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Family Violence and Family Law in Alberta: The Need for Legislative Reform and Expansive Statutory Interpretation

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Legislation Commented On: *Family Law Act*, [SA 2003, c F-4.5 \(CanLII\)](#)

November is [Family Violence Protection Month](#) in Alberta, and this provides a good opportunity to reflect on the laws that address family violence in this province. I have written previously on the intersections amongst laws in Alberta that apply in the context of family violence, as well as how they compare to family violence laws in other jurisdictions (see [here](#) and [here](#)). Alberta has made good progress in its response to family violence in some areas – for example, residential tenancy law and occupational health and safety law – but there are other areas where we are falling behind, including family law.

In March 2021, new amendments to the *Divorce Act*, [RSC 1985, c 3 \(2nd Supp\)](#), took effect. For the first time federally, family violence is explicitly included as a factor relevant to the best interests of the child, and therefore relevant to judicial decisions and negotiated agreements on parenting. Family violence is defined broadly in the *Divorce Act* to include:

any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is **violent or threatening** or that constitutes a pattern of **coercive and controlling behaviour** or that causes that other family member to **fear for their own safety or for that of another person** — and in the case of a **child, the direct or indirect exposure to such conduct**. (s 2(1), emphasis added)

It is also noteworthy that the *Divorce Act* expressly enumerates a wide range of conduct as falling within the definition of family violence, including psychological and financial abuse, threats to or the actual killing or harming of animals, and damage to property (s 2(1)). This definition was informed by submissions from family law experts, anti-violence and equality-seeking groups (see e.g. [here](#)).

The *Divorce Act* applies to parties who are seeking a divorce in Alberta. For parties who are not married or are not seeking a divorce, Alberta's *Family Law Act*, [SA 2003, c F-4.5](#), provides the legal framework. Like the *Divorce Act*, it includes family violence as a factor relevant to the best interests of the child. However, the *Family Law Act* defines family violence more narrowly as:

behaviour by a family or household member causing or attempting to cause **physical harm** to the child or another family or household member, including **forced confinement** or **sexual abuse**, or causing the child or another family or household member to **reasonably fear for his or her safety** or that of another person. (s 18(3), emphasis added)

Under the *Family Law Act*, family violence expressly does **not** include reasonable force applied to a child for discipline purposes, which is a unique provision in Canadian family legislation (see s 18(3)(a)). It also does not include psychological, emotional or financial abuse or coercive and controlling behaviour, nor does it include specific reference to children’s direct or indirect exposure to family violence.

These exclusions are surprising when we compare the *Family Law Act* to other legislation in the province. For example, the *Residential Tenancies Act*, [SA 2004, c R-17.1](#), s 47.2(2) and *Employment Standards Code*, [RSA 2000, c E-9](#), s 53.981(2) include emotional and psychological abuse in their definition of domestic violence, and the *Child, Youth and Family Enhancement Act*, [RSA 2000, c C-12](#), s 1(3)(a)(ii)(C) includes “exposure to family violence” in its definition of when children are in need of intervention.

The definition of family violence in the *Family Law Act* also stands out as underinclusive when we consider that many other provinces have brought their family legislation and its treatment of family violence in parenting matters into line with the *Divorce Act*, including Saskatchewan (*Children's Law Act*, [SS 2020, c 2](#)), Ontario (*Children's Law Reform Act*, [RSO 1990, c C.12](#)), New Brunswick (*Family Law Act*, [SNB 2020, c 23](#)) and Prince Edward Island (*Children's Law Act*, [RSPEI 1988, c C-6.1](#)).

British Columbia was a frontrunner in this area. Its *Family Law Act*, [SBC 2011, c 25](#), has included a broad definition of family violence since 2013. Research out of that province shows that an expansive definition of family violence can make a difference in terms of judges’ willingness to make findings that family violence has occurred (see Susan B Boyd & Ruben Lindy, “Violence Against Women and the B.C. Family Law Act: Early Jurisprudence” (2016) 35:2 Can Fam LQ 101, available at SSRN [here](#)). In several cases cited by Boyd and Lindy, judges noted the significance of the legislative intent to have courts broadly consider the harms of family violence in the context of parenting decisions. A recent Ontario case, decided under the new *Divorce Act* amendments, similarly highlights the importance of legislative intent to protect children from family violence (see *S.S. v R.S.*, [2021 ONSC 2137 \(CanLII\)](#) at para 28, cited in Joanna Radbord & Deborah Sinclair, “In Children's Best Interests: Addressing Intimate Partner Violence In Parenting Cases” (June 2021) 34 OFLR 153).

However, Boyd and Lindy also found that in spite of the increased willingness of judges to recognize family violence when it is defined more broadly, their findings of family violence did not necessarily have a positive impact on their decisions about parenting arrangements. This is because judges retain the discretion to weigh a range of factors under BC’s *Family Law Act* (s 38), some of which can be used to minimize the impact of family violence on the child’s best interests. Courts must also consider whether it is appropriate to require the child’s guardians “to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members” (s 37(2)). Boyd and Lindy found that judges often interpreted this provision as a “friendly parent” rule, rather than looking at the impact of family violence on the ability to “cooperate” safely.

More recent research out of British Columbia by Rise Women’s Legal Centre confirms many of these findings (Haley Hrymak and Kim Hawkins, [Why Can’t Everyone Just Get Along? How BC’s Family Law System Puts Survivors in Danger](#) (Vancouver: Rise, January 2021)). The Rise report concluded that “the family law system may have changed its legislation, but it did not change its underlying attitudes and assumptions, which are frequently built upon a foundation of preconceived myths and stereotypes about the dynamics of interpersonal violence” (at 9). Women reported not being believed about violence unless there was corroboration, and felt that legal actors – police, lawyers, and judges – did not appreciate the impacts or safety risks associated with non-physical violence (at 25). Forty-four percent of women also indicated that they were told by their lawyers not to raise family violence in the context of family litigation so that they would “look reasonable” and not be labelled as selfish or alienating (at 37, 52).

Over half the women surveyed for the Rise report were accused of alienating their children from the other parent (at 45-6), and other research confirms the link between family violence and allegations of parental alienation in family law cases. In “Penalizing women’s fear: intimate partner violence and parental alienation in Canadian child custody cases” (2020) [42 J Soc Welfare & Fam L 88](#), Elizabeth Sheehy and Susan Boyd found that the focus of family courts on the norm of shared parenting has facilitated arguments of parental alienation, which often appear in cases involving allegations of family violence. Confirming the findings of Linda Neilson in [Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?](#), they found that allegations and findings of alienation are highly gendered, with mothers being twice as likely to be accused of alienation as fathers (at 82). In one case Boyd and Sheehy cite, the court used BC’s broad definition of family violence to label a mother – who was self-represented – as having engaged in alienation and therefore as having committed family violence herself, even though her allegations of violence against the father were accepted (see *CLM v MJS*, [2017 BCSC 799 \(CanLII\)](#)). Similar to the Rise report, Boyd and Sheehy found that women may be advised by their lawyers not to raise family violence in court proceedings so as to avoid allegations of alienation (at 89; see also Radboard & Sinclair at 156).

Women may be particularly at risk of being labelled as alienating where they raise family violence against their ex-partners in parenting proceedings in Alberta. Our Court of Appeal has ruled that expert evidence is not required to make a finding of alienation (see *VMB v KRB*, [2014 ABCA 334 \(CanLII\)](#)), and this approach has been followed by lower courts in this province in a troubling context of increasing allegations of parental alienation across the country and elsewhere, often as a response to allegations of family violence (see [volume 42:1](#) of the Journal of Social Welfare and Family Law (2020) for a special volume on this topic).

My research with colleagues on the handling of domestic violence cases during the first ten weeks of the COVID-19 pandemic confirms that the norms of shared parenting and maximum contact figure prominently in family law cases across Canada, even where the risks of both family violence and the spread of COVID-19 are enhanced (see Jennifer Koshan, Janet Mosher, and Wanda Wieggers, “COVID-19, the Shadow Pandemic, and Access to Justice for Survivors of Domestic Violence” (2021) [57:3 Osgoode Hall LJ 739](#)).

Our COVID-related research also found that judges rarely identify when parties are racialized, Indigenous, or face other intersecting oppressions that may impact how their cases are handled.

Most of the reported case law involves heterosexual ex-partners and there are few examples of cases involving same-sex relationships or parties who are transgender or non-binary. Other research shows, however, that women may face mental health labelling and negative credibility assessments that are highly gendered in family law cases and which may affect case outcomes (see Jonnette Watson Hamilton, “The use of metaphor and narrative to construct gendered hysteria in the courts” (2002) 1 JL & Equality 156; Suzanne Zaccour, “Crazy Women and Hysterical Mothers: The Gendered Use of Mental-Health Labels in Custody Disputes” (2018) 31:1 Can J Fam L 58; Mavis Morton et al, “The degendering of male perpetrated intimate partner violence against female partners in Ontario family law courts” (2021) 43:2 J Soc Welfare & Fam L 104). In the Rise report, which undertook surveys and focus groups rather than a study of reported case law, women noted how they faced intersecting issues that compounded their experience of the family law system: “poverty, systemic racism, lack of available or affordable housing, disability, English as an additional language, living in rural areas, lack of literacy, elder abuse and ageism, being a member of the LGBTQI2S+ community, [and] being an immigrant to Canada without permanent residence”, as well as involvement with child protection authorities (at 15).

Much of this research is disheartening in terms of whether legislative change has had its intended impacts, and is also concerning with regard to the inequalities in the family law system more generally. Nevertheless, many advocates and researchers working in this space argue that legislative reform is a necessary, even if not sufficient, step in the recognition of family violence and its impacts on survivors and their children (see e.g. Boyd and Sheehy at 89). Laws provide the framework for the resolution of family disputes even if the parties do not end up in court, and lawyers should be screening for domestic violence in all cases (see Deanne Sowter, [If It Wasn't Required Before, It Is Now: All Family Lawyers Must Screen for Family Violence](#)). Laws on the books also need to be accompanied by social context education for lawyers, judges, and other actors in the legal system so that the impact of legislative changes is not lost in their application.

I have previously called for the Alberta government to amend the *Family Law Act* to adopt the definition of family violence in the *Divorce Act* amendments, and more broadly to standardize definitions of family violence across all its legislation (see [here](#)). In the family law context, the argument is that the standards that apply to the resolution of disputes should not depend on whether or not the parties were married and are seeking a divorce. Indeed, we might argue that the different standards that currently exist violate the prohibition against discrimination in the *Charter* [*Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (UK), 1982, c 11*] on the basis of marital status, which has been recognized as an analogous ground under section 15 (see *Miron v Trudel*, [\[1995\] 2 SCR 418, 1995 CanLII 97](#)). The *Family Law Act* also has the effect of providing children of unmarried mothers with less protection from family violence, and may perpetuate the stigma and legal disabilities historically linked to illegitimacy. This argument engages family status, for which there are good arguments that favour its recognition as an analogous ground (see [here](#)). There is some case law that accepts similar arguments in the context of differential availability of child support under the *Divorce Act* and family legislation (see e.g. an Alberta case that Jonnette Watson Hamilton and I blogged on [here](#)).

In addition, a narrow definition of family violence may have adverse impacts on women, who are the disproportionate survivors of family violence. We also know that some women report

disproportionate levels of violence, such as Indigenous women (although in Alberta, I have found very few reported cases of Indigenous women using the family law system, as opposed to being caught up in the child protection system). Treating parties to family disputes adversely by only recognizing a narrow definition of family violence may engage marital and family status, sex, age, Indigeneity, and other grounds, and perpetuate the disadvantage of survivors and their children contrary to section 15.

Failing amendment of Alberta's *Family Law Act* to include a more expansive definition of family violence, are other strategies available? It could be argued that the *Family Law Act* should be interpreted consistently with *Charter* values protecting equality and non-discrimination based on the grounds I raised above (see e.g. *Young v Young*, [\[1993\] 4 SCR 3, 1993 CanLII 34](#)). This would allow a broader definition of family violence that includes emotional and financial abuse and coercive control to be read into the *Family Law Act*. In support of this argument, section 18(3) of the *Family Law Act*, which defines family violence, states that the term "includes" various forms of conduct. This signifies an open-ended definition that creates an opening for an interpretation of the Act that is consistent with the *Divorce Act* and *Charter* values.

This argument could be buttressed by the doctrine of paramountcy, which dictates that conflicts between federal and provincial legislation must be resolved in favour of the federal legislation. Conflicts are defined narrowly in the paramountcy case law to allow as much room as possible for the operation of federal and provincial laws with overlapping subject matter – here, the *Divorce Act* made pursuant to the federal government's power over marriage and divorce in section 91(26) of the *Constitution Act, 1867*, [30 & 31 Vict, c 3](#), and the *Family Law Act* made pursuant to the provincial government's power over property and civil rights in section 92(13) of the *Constitution Act, 1867*. However, there are family law cases where courts have considered whether provincial family laws frustrate the purpose of the *Divorce Act* (see e.g. *M(BD) v M(AE)*, [2014 BCSC 453 \(CanLII\)](#) at paras 113-120, cited in *Boyd and Lindy* at note 51). It could be argued that the *Family Law Act* should be interpreted to include emotional and financial abuse and coercive control so as not to frustrate the purpose behind the broad approach to family violence in the *Divorce Act*.

In the federalism context, it is also interesting to note that a consideration of maximum contact with both parents has been read into Alberta's *Family Law Act*, in part to align with its presence in the pre-amendment *Divorce Act* (see e.g. *ADM v SWL*, [2015 ABQB 630 \(CanLII\)](#) at paras 132-138). While this judicial practice supports my argument about interpreting family violence in the *Family Law Act* consistently with the *Divorce Act*, it must be noted that "maximum contact" is no longer included in the *Divorce Act* (see this [Legislative Backgrounder](#) on the *Divorce Act* amendments). Accordingly, it should not be read into the *Family Law Act* any longer either. Especially in cases involving family violence, maximizing contact with the abusive parent may not be in the best interests of the child due to the potential that contact will expose the child to further violence either directly or indirectly (see e.g. [here](#)). It is also noteworthy that under the *Divorce Act* amendments, primary consideration must be given to the physical, emotional and psychological safety, security and well-being of a child (s 16(2)). The *Family Law Act* includes a similar provision that "the greatest possible protection of the child's physical, psychological and emotional safety" should be ensured in assessing their best interests (s 18(2)(a)).

Another argument for interpreting family violence consistently as between the *Family Law Act* and *Divorce Act* relates to litigation strategy. It is important not to facilitate a legal context that would allow abusive litigants to opt to have their matters addressed under the *Family Law Act* in order to avoid the *Divorce Act*'s approach to family violence. The phenomenon of litigation harassment and abuse has been documented by several researchers, and like the other issues raised in this post, it is highly gendered (see e.g. Boyd and Lindy and the Rise report; and for an Alberta example, see *Lofstrom v Radke*, [2017 ABCA 362 \(CanLII\)](#)). While litigation harassment typically involves multiple applications to wear down the other party rather than simply seeking a litigation advantage, it is still possible to envision how deliberate avoidance of the *Divorce Act* and its broad definition of and approach to family violence could do harm to survivors of violence and their children.

In addition to the foregoing arguments, Donna Martinson and Margaret Jackson have delineated several principles that courts should apply in interpreting the *Divorce Act* in cases involving family violence (see Donna Martinson & Margaret Jackson, "[The 2021 Divorce Act: Using Statutory Interpretation Principles to Support Substantive Equality for Women and Children in Family Violence Cases](#)" (2021) 5 *Family Violence and Family Law Brief* 1). These include considering children to be full rights bearers and interpreting family legislation consistently with Canada's international obligations that guarantee substantive equality for women and children. In the recent decision in *S.S. v. R.S.*, mentioned above, Justice Renu Mandhane – former Chief Commissioner of the Ontario Human Rights Commission – illustrated this approach by noting that she would “offer an interpretation of the new parenting provisions that is consistent with children’s human rights and Canada’s obligations under international law” (at para 26), including their right to protection from family violence. More specifically, under the [Convention on the Rights of the Child](#), children have a right to be protected from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child” (article 19, cited at para 45). Although this approach focused on the *Divorce Act*, it applies equally to provincial legislation such as Alberta’s *Family Law Act*.

Some people might argue that the government of Alberta has had its hands full with the COVID-19 pandemic, so this is not the time to be making the case for an amendment to provincial family legislation. However, we know that [family violence has increased during the pandemic](#), as has [family breakdown](#). Family Violence Prevention Month is an opportune time for the Alberta government to introduce legislation to revise the *Family Law Act* to better protect survivors of family violence. If it fails to do so, courts and other legal actors should interpret the *Family Law Act*'s definition of family violence broadly and consistently with the *Divorce Act*, constitutional and human rights law, and should consider family violence seriously when assessing its impact on parenting decisions.

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