describes the relevant statutory interpretation principles reviewed in *Michel v. Graydon*, categorizing them under five headings. The references in this Part to family violence replace references in the judgment to child support. The substitutions are highlighted, with the original wording in brackets.

### *Determining the Legislative Scheme and Objects*

To determine the scheme and objects of the Act relating to family violence, apply these principles:

- examine the section in its entire context and in its grammatical and ordinary sense, in harmony with the statute's scheme and objects. (Court at paras. 11 and 21 and Concurring judgment at para. 69.)
- use a fair, large and liberal construction and interpretation as best ensures the attainment of its objects, including the object of the best interest of the child. (Concurring judgment at paras. 40 and 69). This requirement conforms with s. 12 of the federal *Interpretation Act*.<sup>15</sup>
- use a purposive and contextual approach to lay the groundwork for such a construction and interpretation which:
  - identifies the purposes and fundamental principles of [child support] **the protection of children and other family members from family violence**, ensuring that the policies and values relate to contemporary society and that the provisions focus on the best interests of the child. (Concurring judgment at paras. 43 and 71), and
  - looks at the wider legislative purposes, societal implications and actual impacts. (Concurring judgment at para. 40)

## *Identifying the Social and Historical Context Relating to Family Violence*

- Family law calls for an approach that takes into account the broader social framework in which family dynamics operate. (Concurring judgment at para. 88)
- It is a principle of statutory interpretation that the legislator is taken to know the social and historical context in which it makes its intention known. (Concurring judgment at para. 97)
- The historical evolution of Canadian approaches to [child support] **protecting families, including children, from violence** bear on a proper interpretation of the Family Law Act and the *Divorce Act*. (Concurring judgment at para. 44)

## *Treating Children as Full Rights Bearers*

- The status of children has changed dramatically...children today are viewed as individuals who, as full rights bearers, and members of a group made vulnerable by dependency, age, and need, merit society's full protection. (Concurring judgment at para. 77)
- [Child support] **Being free from violence** is the right of the child and the responsibility of parents. (Court at para. 10, Concurring judgment at para. 41)
- The best interests of the child principle is at the heart of any interpretative exercise. (Concurring judgment at para. 102) An interpretation is needed that will best serve children. (Concurring judgment at para. 72)

## *Considering Responsibilities of Parents and Courts*

- [Child support] **Laws relating to family violence are** the means through which the law ensures that individuals with parental responsibilities [provide financial assistance to children] **in fact protect the children from violence.**
- The interpretation by the Appeal Court prevented, rather than enhanced, access to justice for children. (See for example Concurring judgment at paras. 41, 43, 72 and 73).
- "Courts are not to be discouraged from defending the rights of children when they have the opportunity to do so." (Court at para. 31.)

## *Determining Canada's International Obligations to Women and to Children*

- It is presumed that the legislature takes account of Canada's international obligations: Vavilov 2019 SCC 65 at para. 182. They include the *UN Convention on the Rights of the*

*Child and the Convention on the Elimination of All Forms of Discrimination Against Women.* (Concurring judgment at para. 103)

- Principles in international conventions such as the *UN Convention on the Rights of the Child* help inform the contextual approach to the interpretation of the FLA as well as the *Divorce Act* (Concurring judgment at para. 103)

## Part II – Divorce Act Family Violence Scheme and Objects Discerned from the Act Itself

### KEY POINTS:

1. Provides four broad principles key to the Act's scheme and objects:
  - a. Best interests of *the particular child* only consideration
  - b. That children's safety, security and well-being *must be given primary consideration.*
  - c. No presumption of joint or shared parenting
  - d. No general maximum parenting time/contact principle – always subject to safety, security and well-being
2. Applies an expansive, non-exhaustive definition of family violence.
3. Recognizes protection requires risk assessment – determining the impact of family violence now and on future risk.
4. Makes clear that the “friendly” cooperative, communicative parenting provisions are subject to safety, security and well-being.
5. Establishes that children have the right to have their views and preferences *meaningfully considered in all cases, which includes family violence and alienation cases.*
6. Recognizes that protection from family violence requires both knowledge of and coordination of other relevant legal proceedings, especially child protection, criminal and immigration proceedings.

### *Four Broad Divorce Act Principles Key to its Scheme and Objects*

Four broad principles found in the Divorce Act are critically important in considering the schemes and objects of the Act relating to family violence:

#### Best Interests of the Particular Child in Question as the ONLY Consideration

- The court will take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order: s. 16(1).
- In doing so the court shall consider *all factors related to the circumstances of the child*, including 12 specific factors: s. 16(3).



- *The Divorce Act Changes Explained* states that the list is not exhaustive; a court may consider factors not on the list. (at p. 84)

### Child's Safety, Security and Well-being Must be Given Primary Consideration

- Particularly relevant to family violence is the section stating that the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being: s.16(2).
- *The Divorce Act Changes Explained* states that when there are conflicts between two or more criteria, courts must prioritize the child's safety, security and well-being. (at p. 82)

### There is No Presumption of Joint/Shared Parenting

- Requiring this individual analysis explains why the Act does not contain a presumption that joint/shared parenting is in the best interests of children in spite of significant "lobbying" by some that it be included.

### There is no General Principle of Maximum Parenting Time/Contact

- In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child: s. 16(6).
- The section heading Maximum Contact found in the 1985 *Divorce Act* is not included in the new Act. Though found initially in Bill C-78, it was changed to now say: *Parenting Time Consistent with the Best Interests of the Child*.
- *The Divorce Act Changes Explained* states that: (1) it is well accepted that unless circumstances, such as safety concerns, indicate otherwise, children should have a strong relationship with each parent; (2) the optimal amount of parenting time depends on an individual child's circumstances and must take into account all factors relating to the best interests of the child in determining what division of time would be best; (p. 109); and (3) as part of the best interests of the child analysis, the allocation of parenting time is subject to the overarching primary consideration of the child's safety, security and well-being. (p. 110)
- It follows that the principle is, in effect, not maximum parenting time, but rather, as much parenting time as is consistent with the child's physical, emotional and psychological safety, security and well-being: s. 16(2).

## *Expansive Non-Exhaustive Definition of Family Violence*

- The broad non-exhaustive family violence definition supports the Act's object of protecting children and other family members from all forms of family violence, keeping them safe, secure and well: s. 2(1).
- *The Divorce Act Changes Explained* states that: (1) family violence can take many forms and can cause significant harm to both victims and witnesses; and (2) includes not only violent acts but the child's exposure to such acts, adding that a child's direct exposure (for example a child seeing or hearing the violence) or indirect exposure (for example, a child seeing that parent is fearful or injured) is recognized as family violence and child abuse. (pp. 33-34)
- It also states that there are significant rates of family violence against children and spouses both during and after separation. Separation can be a particularly risky period for spousal violence. (pp. 95 and 96)

## *Protection Requires Risk Assessment: Determining the Impact of Family Violence*

It is axiomatic that having as much relevant information about family violence and its impact in each case as is reasonably possible is an essential aspect of effectively assessing risk; relevant information is a necessary component of an outcome that is sustainable, and ensures the safety, security and well-being of children and other family members. The contrary is also true: a lack of relevant information can lead to outcomes which do not do so. The question of what is relevant in each case is informed by the relevant legal principles considered within a contextual framework. Section 16(3)(j) provides that the court must consider any family violence and its impact on, *among other things*:

- (i) the *ability and* willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
  - (ii) any family violence and its impact on, among other things, the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child.
- When considering the impact of any violence under s. 16(3)(j), the court shall consider seven specific factors<sup>16</sup> as well as any other relevant factor: s. 16(4).
  - *The Divorce Act Changes Explained* states that evidence indicates that family violence has wide-ranging effects on victims and families, including long-term impacts on the behaviour, development and physical, psychological and emotional health of the child.<sup>17</sup>

## *“Friendly” Cooperative Communicative Parenting Provisions Subject to Children’s Safety, Security and Well-being*

Those challenging family violence claims and advancing parental alienation claims can focus on the importance to children of what can be called the friendly cooperative communicative parenting provisions of the *Divorce Act*. This is especially so when claims of “parental alienation” are made. It is essential to place the friendly cooperative communicative parenting sections in their proper context, considering the Act’s scheme and objects.

### Family Violence and Willingness to Support the Development and Maintenance of the Child’s Relationship with the Other Spouse

The court must consider each spouse’s willingness to support the development and maintenance of the child’s relationship with the other spouse: s. 16(3)(c)). However:

- This section must be interpreted in light of the overarching principle found in s. 16(2); that is, developing and maintaining the child’s relationship with the other spouse *must be consistent with the child’s physical, emotional and psychological safety, security and well-being*.
- *The Divorce Act Changes Explained* makes three connected and equally important points concerning this “friendly parent” provision: (p. 88):
  - (1) It is generally important that each parent support the child’s relationship with the other parent. A positive relationship with both parents provides stability for the child during their parents’ separation and divorce.
  - (2) In some cases, it may be inappropriate for one parent to support a child’s relationship with the other parent, such as in a situation of family violence where there are safety concerns.
  - (3) In cases involving family violence, courts must consider the impact of the violence on all of the best interests of the child factors set out in section 16, including on the willingness of a spouse to support the child’s relationship with the other spouse. In every case, the court must give primary consideration to the child’s safety, security and well-being.

### Family Violence and the Ability and Willingness to Communicate and Cooperate

The Court must consider two things:

- the *ability and willingness* of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child: s. 16(3)(i).

- any family violence and its impact on, among other things, the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child: s. 16(3)(j)(ii).

*The Divorce Act Changes Explained* states that: (at pp. 94 and 96)

- generally, children benefit when their parents cooperate and communicate. Parents who do that are more likely to manage flexible parenting arrangements and joint decision making about their children.
- flexible arrangements may not be appropriate for parents unable, or unwilling cooperate or communicate with each other.
- In cases of family violence, particularly spousal violence, it is crucial that the court consider whether a co-operative parenting arrangement is appropriate. A victim of family violence might be unable to co-parent due to the trauma they have experienced or ongoing fear of the perpetrator. In addition, co-operative arrangements may lead to opportunities for further violence.

### Family Violence and Claims of Parental Alienation

An in-depth discussion of the important issue of problems in parent-child relationships is well beyond the scope of this paper.<sup>18</sup> However, we highlight for consideration a number of issues raised which focus specifically on family violence. We use the term alienation understanding that both the term, and the science behind it, are not without controversy.<sup>19</sup>

Courts must respond effectively to deliberate, inappropriate attempts to interfere with a child's relationship with a parent:

- Such attempts are certainly not in the best interests of the child.
- Yet it is well-recognized that there are many reasons why a relationship between a child and a parent may be problematic that do not relate to efforts by the other parent to interfere with the relationship. Family violence is one of them.
- A full analysis of all of the circumstances is required to determine the cause of the problem and to consider an appropriate solution.

Concerns have been raised in Canada and internationally, primarily by people and organizations supporting the equality rights of women and children, about the way claims of family violence can be minimized or ignored, rather than analyzed in a fair and impartial way when there are also claims of alienation.<sup>20</sup> Instead, the suggestion is that:

- once an allegation of alienation is made, there can be a *premature* and inappropriate shift away from the issue of family violence and evidence relating to it, to, instead, looking only for indicators of alienation.
- That is, the focus can shift to indicia of alienation without an appropriate and in-depth analysis of all the circumstances of the case, including the family violence claims. Doing this can inappropriately undermine fair and impartial consideration of the family violence claims, a result that can have significant adverse consequences for the safety, security and well-being of the children and other family members affected.
- Doing so can include a premature reformulation of victim resistance to alienation. Eight examples are provided in a recent analysis prepared by Rise Women’s Legal Centre in Vancouver:<sup>21</sup> (1) mother discloses violence to attempt to alienate children; (2) children disclosing violence to disclosure is evidence of alienation; (3) mother is afraid of father to mother is modelling fear to alienate the children from their father; (4) children are afraid of father to mother has caused the children to be afraid of the father; (5) mother does not want to see the father to mother is modelling alienation against the father; (6) children do not want to see the father to children are exhibiting alienation caused by the mother; (7) mother protects children from the father to mother is restricting father’s access to children as part of parental alienation; and (8) mother reports ongoing family violence to mother is fabricating family violence to further parental alienation.

It is concerning that organizations which support women’s equality report that many women are afraid to disclose family violence in family law court proceedings because they worry that their claims will be misconstrued as alienation, resulting in the loss of their children. There are also worrisome reports from women that some lawyers recommend that they do not raise the issue of violence for the same reason.<sup>22</sup>

Concerns also have been raised that the views and preferences of children in these cases can be minimized or ignored.

### *Children Have the Right to Have Their Views and Preferences Meaningfully Considered in Family Violence and in Alienation Cases*

#### Children’s Views and Preferences Generally

In keeping with children’s status as full rights bearers, the court must consider the child’s views and preferences, giving due weight to the child’s age and maturity, unless they cannot be ascertained: s. 16(3)(e).

- Read in its grammatical and ordinary sense this section applies to all children and all cases. The language used contains no ambiguity; it applies to all children, and therefore all cases, including those where there are claims of family violence and alienation. The only limitation is if the views “cannot be ascertained”. It is legally presumed that in

enacting this section Parliament took into account Canada's international obligations, including those found in the *United Nations Convention on the Rights of the Child*.

- This portion of the Leaning Brief must therefore be read together with the discussion of this Convention in Part IV – Canada's International Obligations. As noted there, the UN Committee on the Rights of the Child states that a child's right to be heard has particular relevance in violence situations and the participation right commences with very young children who are particularly vulnerable to violence.
- The Legislative objectives specifically state that Canada is a party to the Convention and refer in particular to Article 12. They note that Article 12 requires consideration of the views of children on issues important to them and directs that courts (and parents) give weight to the child's views in accordance with the child's age and maturity.
- *The Divorce Act Changes Explained*<sup>23</sup> again refers to the Convention and Article 12 saying that children who are capable of forming their own views have the right to participate in a meaningful way in decisions that affect their lives, and parenting decisions made by judges and parents affect children directly. They also state that in some cases it may not be appropriate to involve children, for example if they are too young to meaningfully participate.
- In considering this section the Ontario Superior Court of Justice in **S.S v. R.S.** concluded that: (1) A human rights approach fundamentally recognizes children as subjects rather than objects of law rather than objects of their parents; (2) Making children more visible in legal proceedings that affect their rights is fundamentally important in Canada because children are not guaranteed legal representation in family law proceedings; and (3) Even if there is no direct evidence about the child's views s. 16(3)(e) still requires the court to make reasonable efforts to glean and articulate the child's views and preferences whenever possible, considering the child's age and maturity and all the other evidence before it.<sup>24</sup>

For more information about children's participation in family law and child custody proceedings, see *Implementing Children's Participation Rights in Family Law and Child Welfare Court proceedings*. This comprehensive Literature Review/Report was released by the British Columbia Office of the Representative for Children and Youth on June 4, 2021 and was prepared for that Office by the FREDA Centre.<sup>25</sup>

### Children's Views and Preferences in Alienation Cases: Putting the Cart before the Horse

A significant equality issue for women and children relates to cases in which there are allegations of one parent alienating a child against the other parent. Children in these cases generally have a right to express their views and preferences. (See also the discussion of this issue in **Medjuck v. Medjuck**, citing **G.(B.J.) v. G. (D.L.)**,<sup>26</sup> found in Part IV – Canada's International Obligations).

- Notwithstanding that, there can be a reluctance to listen to children at all when there is an allegation of alienation; their view and preferences can be inappropriately minimized or ignored.
- Children can have relevant information about whether there is in fact alienation. While the issues involved in hearing from children in these cases are complex, there is a concern about another premature conclusion.
- That is, an ultimate issue to be determined by the court is whether there is in fact “alienation”. Yet, decisions are sometimes made early in the court process that a child is not capable of forming their own views based on concerns about alienation, made in the absence of the child’s input about alienation, before there has been a judicial assessment of the reliability of expert and other evidence about alienation, and before there has been a judicial finding of alienation based on all of the evidence. This can lead to a premature conclusion that the child cannot form their own views *because of* alienation.
- This approach “puts the cart before the horse”. Using it also overlooks the fact that Article 12(1) provides children with two rights: the right to be heard if they are capable of forming their own views; *and* the right to have those views given due weight in accordance with their age and maturity. In our respectful view, in many of these cases the question of whether the child’s views have been “tainted” ought to be left to be determined as a question of due weight to be given to the views.

Children’s general rights to participate will be more fully addressed, including the issue of the right to participate in alienation cases, in an upcoming webinar organized by the authors of this Learning Brief.

### *Dangerous Disconnects: Protection from Family Violence Requires Coordination of other Relevant Legal Proceedings*

Multiple court proceedings relating to the same family are not uncommon in family violence cases. They can include criminal proceedings, child protection proceedings and immigration proceedings.<sup>27</sup>

- Section 16(3)(k) requires judges to (“shall”) consider any civil or criminal proceeding, order, condition or measure that is relevant to the safety, security and well-being of the child. Importantly, section 7.8 of the Act creates a duty on the Court to consider a number of orders, agreements or measures, unless it would clearly not be appropriate to do so. These sections must be interpreted within the broader context of the scheme and objects of the Act.
- *The Divorce Act Changes Explained* and the Legislative objectives state that many types of orders relating to other civil and criminal proceeding may be relevant to the safety or

well-being of the child and refer to the new duty for the Court to find out about other proceedings and to coordinate them.

## Part III – Understanding the Social and Historical Context of Violence Against Women and Children

### KEY POINTS

1. **Complex multifaceted nature of family violence**
2. **The gendered nature of family violence**
3. **Dangerousness of post separation violence**
4. **Misunderstandings about if, when, why and how violence is disclosed/reported**
5. **Devastating impact of violence**
6. **Discriminatory views about women’s credibility: myths, stereotypes and claims of false allegations**

*Michel v. Graydon* emphasized both the importance of understanding the social and historical context of family violence and the fact that legislators are taken to know both. Our emphasis is on social context information though we include references to historical context.

Social context information can, among other things, be used in the many sections of the *Divorce Act* giving to judges the discretion to consider factors other than those listed. It is not possible here to do other than identify several key areas that should be pursued. For more information about social and historical context analysis see *Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases*, published in the Canadian Journal of Family Law in 2017<sup>28</sup>, and *Family Violence and Parenting Assessment, Law Skills and Social Context*.<sup>29</sup>

### *Multifaceted Nature of Family Violence*

#### Complexity Requiring an Intersectional Approach

Family Violence is complex, multi-faceted and widespread, and the Legislative objectives state that:

- family violence is a devastating reality for many Canadians from many walks of life; it may cause, contribute to or result from a family breakdown
- in 2014, 4% of people living in Canadian provinces with a current or former spouse or common-law partner, (approximately 760,000 people) reported having been physically or sexually abused by their spouse in the previous five years.

Addressing family violence requires an intersectional approach, one which considers combinations of factors, including economic factors, such as the effects of poverty. The discriminatory impacts of colonialism and racism can be significant factors.



## Identifying Types of Violence

The Legislative objectives identify:

- coercive and controlling violence;
- violent resistance;
- situational (or common) couple violence (generally caused by inability to manage conflict or anger); and
- separation instigated violence.

It is important to differentiate between kinds of violence.

## Necessity of Identifying Patterns of Violence

Evidence of any history of/pattern of violence is required. Conduct viewed in isolation from any pattern of violence can be mischaracterized, potentially putting the intended victim(s) at further risk:

- violence which is part of a long-time pattern of coercion and control can be wrongly considered as one-off situational (couple) violence; and
- what is in reality defensive behaviour can be viewed as aggressive behaviour.

## *The Gendered Nature of Family Violence*

Violence is gendered. Though this view is not without controversy, with some suggesting that there is gender symmetry<sup>30</sup>, the prevailing and appropriate view is that there is most often a significant difference in the nature of and severity of the violence experienced by women and men when it is viewed contextually:

- Dr. Peter Jaffe, Dr. Claire Crooks, and Professor Nicholas Bala found, in 2005, that though some statistical information may suggest the rates of violence are similar, when taken together with additional contextual information, there are important gender patterns in severity, impact and lethality of violence.<sup>31</sup>
- The Legislative objectives state that: (1) while overall rates of family violence may not differ greatly between men and women, there are significant gender differences in the severity of the violence; (2) In 2014, women were twice as likely as men to report being sexually assaulted, beaten, choked or threatened with a gun or knife; and (3) In contrast, men were three and a half times more likely to report being kicked, bitten or hit with something.
- Status of Women Canada concluded in 2016 that while violence can affect everyone, women and girls are more at risk of many forms of violence, including intimate partner violence; some women are more vulnerable than others. Indigenous women face even

greater challenges (as highlighted by the Missing and Murdered Indigenous Women and Girls Report).<sup>32</sup>

- *Michel v. Graydon* states that women in relationships are more likely to suffer intimate partner violence than their male counterparts.<sup>33</sup> The concurring judgment refers to statistics showing that 79% of cases reported to police are reported by women.<sup>34</sup>
- Studies on domestic violence homicide support the conclusion that violence against women is gendered; not only is it often of a more severe nature, but it can be deadly. A recent report of the Canadian Domestic Violence Homicide Prevention Initiative supports this conclusion. The Report states that with respect to adult victims only, females comprised 79% and males were 21%.<sup>35</sup> Among child victims, females represented 53% and males 47%. The Report points out that this is consistent with other domestic homicide research and national trends more broadly.
- Crime statistics also specifically demonstrate the gendered nature of family violence (IPV). In 2019, the rate of police-reported intimate partner violence was 347 victims per 100,000 populations. While just over half (53%) of victims of violence were female, the large majority (79%) of victims of IPV specifically were women, and this held true regardless of the type of intimate partner relationship.<sup>36</sup>
- In 2021, the most recent Statistics Canada Report indicates there were several forms of IPV that were more than 5 times more prevalent among women than men, and these forms of violence tended to be the most severe. Although these acts of violence were less common, women were considerably more likely to have experienced the following in their lifetime: being forced to have sex (10% versus 2%), being made to perform sex acts they did not want to perform (8% versus 1%) and being choked (7% versus 1%).<sup>37</sup>

### *Dangerousness of Post Separation Violence*

There was a long-standing but erroneous societal view reflected in laws and legal practices that once couples separated, the violence stops. That thinking essentially makes family violence irrelevant when considering parenting issues after separation. The opposite is often true. As the Legislative objectives put it:

- Separation and divorce can in fact exacerbate an already violent relationship and the period following separation is the highest time of risk. This time period can overlap with court proceedings.
- For example, from 2007 to 2011, a woman's risk of being killed by a spouse from whom she was separated was nearly six times higher than the risk of being killed by a spouse with whom she was living.

## *Misunderstandings about If, When and Why and How Violence is Disclosed/Reported*

Our understanding of when, how and why women do, or do not, report or disclose violence has evolved over time.

- We once had a doctrine of recent complaint in criminal sexual assault cases which assumed credible women would report or disclose violence soon after it happened; we now know this conclusion is entirely wrong. Domestic violence remnants of this thinking continue, even though some evidence shows that at least 70% of women do not disclose domestic violence.
- There is still much misinformation about disclosure and reporting.
- Among the many reasons for non-disclosure or delay in disclosure are: a lack of trust that those throughout the justice system will believe them and keep them and their children safe; fear of wrongfully being accused of parental alienation and losing their children and advice from some lawyers not to disclose for that reason; inability to retain a lawyer or other needed support services; not even recognizing they are in a violent situation, especially when coercion and control tactics are used; and a considered decision that it is safer to disclose after separation.

## *Impact of Violence*

Though fully dealing with the impact of violence is well beyond the scope of this Brief, we identify eight particularly relevant areas of concern: (1) the impacts of trauma; (2), the significant impact on children of their exposure to family violence; (3) the overlap between spousal violence and child abuse; (4) exposure to violence as a form of child abuse, recognized as such by Canada's Minister of Justice; (5) psychological, physical and sexual abuse as adverse childhood experiences (ACEs); (6) connection to future violence victimization and perpetration; (7) violent parent as a negative relationship role model; and (8) the economic impact of family violence.

Family violence can have a significant and negative impact on children.

- Dr. Peter Jaffe, Dr. Claire Crooks and Professor Nicholas Bala suggest in their seminal 2005 article that it was not until the mid to late 1990s that many professionals began to be aware of the negative implications of spousal violence to children. They note that before then it was believed that a man could be a violent spouse but could still be a good father.<sup>38</sup>
- The Legislative objectives consider the significant negative effects of family violence on children, stating that (1) family violence can have a profound effect on children; (2) those who are exposed to violence are at risk for emotional and behavioural problems throughout their lifespan, and these impacts are similar to those of direct abuse; and (3)

some of these consequences include post-traumatic stress, low educational achievement, difficulties regulating emotions, chronic physical diseases, and greater propensities for future victim/perpetrator roles.

### *Discriminatory Views about Women's Credibility: Myths, Stereotypes and Claims of False Allegations*

Addressing discriminatory views about the credibility of women's allegations of family violence in justice processes is critical to the Divorce Act object of ensuring their safety, security and well-being. Yet:

- Rather than approaching the question impartially when women raise the question of family violence, some decision-makers across the justice system are, consciously or unconsciously, immediately skeptical.
- That skepticism has its roots in historical patterns of discriminatory attitudes, laws, and practices; formally changing laws does not always address deeply rooted attitudes and beliefs.
- Credibility assessments are particularly prone to the use of myths and stereotypes. For example, it can be concluded, based only on unproven assumptions, that: (a) a credible woman would tell someone, report it to the police and/or child welfare authorities and leave the abusive relationship; (b) if a woman does not disclose until she has left and court proceedings have begun, she is being untruthful or exaggerating to gain an advantage; and (c) if legal aid is only available in cases where violence is an issue, she made an untruthful or exaggerated claim of violence to be eligible.

A significant inequality issue for women is the claim (by some) that women, as a group, are particularly prone to making false allegations of violence to gain an advantage in family law proceedings.

- There can be false allegations by women, just as there can be false denials by men. But the claim that it happens often is disputed; evidence presented to support that conclusion should be carefully evaluated to ensure it is bias free.
- For example: (a) Numerous Canadian police services reported many sexual assault allegations as unfounded, but when the results were closely examined, many of those were recategorized as founded; and (b) As Professor Nicholas Bala and Dr. Barbara Fidler recently said,<sup>39</sup> some custody evaluators may have limited experience dealing with issues like interpersonal violence or alienation and may have a range of biases. As a result, and hypothetically, any claims made that the women they evaluated often made false allegations may be suspect.

For further discussion of this credibility topic see for example: (1) Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases and Family Violence and Parenting Assessment, Law Skills and Social Context referred to at the beginning of this Part.; and, more recently, Why Can't Everyone Just Get Along? How BC's Family Law System Puts Survivors in Danger.<sup>40</sup>

## Part IV – Canada's International Obligations

### KEY POINTS

1. The UN Convention on the Rights of the Child treats children as rights holders with a significant role to play in family law proceedings.
2. Being protected from all forms of violence and having significant participations rights in court proceedings that affect them are central rights in family violence cases.
3. The Convention applies to all children and all cases, including those involving allegations of family violence and/or parental alienation.
4. The UN Committee on the Rights of the Child created by the Convention to implement it, emphasizes that: there is an inextricable link between best interests and participation; the right to be heard has particular relevance in family violence cases; there should no age limits for participation; and there should be a presumption of capacity.
5. The Committee emphasizes the necessity for eight guarantees/safeguards, with one being all appropriate legal representation when the child's best interests are to be formally assessed and determined by courts; that representation facilitates the seven other safeguards set out in this Part.

### *International Obligations Generally*

We have seen that, as a principle of statutory interpretation, the Divorce Act is presumed to take account of Canada's international obligations.<sup>41</sup>

- There are numerous international instruments that are relevant in family violence cases. **Michel v. Graydon** gave two examples: The UN Convention on the Rights of the Child and The UN Convention on the Elimination of all Forms of Discrimination Against Women.<sup>42</sup>

Some of the others include the: UN Declaration on the Rights of Indigenous Peoples; UN Declaration on the Elimination of Violence against Women; International Convention on the Elimination of all Forms of Racial Discrimination; and the UN Convention on the Rights of Persons with Disabilities.<sup>43</sup>

### *UN Convention on the Rights of the Child*

The UN Convention on the Rights of the Child supports an approach which, as the concurring judgment in **Michel and Graydon** stated, sees children as full rights bearers.

- That judgment<sup>44</sup> referred to a dramatic change in the status of children from the times when they were viewed as property to seeing them as full rights bearers.
- In between the two:
  - the prevailing wisdom was that children should be kept out of - protected from - court processes.
  - children were viewed “paternalistically, [seeing] them as non-competent people on their way to adulthood, about whom protective decisions must be made.” - “human becomings” - rather than human beings.<sup>45</sup>
- This view, one that was well-intentioned, no longer reflects the recognized legal rights of children.

The Convention approach is holistic; all rights apply to all children. Four of its Articles are considered fundamental, are described as General Principles, and provide an overarching framework for this holistic approach: respecting and ensuring the rights to each child without discrimination (Article 2); making the best interests of the child a primary consideration in all actions affecting the child (Article 3(1)); the child’s inherent right to life and healthy development (Article 6); and the child’s participation rights (Article 12).

Several Articles are particularly relevant to family violence:

- a child means every human being below the age of eighteen years: Article 1.
- Article 19 protects a child from violence of all kinds “while in the care of parents(s), legal guardians(s) or any other person who has care of the child.”
- Article 12(1) provides all children who are capable of forming their own views with two rights:
  - the right to express their views freely in all matters affecting them, and
  - the right to have those views given due weight in accordance with the child’s age and maturity.
- This “right to be heard” specifically applies to any judicial proceeding affecting the child: Article 12(2).

The Ontario Superior Court of Justice considered the Convention and Article 12 in *Medjuck v. Medjuck*, citing *G. (B.J.) v. G. (D.L.)*, a decision referred to with approval by the UN Committee on the Rights of the Child.<sup>46</sup> The Court in *Medjuck* concluded that:

- Article 12 applies to all children and does not make an exception for cases dealing with domestic violence, parental alienation or both;
- A child capable of forming views and communicating them should generally be allowed to express them in judicial proceedings, (though in some cases the alienating behaviour may be such that the child is really not capable of forming the child's own views);
- In many cases, including high conflict cases, the focus will be on the weight attached to the views, not on whether the views should be expressed; and
- Obtaining views from all sorts of children, including younger children, on a wide range of topics relevant to the dispute, can lead to better decisions for children that have a greater chance of working successfully.

### The UN Committee on the Rights of the Child

- The UN Convention on the Rights of the Child creates the UN Committee on the Rights of the Child: Article 43.
- The Committee is established for “the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention.”<sup>47</sup>

### Use of the General Comments of the UN Committee on the Rights of the Child

The obligations referred to in Article 43 are informed by the creation by the Committee of General Comments on the Articles of the Convention:

- General Comments provide important guidance on the interpretation of the Convention Articles in family law matters and are entitled to significant weight.
- While not “binding” they represent international child rights norms which are well-founded and persuasive.
- The General Comments form an important basis for the Committee’s periodic reviews of member states’ compliance. At the time of writing Canada is in the midst of such a review, with the last “Concluding Observations: Canada” provided in 2012.
- Those particularly relevant to family law cases are: General Comment 12 on “The right of the child to be heard”;<sup>48</sup> General Comment 13 on “The right of the child to freedom from all forms of violence”;<sup>49</sup> and General Comment 14, on “The right of the child to have his or her best interests taken as a primary consideration (article 3 para. 1).<sup>50</sup> See in particular these Comments:

- The child’s right to be heard has particular relevance in violence situations and the participation right commences with very young children who are particularly vulnerable to violence.<sup>51</sup>
- There is a direct – “inextricable” - link between determining children’s best interests, as set out in Article 3, and hearing the child’s views and taking them seriously.<sup>52</sup>
- There should be a presumption that a child has the capacity to form his/her/their own views and a recognition that he/she/they has the right to express them; it is not up to the child to first prove capacity.<sup>53</sup>
- There should be no age limits for participation.<sup>54</sup>
- General Comments have been referred to in Canadian jurisprudence and should be applied unless:<sup>55</sup> (1) persuasive reasons are provided that they are not relevant, and (2) other viable options are identified to address the concerns raised by the General Comments.
- The Ontario Superior Court of Justice, when interpreting the Divorce Act in *S.S. v. R.S.*, referred to both General Comment 13 with respect to the devastating impact of violence on children’s survival and their physical, mental, spiritual, moral and social development<sup>56</sup> and General Comment 14 dealing with: (1) the reason there is no presumption in favour of one type of parenting or another, (paras. 49-50); and (2) the fact that the use of primary consideration in Article 3 means that the child’s best interests must be given priority over all other considerations (para. 33).

### Importance of Judicial Implementation of Children’s Rights: Eight Safeguards and Guarantees

The Court in *Michel v. Graydon* emphasized the importance of a judge’s role in the implementation of rights: “Courts are not to be discouraged from defending the rights of children when they have the opportunity to do so.”<sup>57</sup> “It also emphasized that without an effective and accessible means of enforcing rights, the rule of law is threatened.”<sup>58</sup> The Ontario Court of Appeal considered the need for legal protections for children in a family law proceeding in which parental alienation featured, in *Ontario (Children’s Lawyer) v. Ontario (Information and Privacy Commissioner)*.<sup>59</sup> The Court referred to the UN Convention, noting that Canada is signatory, and stating that the Convention requires that “children be afforded special safeguards, care and legal protection by the courts on all matters involving their best interests”.<sup>60</sup> British Columbia’s Chief Justice Robert Bauman has emphasized the importance for children of not just having rights, but also being able to implement them. He described the enforcement of their rights within a framework of empowerment of children, not paternalism.<sup>61</sup>

The UN Committee on the Rights of the Child describes legal guarantees and procedural safeguards which are essential to the enforcement/implementation of children’s rights in



General Comment 14.<sup>62</sup> Legal representation is one of the eight and it is a critical means of actualizing the other seven: (1) Right of the child to express his or her own views (ss. 89-91); (2) Establishment of facts (s. 92); (3) Time perception (s. 93); (4) Qualified professionals (ss. 94 and 95); (5) Legal Reasoning (s. 97); (6) Mechanisms to review or revise decision (s. 98); (7) Child rights impact assessments (s. 99); and (8) Legal representation (s. 96). The Court in *S.S. v. R.S.* referred to the legal reasoning safeguard, pointing to the need for each decision to be motivated, justified and explained, including stating all the relevant factual circumstances (para. 54).

For practical information about the Convention generally and these safeguards and guarantees as they apply to family law, see the Honourable Donna Martinson and the Honourable Judge Rose Raven: *Implementing Children's Participation in Family Court Cases: View of the Child and Beyond*<sup>63</sup> and *Practical Guide/Checklist: Implementing Child Rights Safeguards and Guarantees in Court Processes*.<sup>64</sup> See also the Canadian Bar Association's comprehensive online *Child Rights Toolkit*.<sup>65</sup>

### Children's Legal Representation in Family Violence Cases

The legal representation requirement just referred to says that the "child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts." We see this right to legal representation as fundamental to the effective implementation of children's rights in court proceedings. A detailed analysis is beyond the scope of this brief, but we highlight it here.<sup>66</sup> The Supreme Court of Canada has stated that the ability to access a lawyer to advance and protect legal rights without interference is a fundamental aspect of Canada's legal system.<sup>67</sup> The statement is not, nor should it be, limited to adults.<sup>68</sup> While access to a lawyer is obviously important to adults, it is particularly important that children, who do not have the same advantages as adults to access counsel, also have the advantage of this fundamental right to advance and protect their rights to be safe, secure and well and to participate in decisions that impact their lives.

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1 The Honourable Donna Martinson, Q.C., LL.M., has worked throughout her career to address discriminatory laws and practices against women and children to ensure that visions of "equality for all" in our justice system include equality for women and children. She has made invaluable contributions as a lawyer working as a Crown Prosecutor and in private practice, as a law teacher in Alberta and British Columbia, and as a judge with the British Columbia Provincial Court and then the British Columbia Supreme Court. She has continued advocating for equality and access to justice through her extensive post-judge volunteer work from July 2009 to the present: (1) as an Adjunct Professor at the School of Criminology at Simon Fraser University, through the FREDA Centre on Research on Violence Against Women and Children; (2) at the Peter A. Allard School of Law, University of British Columbia, through the Centre for Feminist Legal Studies; (3) as an Executive member of the national Canadian Bar Association Child and Youth Law Section, where she Chaired its UN Convention on the Rights of the Child Committee; (4) as founding Chair of the Canadian Bar Association, B.C. Branch, Children's Law Section; and (5) as a member of the founding Steering Committee for Rise Women's Legal Centre, and a Board member since it began in 2016.

2 Dr. Margaret Jackson is the Director and Co-founder of the FREDA Centre for Research on Violence against Women and Children in the School. FREDA is part of a national network of centres undertaking research on violence against women and children issues. She is also Professor Emerita with, and past Director of, the School of

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Criminology and the Institute for Justice Policy. She has authored or co-authored numerous articles and reports in the areas of violence against women and children, justice system policy, court processes and decision-making, and most recently, cyberbullying and bullying. As principal or co-investigator, she has undertaken research projects for both the Federal and Provincial governments. The primary focus of the FREDA Centre is upon collaborative research working with community agencies and the community itself to address substantive equality issues for women and children experiencing abuse.

3 Divorce Act R.S.C., 1985, c. 3 (2nd Supp.).

4 Michel v. Graydon, 2020 SCC 24.

5 Family Law Act [SBC 2011] Chapter 25.

6 This connection was helpfully reviewed in some detail by Dr. Linda Neilson and Prof. Susan Boyd, in Interpreting the New Divorce Act, Rules of Statutory Interpretation & Senate Observations, (March 2020), online: FREDA Centre for Research on Violence Against Women and Children, <https://www.fredacentre.com/new-report-interpreting-the-new-divorce-act-rules-of-statutory-interpretation-and-senate-observations-march-2020/> [Neilson & Boyd, Interpreting the New Divorce Act].

7 Michel v. Graydon, supra note 4 at 6.

8 Colucci v. Colucci, 2021 SCC 24.

9 Ibid at para. 69.

10 Department of Justice, Government of Canada, The Divorce Act Changes Explained - Department of Justice, (Ottawa: Department of Justice, 17 July 2019), online: <https://www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-cide/index.html> [The Divorce Act Changes Explained].

11 Department of Justice Government of Canada, Department of Justice - Legislative Background: An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to Make Consequential Amendments to Another Act (Bill C-78 in the 42nd Parliament) Ottawa: Department of Justice, 5 December 2017), online: <<https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/c78/03.html>>

12 S.S. v. R.S., 2021 ONSC 2137.

13 Ibid at 26 – 28.

14 Neilson & Boyd, Interpreting the New Divorce Act, supra note 6.

15 Interpretation Act R.S.C., 1985, c. I-21.

16 Supra note 3, ss. 16(4). The seven factors a court must consider in relation to family violence - as listed in the Divorce Act - are as follows: (a) the nature, seriousness and frequency of the family violence and when it occurred; (b) whether there is a pattern of coercive and controlling behavior in relation to a family member; (c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence; (d) the physical, emotional and psychological harm or risk of harm to the child; (e) any compromise to the safety of the child or other family member; (f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person; (g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and (h) any other relevant

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factor. Also note Neilson & Boyd supra note 6., in particular the discussion relating to the addition of “coercive and controlling” behavior as a component of family violence, p. 1 and p.12.

17 The Divorce Act Changes Explained, supra note 10 at 95-96.

18 Loretta Frederick, Peter Jaffe, Joan Meier, Simon Lapierre, Linda C. Neilson, The Misuse of Alienation in Domestic Violence Cases in Family Court: Helping Court-Related Professionals to Sort through Conflicting Allegations (23 March 2021), online: VAW Learning Network [http://www.vawlearningnetwork.ca/webinars/recorded-webinars/2021/March-23rd\\_Webinar\\_slides\\_updated.pdf](http://www.vawlearningnetwork.ca/webinars/recorded-webinars/2021/March-23rd_Webinar_slides_updated.pdf); The Honourable Donna Martinson and Dr. Margaret Jackson, Family Violence and Parenting Assessments: Law, Skills and Social Context (20 November 2019), online: FREDA Centre for Research on Violence Against Women and Children <https://fredacentre.com/wp-content/uploads/Martinson.-Jackson-Family-Violence-and-Parenting-Assessments-Report-Highlights-and-Report-Brief-1.pdf> [Martinson & Jackson, Family Violence and Parenting Assessments]; Haley Hrymak & Kim Hawkins, Section 211 Toolkit (March 2021), online: Rise Women’s Legal Centre <https://womenslegalcentre.ca/wp-content/uploads/2021/04/Rise-Womens-Legal-Centre-Section-211-Toolkit-1.pdf> [Hrymak & Hawkins, Section 211 Toolkit]; Haley Hrymak & Kim Hawkins, Why Can’t Everyone Just Get Along? How BC’s Family Law System Puts Survivors in Danger, online: Rise Women’s Legal Centre <https://womenslegalcentre.ca/wp-content/uploads/2021/01/Why-Cant-Everyone-Just-Get-Along-Rise-Womens-Legal-January2021.pdf> [Hrymak & Hawkins, Why Can’t Everyone Just Get Along?].

19 Barbara Jo Fidler & Nicholas Bala, ‘Guest Editors’ Introduction to the 2020 Special Issue on Parent–Child Contact Problems: Concepts, Controversies & Conundrums’, Family Court Review 58, no. 2 (2020): 265–69 [Fidler & Bala, 2020 Special Issue on Parent–Child Contact Problems]. This special issue contains a number of works on this topic, which may be of interest to the reader.

20 Martinson & Jackson, Family Violence and Parenting Assessments, supra note 18.

21 Hrymak & Hawkins, Section 211 Toolkit, supra note 18 at 45.

22 Hrymak & Hawkins, Why Can’t Everyone Just Get Along? supra note 18; see also an associated webinar and learning brief, sponsored by The FREDA Centre, online: <<https://www.fredacentre.com/rise-webinar-why-cant-everyone-just-get-along-how-bcs-family-law-system-puts-survivors-in-danger/>>; Tara Carman, The CBC Investigates: Survivors of domestic abuse told to keep quiet about it in court or risk jeopardizing child custody, September 27, 2020, online: <<https://www.cbc.ca/news/canada/domestic-abuse-custody-1.5738149>>; Martinson & Jackson, Family Violence and Parenting Assessments, supra note 18 at 90.

23 The Divorce Act Changes Explained, supra note 10 at 90.

24 S.S. v. R.S., supra note 12 at 39-40.

25 Research Coordinators: Professor Emerita Margaret Jackson and the Honourable Donna Martinson with Research Associates: Melissa Gregg, Chelsea Pang and Sarah Yercich, Implementing Children’s Participation Rights in Family Law and Child Welfare Court Proceedings, Literature Review (November 2020), online: [https://rcybc.ca/reports-and-publications/child-participation-in-family-law-and-child-welfare-court-proceedings/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=child-participation-in-family-law-and-child-welfare-court-proceedings](https://rcybc.ca/reports-and-publications/child-participation-in-family-law-and-child-welfare-court-proceedings/?utm_source=rss&utm_medium=rss&utm_campaign=child-participation-in-family-law-and-child-welfare-court-proceedings) [Implementing Children’s Participation Rights] As noted at the beginning of the document’s Executive Summary, the United Nations Convention on the Rights of the Child (CRC) protects all aspects of a child’s life and ensures that these rights are appropriately protected in economic, political, social, and legal environments. Children’s entitlement to legal representation and to voice their best interests during court proceedings, form a necessary component of this overarching protection. Canada ratified the CRC in 1991, and yet many shortcomings remain to British Columbia’s and Canada’s

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approach to children's rights during legal proceedings. This literature review/report addresses a number of gaps and barriers that exist in relation to Canada's management of children's legal representation.

- 26 *Medjuck v. Medjuck*, 2019 ONSC 3245; *G(B.J.) v. G. (D.L.)*, 2010 YKSC 44. The first author of this Learning Brief was the judge in the Yukon Supreme Court case.
- 27 The Honourable Donna Martinson & Dr. Margaret Jackson, Canadian Observatory on the Justice System's Response to Intimate Partner Violence, Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts (Research Project for the Canadian Observatory on the Justice System's Response to Intimate Partner Violence (14 January 2016) at 5 & 17, online: FREDA Centre for Research on Violence Against Women and Children <https://fredacentre.com/wp-content/uploads/Observatory-Martinson-Jackson-Risk-Report-FINAL-January-14-2016.pdf>; Donna Martinson & Margaret Jackson (2017). "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases." *Canadian Journal of Family Law* 30 (1): 11 at 56. <https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1011&context=can-j-fam-l> [Martinson & Jackson, Family Violence and Evolving Judicial Roles].
- 28 *Ibid* at 22-39.
- 29 Martinson & Jackson, *Family Violence and Parenting Assessments*, *supra* note 18 at 13-18.
- 30 For a discussion of the different approaches and why we say violence is gendered, see Martinson & Jackson, *Family Violence and Evolving Judicial Roles*, *supra* note 27, at 64.
- 31 Peter G. Jaffe, Claire V. Crooks, & Nicholas Bala. *Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices* (Family, Children and Youth Section Research Report, 2005), online: <[https://www.justice.gc.ca/eng/rp-pr/fl-lf/parent/2005\\_3/2005\\_3.pdf](https://www.justice.gc.ca/eng/rp-pr/fl-lf/parent/2005_3/2005_3.pdf)> [Jaffe, Crooks & Bala, *Making Appropriate Parenting Arrangements*].
- 32 *Setting the Stage for a Federal Strategy Against Gender-based Violence: Vision, Outcomes and Principles* (Status of Women, 2016), online: <https://cfc-swc.gc.ca/violence/strategy-strategie/principle-principe-en.html>; see also National Inquiry into Missing and Murdered Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (3 June 2019), online: <<https://www.mmiwg-ffada.ca/>>.
- 33 *Michel v. Graydon*, *supra* note 4 at 95.
- 34 *Ibid*. See also Sara Beattie & Hope Hutchins, *Shelters for Abused Women in Canada* (Statistics Canada, Catalogue No. 85-002-X, 2014), online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2015001/article/14207-eng.htm> at 6.
- 35 Myrna Dawson, Peter Jaffe, Anna-Lee Straatman, Julie Poon, Meghan Gosse, Olivia Peters & Gursharan Sandhu *One is Too Many: Trends and Patterns in Domestic Homicides in Canada 2010-2015* (Canadian Domestic Homicide Prevention Initiative with Vulnerable Populations, 2018), online: <<http://cdhpi.ca/sites/cdhpi.ca/files/CDHPI-REPORTRV.pdf>> at 9.
- 36 Shana Conroy, *Family Violence in Canada: A Statistical Profile, Section 3: Police-Reported Intimate Partner Violence in Canada 2019* (Canadian Centre for Justice and Community Safety Statistics, Statistics Canada, 2 March 2021), online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00001/03-eng.htm>>.

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- 37 Adam Cotter, Intimate partner violence in Canada, 2018: An Overview (Canadian Centre for Justice and Community Safety Statistics, Statistics Canada, 26 April 2021), online: <<https://www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00003-eng.htm>>.
- 38 Jaffe, Crooks & Bala, Making Appropriate Parenting Arrangements, *supra* note 31.
- 39 Fidler & Bala, 2020 Special Issue on Parent-Child Contact Problems, *supra* note 19.
- 40 Hrymak & Hawkins, Why Can't Everyone Just Get Along? *supra* note 18 at 45-48.
- 41 For a consideration of the presumption of conformity with international law in the Charter context see Quebec (Attorney General) v. 9147-0732 Quebec Inc, 2020 SCC 32.
- 42 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, online: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>; UN General Assembly, Convention on the Elimination of all Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249; UN General Assembly, online: <<https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>>.
- 43 UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution/adopted by the General Assembly, 2 October 2007, A/RES/61/295, online: [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf); UN General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104, online: <https://www.ohchr.org/en/professionalinterest/pages/violenceagainstwomen.aspx>; International Convention on the Elimination of all Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660 at 195, online: <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>; UN General Assembly, United Nations Convention on the Rights of Persons with Disabilities, 30 March 2007, online: <<https://www.ohchr.org/en/hrbodies/crpd/pages/conventionrightspersonswithdisabilities.aspx>>.
- 44 *Supra* note 4 at 77.
- 45 The Honourable Raynell Andreychuk (Chair) & The Honourable Joan Fraser (Deputy Chair), Children: The Silenced Citizens, Effective Implementation of Canada's International Obligations with Respect to the Rights of Children, Final Report of the Senate Standing Committee on Human Rights (2007), online: <<https://sencanada.ca/content/sen/Committee/391/huma/rep/rep10apr07-e.pdf>>.
- 46 *Medjuck v. Medjuck*, citing *G(B.J.) v. G. (D.L.)*, *supra* note 26. As stated in that note, the Yukon Supreme Court decision was written by the first author of this Learning Brief. The UN Committee on the Rights of the Child made its remarks in its last Concluding Observations Canada: *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding Observations: Canada*, 61<sup>st</sup> Sess, UN Doc CRC/C/CAN/CO/3-4 (2012).
- 47 UN General Assembly, Convention on the Rights of the Child, *supra* note 42.
- 48 UN Convention on the Rights of the Child General Comment No. 12 (2009): The Right of the Child to be Heard, UN Doc. CRC/C/GC/12 (1 July 2009), online: <<https://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>>
- 49 UN Convention on the Rights of the Child General Comment No. 13 (2011): The Right of the Child to Freedom from all Forms of Violence, UN Doc. CRC/C/GC/13 (18 April 2011), online: <[https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13\\_en.pdf](https://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.pdf)>

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50 UN Convention on the Rights of the Child General Comment No. 14 (2011): The Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, UN Doc. CRC/C/GC/14 (29 May 2013), online: <[https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)>

51 UN Convention on the Rights of the Child General Comment No. 13, supra note 49 at 63.

52 UN Convention on the Rights of the Child General Comment No. 12, supra note 48 at 74; UN Convention on the Rights of the Child General Comment No. 14, supra note 50 at 43.

53 UN Convention on the Rights of the Child General Comment No. 12, supra note 48 at 20.

54 Ibid at 21.

55 The Honourable Donna Martinson & The Honourable Judge Rose Raven, Implementing Children's Participation in Family Court Cases: Views of the Child and Beyond (CLEBC Access to Justice for Children 2020, March 6, 2020), online:

<<https://1iuibf12bq823l3a7515u1i5-wpengine.netdna-ssl.com/wp-content/uploads/2020/04/ImplementingChildrensParticipationinFamily.pdf>>, at p. 5.1.4 [Martinson & Raven, Implementing Children's Participation in Family Court Cases].

56 S.S. v. R.S., supra note 12 at 46-47.

57 Michel v. Graydon, supra note 4 at 31.

58 Ibid at 96.

59 Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner) 2018 ONCA 556.

60 Ibid at 51.

<sup>61</sup>Why Access to Justice for Children Matters, Remarks of the Honourable Robert J. Bauman, Chief Justice of British Columbia, for CLEBC Access to Justice for Children Conference: Child Rights in Action, May 11, 2017. [https://www.bccourts.ca/Court\\_of\\_Appeal/about\\_the\\_court\\_of\\_appeal/speeches/Speech\\_Why\\_Access\\_to\\_Justice\\_for\\_Children\\_Matters.pdf](https://www.bccourts.ca/Court_of_Appeal/about_the_court_of_appeal/speeches/Speech_Why_Access_to_Justice_for_Children_Matters.pdf)

62 For more information about the safeguards and guarantees, including legal representation, see: The Honourable Donna J. Martinson and Caterina E. Tempesta, Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation, (2018) 31 Canadian Journal of Family Law 151. <https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1009&context=can-j-fam-l>

63 Martinson & Raven, Implementing Children's Participation in Family Court Cases, supra note 55; Martinson & Jackson, Family Violence and Parenting Assessments, supra note 18 at 56-65; Caterina E. Tempesta, Legal Representation as a Critical Aspect of the Child's Right to be Heard. (Master of Laws Thesis: Advanced Studies in International Children's Rights Leiden University of Faculty of Law Netherlands, 2018- 2019), online: < <https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-privaatrecht/jeugdrecht/legal-representation-as-a-critical-aspect-of-the-childs-right-to-be-heard.pdf>> [Tempesta, Legal Representation]; Alternative Report to the UN Committee on the Rights of the Child (Canadian Bar Association/Child and Youth Law Section, 2020), online: <<https://www.cba.org/CMSPages/GetFile.aspx?guid=fdb96dc7-35e0-4b6d-8918-40ba6607582a>> [UN Alternative Report].

64 Martinson & Raven, Practical Guide/Checklist: Implementing Child Rights Safeguards and Guarantees in Court Processes,

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<https://1juibf12bq823l3a7515u1i5-wpengine.netdna-ssl.com/wp-content/uploads/2020/04/ImplementingChildrensParticipationinFamily-Handout.pdf>

65 Child Rights Toolkit (Canadian Bar Association’s National Children’s Law Committee, Spring 2017), available online.

66 Martinson & Raven, *Implementing Children’s Participation in Family Court Cases*, supra note 55; Martinson & Jackson, *Family Violence and Parenting Assessments*, supra note 18; Tempesta, *Legal Representation*, supra note 63; UN Alternative Report, supra note 63. When and how children should be entitled to legal representation is the subject of ongoing discussion throughout Canada. The FREDA Centre has addressed the concern in *Implementing Children’s Participation Rights* at pp. 3-8 of its Literature Review, supra note 25. That Literature Review states that with respect to the legal representation safeguards, the B.C. Court of Appeal, in *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286, noted, in comments not necessary to the decision and therefore not binding (obiter), that while the English version of the UN Committee’s comments refers to legal representation, the French version refers to “un conseil juridique”, which “appears to indicate” that the level of representation contemplated is not a full right to counsel, but rather a right to have the benefit of legal advice. For additional information, see Martinson & Jackson, *Family Violence and Parenting Assessments*, supra note 18 at 63. Finally, in Tempesta, *Legal Representation*, supra note 63 at 30-31, the author respectfully suggests that by applying a teleological approach to the interpretation of the UNCRC, it is difficult to imagine that the Committee on the Rights of the Child intended for children to have less-than-fulsome legal protection in judicial proceedings where their best interests are being assessed and where there is a conflict with a parent. Such an interpretation, Tempesta adds, is also inconsistent with the due process guarantees afforded to all persons under other human rights standards.

67 *Canada (AG) v. Federation of Law Societies of Canada*, 2015 SCC 7.

68 The Ontario Divisional Court recently expressed a similar sentiment with respect to a child’s rights to legal advice: “As held by Binnie J. in *Woos*, access to legal advice is a fundamental right in Canada. There is nothing that limits this right to adults.” *Justice for Children and Youth v. J.G.*, 2020 ONSC 4716, at 51.