File No. 41061

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

KULDEEP KAUR AHLUWALIA

APPELLANT
(Respondent)

AND:

AMRIT PAL SINGH AHLUWALIA

RESPONDENT
(Appellant)

MOTION RECORD OF THE PROPOSED INTERVENERS
WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION and RISE WOMEN'S LEGAL CENTRE
(Pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*)

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IN THE SUPREME COURT OF CANADA
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BETWEEN:

KULDEEP KAUR AHLUWALIA

APPELLANT
(Respondent)

AND:

AMRIT PAL SINGH AHLUWALIA

RESPONDENT
(Appellant)

NOTICE OF MOTION FOR LEAVE TO INTERVENE OF WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION and RISE WOMEN'S LEGAL CENTRE
(Pursuant to Rules 47and 55-59 of the *Rules of the Supreme Court of Canada)*

TAKE NOTICE THAT the Moving Parties, West Coast Legal Education and Action Fund Association ("West Coast LEAF") and Rise Women's Legal Centre ("Rise"), hereby apply to a judge of this Honourable Court, pursuant to Rules 47 and 55-59 of the *Rules of the Supreme Court of Canada*, for an order granting West Coast LEAF and Rise:

1. leave to jointly intervene in this appeal pursuant to Rule 55, on a without costs basis;
2. permission to file a factum in this appeal in accordance with Rules 37 and 42;
3. leave to make oral argument at the hearing of this appeal of such length as the Court may deem appropriate; and
4. Such further or other order that the Court may deem appropriate.

AND FURTHER TAKE NOTICE that the following documents will be referred to in support of the motion:

1. The affidavit of Martina Zanetti, made September 9, 2024.

2. The affidavit of Vicky Law, made September 9, 2024.

3. The Memorandum of Argument filed herewith.

4. Such further or other materials as counsel may advise and the Justice hearing this motion may permit.

AND FURTHER TAKE NOTICE that the motion shall be made on the following grounds:

1. The proposed interveners, West Coast LEAF and Rise, are British Columbia-based legal organizations that share a real interest in the issues raised in this appeal.

2. West Coast LEAF's mandate is to use the law to create a just and equal society for all women and people who experience gender-based discrimination. It carries out its mandate through a range of litigation, law reform, and public legal education activities.

3. Rise's mandate is to provide legal services for women and gender diverse individuals in family law matters and to provide education to law students. It carries out its mandate through delivering direct legal services to clients, training and supporting lay advocates and community support workers, and engaging in research and other law reform activities.

4. West Coast LEAF and Rise have frequently worked together to address systemic family law issues and support survivors of family violence. For example, they jointly intervened before this Court in *Barendregt v. Grebliunas*, 2022 SCC 22.

5. If permitted to intervene, the proposed interveners will advance the line of argument set out in the Memorandum of Argument at paragraph 4 and 18-30 filed in support of this motion. The proposed interveners will submit that the Court should:

    a. acknowledge that myths and stereotypes about family violence persist at law;

    b. prohibit reliance on them in tort and family law claims by extending legal principles developed predominantly in the context of criminal cases involving sexual assault and interspousal violence; and

c. apply the prohibition in determining whether to recognize family violence as a cause of action in tort.

6. If granted leave to intervene, West Coast LEAF and Rise will make submissions that are relevant to the appeal, useful to the Court, and distinct from those of the parties and the other interveners.

7. The proposed interveners will not seek to supplement the record or expand the legal issues. They will not take a position on the outcome of the claims between the Appellant and Respondent.

Dated at Vancouver, British Columbia this 9th day of September, 2024.

SIGNED BY

Monique Pongracic-Speier, KC, Kate Feeney, Gita Keshava, Rosanna Adams,
Counsel for Proposed Interveners, West Coast LEAF and Rise

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NOTICE TO THE RESPONDENT TO THE MOTION: A respondent to the motion may serve and file a response to this motion within 10 days after service of the motion. If no response is filed within that time, the motion will be submitted for consideration to a judge or the Registrar, as the case may be.

File No. 41061

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(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

KULDEEP KAUR AHLUWALIA

APPELLANT
(Respondent)

AND:

AMRIT PAL SINGH AHLUWALIA

RESPONDENT
(Appellant)

AFFIDAVIT OF MARTINA ZANETTI
(Pursuant to Rules 47(1)(b) and 57 of the *Rules of the Supreme Court of Canada*)

I, Martina Zanetti, Barrister & Solicitor, of the City of Vancouver, in the Province of British Columbia, AFFIRM AS FOLLOWS:

1. I am the President of the Board of Directors of West Coast Legal Education and Action Fund Association ("West Coast LEAF"), and as such have personal knowledge of the matters herein referred to, except where stated to be based on information and belief, in which case I verily believe them to be true.

2. West Coast LEAF seeks leave to jointly intervene with the Rise Women's Legal Centre ("Rise") in the hearing of *Kuldeep Kaur Ahluwalia v. Amrit Pal Singh Ahluwalia*, Case No. 41061. I am authorized to provide this affidavit on West Coast LEAF's behalf.

A. Overview

3. The issues before this Court engage West Coast LEAF and Rise's shared interest in the development of the law to more effectively respond to the harms of family violence, including through the eradication of myths and stereotypes about family violence. West Coast LEAF and Rise seek leave to intervene to urge the Court to:

(a) Acknowledge that myths and stereotypes about family violence persist at law;

(b) prohibit reliance on them in tort and family law claims by extending legal principles developed predominantly in the context of criminal cases involving sexual assault and interspousal violence; and

(c) apply the prohibition in determining whether to recognize the family violence as a cause of action in tort.

4. I have reviewed the Memorandum of Argument included in our Motion Record, and I confirm that it is an accurate reflection of West Coast LEAF and Rise's proposed joint submissions.

B. Background on West Coast LEAF

5. West Coast LEAF is a non-profit society incorporated in British Columbia and registered federally as a charity. West Coast LEAF's mandate is to use the law to create an equal and just society for all those who experience gender-based discrimination in BC. It carries out its work with the support of about 342 members and 15 employees.

6. West Coast LEAF was created in April 1985 when the equality provisions of the *Charter* came into force. While originally an affiliate of LEAF National, West Coast LEAF has independently engaged in litigation since 2009.

7. West Coast LEAF takes an intersectional approach to its work. In other words, it engages with the equality interests of women and gender-diverse people along multiple and intersecting axes of marginalization, including Indigeneity, race, immigration status, gender identity, sexual orientation, disability, age, and socioeconomic status. It consults and collaborates with other equality-seeking groups to ensure that its work reflects the diversity of human experiences.

8. West Coast LEAF has a long history of using litigation, law reform activities, and public legal education to advance its mandate. Its areas of focus are freedom from gender-based violence, access to justice, access to healthcare, economic security, justice for those who are criminalized, and the right to parent.

9. West Coast LEAF's law reform program includes community-based research and report-writing, consultations with and submissions to governments at all levels, and advocacy campaigns. Its public legal education program engages with lay audiences throughout BC, with the aim of helping people understand and access their equality rights.

10. West Coast LEAF has intervened in 17 cases before this Court, before the superior courts in British Columbia, and in proceedings before administrative tribunals and boards of inquiry. It has offered submissions advancing an intersectional, feminist perspective in a range of cases, including those addressing the development of the common law, the constitutionality of laws or government actions, discrimination under human rights legislation, and questions of statutory interpretation.

11. In addition to its intervention work, West Coast LEAF, with counsel in the present matter, represented the plaintiff in a constitutional challenge to BC's family law legal aid regime for cases involving allegations of family violence, *Single Mothers Alliance of BC v. British Columbia*, BC Supreme Court Action No. S1733843, Vancouver Registry ("*SMA v. BC*"). That litigation was settled in February 2024, with an agreement that committed the Province of British Columbia to significantly expanded funding for family law legal aid services and committed the Legal Services Society of British Columbia (also known as Legal Aid BC) to liberalize financial eligibility criteria and implement a new service delivery model to better meet the needs of survivors of family violence.

West Coast LEAF's interventions

12. West Coast LEAF intervened in the following cases before this Court:

    (a) *R. v. Tsang*, indexed as *R v. Kruk*, 2024 SCC 7 (jointly with LEAF National);

    (b) *Hansman v. Neufeld*, 2023 SCC 14;

    (c) *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17 (jointly with the David Asper Centre for Constitutional Rights and LEAF National)

    (d) *R. v. Kirkpatrick*, 2022 SCC 33;

    (e) *R. v. J.J.* and *A.S. v. Her Majesty the Queen and Shane Reddick*, 2022 SCC 28 (jointly with Women Against Violence Against Women Rape Crisis Centre ("WAVAW"));

(f) *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27;

(g) *Barendregt v. Grebliunas*, 2022 SCC 22 (jointly with Rise);

(h) *Colucci v. Colucci*, 2021 SCC 24 (jointly with LEAF National);

(i) *Michel v. Graydon*, 2020 SCC 24;

(j) *Bent v. Platnick*, 2020 SCC 23, and *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 (jointly with Atira Women's Resource Society, B.W.S.S. Battered Women's Support Services Association, and WAVAW);

(k) *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32;

(l) *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62;

(m) *R. v. Lloyd*, 2016 SCC 13;

(n) *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2014 SCC 59;

(o) *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59;

(p) *Moore v. British Columbia (Education)*, 2012 SCC 61; and

(q) *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 (jointly with Justice for Children and Youth and ARCH Disability Law Centre).

13. While an affiliate of LEAF National, West Coast LEAF also supported the following interventions by LEAF National:

(a) *Rick v. Brandsema*, 2009 SCC 10;

(b) *Blackwater v. Plint*, 2005 SCC 58 (jointly with the Native Women's Association of Canada and the DisAbled Women's Network of Canada);

(c) *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 (jointly with the DisAbled Women's Network of Canada);

(d) *R. v. Shearing*, 2002 SCC 58;

(e) *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69;

(f) *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44;

(g) *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1993] 3 S.C.R. 3 (jointly with the DisAbled Women's Network of Canada and the Canadian Labour Congress);

(h) *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624 (jointly with the DisAbled Women's Network of Canada);

(i) *R. v. O'Connor*, [1995] 4 S.C.R. 411 (jointly with the Aboriginal Women's Council, the Canadian Association of Sexual Assault Centres, and the DisAbled Women's Network of Canada);

(j) *Norberg v. Wynrib*, [1992] 2 S.C.R. 226;

(k) *R. v. Sullivan*, [1991] 1 S.C.R. 489; and

(l) *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.

14. West Coast LEAF has intervened before the BC Court of Appeal and the BC Supreme Court in the following cases:

(a) *R.R. v. Vancouver Aboriginal Child and Family Services Society*, 2024 BCSC 97;

(b) *T.L. v. British Columbia (Attorney General)*, 2023 BCCA 167;

(c) *R. v. Ellis*, 2022 BCCA 278;

(d) *T.L. v. British Columbia (Attorney General)*, 2021 BCSC 2203;

(e) *Council of Canadians with Disabilities v. British Columbia (Attorney General)*, 2020 BCCA 241;

(f) *A.B. v. C.D.*, 2020 BCCA 11;

(g) *British Columbia Civil Liberties Association and John Howard Society of Canada v. Canada (Attorney General)*, 2019 BCCA 228 (jointly with the Native Women's Association of Canada);

(h) *Vancouver Area Network of Drug Users v. Downtown Vancouver Business Improvement Association*, 2018 BCCA 132 (jointly with the Community Legal Assistance Society);

(i) *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62;

(j) *Denton v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2017 BCCA 403 (jointly with the Community Legal Assistance Society);

(k) *Trinity Western University v. The Law Society of British Columbia*, 2016 BCCA 423;

(l) *Scott v. College of Massage Therapists of British Columbia*, 2016 BCCA 180;

(m) *Trinity Western University v. The Law Society of British Columbia*, 2015 BCSC 2326;

(n) *Vancouver Area Network of Drug Users v. British Columbia Human Rights Tribunal*, 2015 BCSC 534 (jointly with the Community Legal Assistance Society);

(o) *Vilardell v. Dunham*, 2013 BCCA 65;

(p) *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309;

(q) *Friedmann v. MacGarvie*, 2012 BCCA 445;

(r) *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (the "Polygamy Reference"); and

(s) *Downtown Eastside Sex Workers United Against Violence v. Canada (Attorney General)*, 2010 BCCA 439.

15. West Coast LEAF is or has been an intervener or interested party in the following cases before an administrative tribunal or inquiry:

(a) *Lepine & Lepine v. Correctional Service of Canada* (Canadian Human Rights Tribunal Files: HR-DP-2899-22 & HR-DP-2900-22);

(b) *Nicholas Dinardo v. Correctional Service Canada* (Canadian Human Rights Tribunal File: T2747/12321) (jointly with the Canadian Association of Elizabeth Fry Societies);

(c) *R.R. v. Vancouver Aboriginal Child and Family Services Society (No. 6)*, 2022 BCHRT 116;

(d) *Oger v. Whatcott (No. 7)*, 2019 BCHRT 58;

(e) *National Inquiry into Missing and Murdered Indigenous Women and Girls* (Part II and Part III hearings) (final report released June 2019);

(f) *In the Matter of an Inquiry Pursuant to Section 63(1) of the Judges Act Regarding the Hon. Justice Robin Camp* (Canadian Judicial Council) (report released November 29, 2016) (as part of a national coalition of six organizations); and

(g) *British Columbia's Missing Women Commission of Inquiry* (final report released November 2012).

C. West Coast LEAF's Interest and Expertise in the Appeal

16. West Coast LEAF has a long-standing interest in systemic family law issues, including the development of the law to more effectively combat family violence and protect the rights and

interests of survivors. It has engaged in extensive work concerning family violence, the family law system, and access to family law justice, including the treatment of family violence under BC's *Family Law Act* ("*FLA*"). This work includes:

(a) In *SMA v. BC*, noted at paragraph 11, above, the plaintiff argued that BC's legal aid scheme unjustifiably infringed ss. 7, 15 and 28 of the *Charter*, and was inconsistent with s. 96 of the *Constitution Act, 1867*, by not providing adequate access to legal aid representation to women who require protection against family violence.

(b) In 2024, West Coast LEAF and Rise made joint submissions in connection with the BC Government's "Family Law Act Modernization Project": a response to the BC Law Institute's consultation paper on potential reforms to the *FLA*'s sections on parentage and a response to the Ministry of Attorney General's consultation paper on potential reforms to the *FLA*'s sections on guardianship, parenting after separation, and protection against family violence. The focus of the latter submission was on reforms to better serve family violence survivors.

(c) In 2023, West Coast LEAF and Rise made a joint submission to Canada's Department of Justice on the criminalization of coercive control. In considering the elements of an effective multisystem response to coercive control, we emphasized the importance of training justice system actors on issues of family violence.

(d) In 2021, West Coast LEAF and Rise jointly intervened in *Barendregt v. Grebliunas*, 2022 SCC 22. We discussed the social context surrounding the issues on appeal, including the endemic problem of family violence in Canada and the barriers to proving family violence in family law cases. These barriers include the pernicious influence of myths and stereotypes about family violence on the trial process.

(e) In 2020, West Coast LEAF and LEAF National jointly intervened in *Colucci v. Colucci*, 2021 SCC 24. The intervention addressed the relationship between child support laws and the feminization of poverty, and proposed a legal framework for making retroactive changes to a payor's child support obligations. It highlighted family violence as a gendered barrier to accessing child support entitlements.

(f) In 2019, West Coast LEAF intervened in *Michel v. Graydon*, 2020 SCC 24. The intervention argued that, to ensure the substantive equality of mothers and children, the *FLA* should be interpreted to permit retroactive child support orders after a child has reached adulthood. It observed that the mother in this case was disadvantaged for reasons including her experiences of family violence.

(g) In 2019, West Coast LEAF and Rise made a joint submission to the BC government on proposed changes to the *Provincial Court Family Rules*. We recommended reforms that would reduce barriers to access to justice and be more responsive to the needs of survivors of family violence.

(h) In 2018, West Coast LEAF prepared a briefing note on Bill C-78, which proposed amendments to the *Divorce Act* and was later enacted in 2019.The focus of our submission was on reforms that would better account for the impacts of family violence on the best interests of the child, parenting arrangements after divorce, relocation, and family dispute resolution processes.

(i) In 2016, West Coast LEAF made a submission to Status of Women Canada on the development of a federal strategy on gender-based violence. With respect to measures that would address family violence, we recommended changes to the *Divorce Act* and better social supports for women fleeing abusive relationships, including increased access to legal aid.

(j) In 2016, West Coast LEAF and the University of British Columbia's Allard School of Law co-founded Rise with the goal of improving access to family law justice for women in BC.

(k) In 2014, West Coast LEAF intervened in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59. We argued that hearing fees disproportionately affect women's access to justice in family law cases, with particular impacts for survivors of family violence.

17. West Coast LEAF has also made submissions in interventions before this Court about the operation of myths and stereotypes about sexual assault in the justice system:

(a) In *R v. Tsang*, indexed as *R v. Kruk*, 2024 SCC 7, West Coast LEAF and LEAF National jointly argued that the recognition of a rule against ungrounded common sense assumptions would have the effect of re-introducing prohibited twin myth reasoning. More specifically, we argued that curtailing the trial judge's use of common sense when assessing credibility expands the scope of permissible inquiries into the complainant's sexual history, predilections and propensities.

(b) In *R. v. Kirkpatrick*, 2022 SCC 33, West Coast LEAF argued that the application of a fraud analysis to non-consensual condom refusal or removal would open the door to myths and stereotypes about sexual assault complainants. This is because proving a risk of serious bodily harm (i.e., a risk of pregnancy or sexually transmitted infection) may invite consideration of sensitive and stigmatizing information about the complainant's sexual and reproductive health status, sexual history, and post-assault actions and healthcare decisions.

(c) In *R. v. J.J.* and *A.S. v. Her Majesty the Queen and Shane Reddick*, 2022 SCC 28, West Coast LEAF and WAVAW argued that the complainant, where permitted to participate in admissibility applications, is uniquely positioned to dispel myths and stereotypes about sexual assault. This is especially the case where a marginalized complainant's lived experiences and intersecting inequalities may not be well recognized or understood by the other trial actors.

(d) In *Bent v. Platnik*, 2020 SCC 23, West Coast LEAF was part of a coalition of interveners that made submissions about the influence of myths and stereotypes about sexual assault in civil defamation proceedings, including the adjudication of applications under anti-SLAPP legislation to dismiss defamation claims against survivors of sexual assault. The coalition invited the Court to ensure that its reasoning in civil matters aligns with its existing equality jurisprudence, including by taking opportunities within the civil context to dispel myths and stereotypes about sexual assault.

D. Conclusion

18. West Coast LEAF and Rise seek leave to jointly intervene in this appeal to offer a distinct and helpful perspective on the issues before the Court.

19. If granted leave to intervene, West Coast LEAF and Rise will not take a position on the outcome of the claims between the Appellant and the Respondent. We will not raise new issues and will work with other interveners and the parties to avoid duplication of submissions.

20. West Coast LEAF and Rise will not seek costs and ask that no costs be awarded against them.

21. I make this affidavit in support of West Coast LEAF and Rise's application for leave to intervene and for no other or improper purpose.

AFFIRMED BEFORE ME at the City of Vancouver, in the Province of British Columbia, this 9 day of September, 2024.

A Commissioner for Taking Affidavits in British Columbia

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BETWEEN:

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APPELLANT
(Respondent)

AND

AMRIT PAL SINGH AHLUWALIA

RESPONDENT
(Appellant)

AFFIDAVIT OF VICKY LAW
(In support of a Motion for Leave to Intervene)
(Pursuant to Rules 47(1)(b) and 57(1) of the *Rules of the Supreme Court of Canada*)

I, Vicky Law, Barrister & Solicitor, of the City of North Vancouver, in the Province of British Columbia, AFFIRM AS FOLLOWS:

1. I am the Executive Director of the Rise Women's Legal Centre ("Rise") and as such have personal knowledge of the matters hereinafter deposed to, except where stated to be based on information and belief in which case I verily believe them to be true.

2. Rise seeks leave to jointly intervene with West Coast Legal Education and Action Fund Association ("West Coast LEAF") in the hearing of *Kuldeep Kaur Ahluwalia v. Amrit Pal Singh Ahluwalia*, Case No. 41061. I am authorized to provide this affidavit on Rise's behalf.

A. Overview

3. Rise is a non-profit community legal centre and registered charity based in Vancouver, British Columbia. Rise opened in 2016 in response to the lack of affordable family law services in BC for women and gender diverse individuals. Rise predominantly assists

clients with family law issues, and occasionally provides assistance on related legal issues including immigration, criminal, and administrative law. Between April 1, 2023, and March 31, 2024, Rise provided a range of services, including referrals, legal navigation, unbundled legal services, and limited representation, to approximately 2000 women.

4. Rise's work focuses on advancing the rights, interests and the safety of women, gender diverse individuals and children who are affected by family violence. More than 80 percent of the clients we assisted in the last year reported having experienced family violence, as defined by the BC *Family Law Act*, SBC 2011, c 25 (the "*BC FLA*").

5. Rise seeks leave to intervene in this appeal based on its deep interest and expertise in family law and family violence, and its ability to provide a unique and useful perspective to aid the Court in its consideration of the issues on appeal. The questions at issue in this appeal engage West Coast LEAF and Rise's shared interest in the development of effective and accessible legal remedies for family violence, as well as the interrelated need to eradicate myths and stereotypes about family violence from the justice system. West Coast LEAF and the Rise Clinic seek leave to intervene to urge the Court to:

(a) acknowledge that myths and stereotypes about family violence persist at law;

(b) prohibit reliance on them in tort and family law claims by extending legal principles developed predominantly in the context of criminal cases involving sexual assault and interspousal violence; and

(c) apply the prohibition in determining whether to recognize family violence as a cause of action in tort.

6. I have reviewed the Notice of Motion and Memorandum of Argument included in our Motion Record, and I confirm that it accurately reflects Rise and West Coast LEAF's proposed submissions.

B. Background on Rise Women Legal Centre

7. In 2016, Rise opened as a teaching clinic for upper year law students from the University of British Columbia's Peter A. Allard School of Law. Each year, the clinic provides temporary articles to up to eighteen law students. We equip the next generation of lawyers with the skills and knowledge to address family violence and provide representation services to women and gender diverse individuals in the Vancouver and Lower Mainland area who otherwise would be self-represented litigants.

8. Having started with three staff members in 2016, Rise currently employs 28 staff, including people with backgrounds in social work, education and victim services.

9. In addition to the student clinic, Rise provides direct legal services through Rise's community legal clinic ("CLC") operating in the Lower Mainland area, and Rise's virtual legal clinic ("VLC"), operating throughout the rest of BC. Both clinic programs begin with legal navigation, where clients receive legal information and referrals. Clients who continue to work with Rise after navigation may receive representation, unbundled legal services or other advocacy services. Our direct client services focus on trial-level work but we assist a limited number of clients with appellate family law proceedings.

10. The VLC currently provides virtual legal services to clients in partnership with 69 community partner organizations. Partner organizations support clients in accessing legal advice, for example by providing a safe space for virtual appointments with Rise lawyers, and in implementing actions recommended by Rise's lawyers.

11. Rise also runs several programs to educate and support family law lay advocates and support workers at organizations throughout BC. These programs are integral to Rise's work because many self-represented litigants rely on lay advocates and support workers while navigating the legal process:

    (a) Rise's Family Advocate Support Line and Indigenous Family Advocate Support Line, along with the Family Advocate Educator, provide procedural information, guidance and training to Law Foundation of British Columbia-funded family advocates and other community support workers and organizations.

(b) Rise's Centralized Legal Services ("CLS") program was implemented in June 2022 to supervise and lower rates of attrition among Law Foundation-funded advocates throughout BC. The program uses a robust supervision model, training and support to reduce turn-over rates among advocates at community organizations.

C. Rise's Experience and Interest in the Appeal

12. In addition to providing services to clients, advocates, and support workers, Rise advocates for reform in the law's responses to family violence and women's and gender diverse people's experiences in the family law system. This work, which is informed by the challenges self-represented litigants encounter in navigating the legal system, includes systemic litigation, research, and consultations with and submissions to government.

13. Notable examples of Rise's test case litigation addressing the operation of myths and stereotypes in family law include the following.

(a) Rise represented the appellant in *KMN v. SZM*, 2024 BCCA 70, an appeal which concerned the relevance of evidence of family violence in assessing the best interest of a child when determining parenting arrangements under the *BC FLA*. Our client was self-represented at trial. The BC Court of Appeal found that the trial judge erred by failing to conduct a meaningful analysis of family violence in the case. The Court affirmed that a child's direct or indirect exposure to family violence is legally relevant to assessing parenting arrangements. The Court addressed the trial judge's reliance on the myth and stereotype that women fabricate claims of intimate partner violence to gain advantage in family law proceedings.

(b) In 2021, West Coast LEAF and Rise jointly intervened in *Barendregt v. Grebliunas*, 2022 SCC 22 to make submissions on the social context surrounding the issues on appeal, including the endemic problem of family violence in Canada and the barriers

to proving family violence in family law cases. These barriers include the pernicious influence of myths and stereotypes about family violence on the trial process.

14. Rise advocates for systemic and policy changes to improve the law's responses to family violence and the experiences of women and gender diverse people in the family law system. For example:

(a) Rise is consulted by other legal service providers with respect to the development of specialized legal clinics and virtual legal services for survivors of family violence.

(b) In 2024, West Coast LEAF and Rise made two joint submissions in connection with the BC Government's "*Family Law Act* Modernization Project". The first responded to the BC Law Institute's consultation paper on potential reforms to the *BC FLA*'s sections on parentage. The second responded to the Ministry of Attorney General's discussion paper on potential reforms to the *BC FLA*'s sections on guardianship, parenting after separation, and protection against family violence. The second submission focused on reforms to better serve survivors of family violence.

(c) In 2023, Rise held a 3-day training symposium called "Working Together: Best Practises for Inclusive Remote Legal Services" aimed at strengthening working relationships between lawyers, family law lay advocates, and other support workers to promote wrap-around supports to enable survivors of family violence to better navigate the family law system. The symposiums addressed topics such as safety-planning, emotional support, and the necessity of legal assistance and representation.

(d) In 2023, West Coast LEAF and Rise made a joint submission to Canada's Department of Justice on the criminalization of coercive control. The submission emphasized the need for an effective multisystem approach to the problem of coercive control. We highlighted the need for improved family violence training for all justice system actors involved, including police officers, judges, and lawyers.

(e) In 2021, Rise consulted with the Department of Justice on the "HELP Toolkit for Family Law Legal Advisers: Identify & Respond to Family Violence", a resource to

assist family lawyers to screen for family violence. Our recommendations were based on our experience supporting women who have experienced family violence.

(f) In 2020, Rise and the Refugee Lawyers' Group made a joint submission to the Immigration and Refugee Board of Canada on the creation of the Gender-Related Task Force at the Refugee Protection Division, and the revision of the *Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution*. We recommended a more inclusive definition of sexual and gender-based violence, focusing on power and control dynamics. We also advocated for a prohibition on reliance on assumptions, myths and stereotypes in the assessment of gender-related refugee claims.

15. Rise conducts research and publishes reports to identify and highlight the structural inequalities that perpetuate gender inequality in the family law system, including the inadequacy of legal supports for people who experience family violence. Our experience in providing direct legal services enables us to make practical systemic recommendations to protect the safety of people who experience family violence. Rise's reports include:

(a) "Why Can't Everyone Just Get Along? How BC's Family Law System Puts Survivors in Danger" (2021) identifies how interactions with the legal system can exacerbate the risk of continued violence to survivors of family violence and makes recommendations to counteract the risk. The report arose from a three-year research project, which included consultations with 160 women and community support workers in 27 focus groups held throughout BC, interviews with 31 key informants, roundtable discussions with 39 participants, and surveys of family lawyers and survivors of family violence who have navigated the family law system. Informants with lived experiences identified that the family law system continuously ignores non-physical violence, such as emotional and financial abuse, and litigation abuse, where perpetrators use the legal process to further exert control over the survivor. The report noted that although the definition of "family violence" in the *BC FLA* now includes emotional and financial abuse, there is evidence that underlying attitudes and assumptions about the dynamics of family violence have not changed among police,

lawyers and judges. The report acknowledges that myths and stereotypes are pervasive and are often used to discredit women's experiences of family violence. Common myths and stereotypes include suggestions that violence has been exaggerated, or that claims of violence are driven by vengeance or to claim additional financial support or resources. The key recommendation arising from this research is that family violence education should be mandatory for law students, lawyers, and judges. Attached to this affidavit and marked as Exhibit A is the conclusion of this report.

(b) "Section 211 Toolkit" (2021) addresses challenges lawyers may encounter when clients who have experienced family violence are subject to a parenting report under s. 211 of the *BC FLA*. These reports are used by the Court to gather information for making parenting orders. The toolkit provides a step-by-step guide and practical considerations to assist lawyers in navigating s. 211 reports. Attached to this affidavit and marked as Exhibit B is the introduction of this report.

(c) "Are We Ready to Change?" (2021) focuses on Rise's research into the ways that family lawyers engage with family violence. It provides practical suggestions to improve the ways lawyers working with survivors of family violence can address family violence in their client-management, for example by screening for family violence, and in their litigation strategies. Attached to this affidavit and marked as Exhibit C is the introduction of this report.

(d) "Decolonizing family law through trauma-informed practises" (2022) builds on Rise's previous work examining the legal system's response to survivors' experience of family violence, through the lens of decolonization and trauma-informed practises. The report highlights the ways our legal system's response to family violence tends to exacerbate the risks women face, instead of enhancing women's safety. Attached to this affidavit and marked as Exhibit D is the introduction of this report.

(e) "Creating Safety in BC Courts: Key Challenges and Recommendations" (2022) assesses courthouse safety and makes recommendations on practical modifications to courthouse design and changes to court processes to make survivors less susceptible

to violence. The report includes a literature review, 25 key informant interviews, and surveys of 25 lawyers working in smaller communities in British Columbia. Attached to this affidavit and marked as Exhibit E is the executive summary of this report.

(f) "Improving Access to Justice through Safeguards in Parenting Assessments" (2024) identifies challenges with parenting reports ordered under the *BC FLA*, including the lack of consistency around these report writers' training, experience, and practice standards, and financial barriers to accessing reports. We focus on the specific impact these challenges have on survivors of family violence. We recommend safeguards, including judicial oversight, to address the challenges identified with these reports. Attached to this affidavit and marked as Exhibit F is the executive summary of this report.

16 Rise's work provides the organization with a unique vantage point from which to observe the intersection of family violence and the family law system.

D. Conclusion

17. Rise and West Coast LEAF seek leave to jointly intervene in this appeal to offer a distinct and helpful perspective on the issues before the Court.

18. If granted leave to intervene, Rise and West Coast LEAF will not take a position on the outcome of claims between the Appellant and Respondent. We will not raise new issues and will work with other interveners and the parties to avoid duplication of submissions.

19. Rise and West Coast LEAF will not seek costs and ask that no costs be awarded against them.

20. I make this affidavit in support of West Coast LEAF and Rise's application for leave to intervene and for no other or improper purpose.

AFFIRMED BEFORE ME at the City of Vancouver, in the Province of British Columbia, this 9th day of September, 2024.

Elizabeth Cameron
Barrister & Solicitor

Rise Women's Legal Centre
510 Burrard Street
4th Floor
Vancouver, BC V6C 3A8

VICKY LAW

Conclusion

This project has highlighted the significant systemic reform that is needed if the family law system is to effectively address family violence. BC's *FLA* is progressive on paper, and it includes an expansive definition of family violence, but it does not provide protection from the entrenched biases, myths and stereotypes that inform legal and law enforcement responses to survivors of family violence. These biases, coupled with the lack of investment in education and resources that would support women's safety mean that after eight years, the promises of the *FLA* largely remain illusory. In our research we had the opportunity to interview over 100 survivors of family violence from across BC, who had gone through the family court system since the passing of the *FLA* in 2013. From their experiences, we know there is still a long way to go in creating a legal system that enhances safety, and in fact, the one currently in place often increases the danger that women face.

Our research found that women's experiences of violence, particularly non-physical violence, are often minimized or completely discounted and that myths and stereotypes surrounding family violence and biases against women are pervasive in family court. These biases frequently lead judges to view women as vindictive when they raise allegations of family violence. The fundamental lack of knowledge about family violence by all actors within the family law system has led to a culture where family violence is frequently not even raised in court – either because professionals do not have the skills to identify and understand it or due to concerns that alleging family violence may make women look vindictive, not credible, and unreasonable in the eyes of the judge. Women told us that in some cases lawyers advised them not to raise issues of violence even when there was significant evidence including medical records and police reports. Expert interviews, a survey to lawyers and survivors, caselaw research, and a review of secondary sources all point to the need for significant changes in the structure, process, and culture of family law and family courts in the province.

A starting point for making significant improvements would be the implementation of mandatory family violence education for lawyers, judges, and police. This education should be created in collaboration with experts on family violence including front-line advocates, community organizations and women with lived experiences of family violence and the family court process. Further, there needs to be some form of specialization for family court so that people are guaranteed to have their family court matters heard by judges knowledgeable about family violence. Courts and

family law processes should be designed to support people going through family law matters, with a recognition of the dangers that may be caused by engaging in any type of legal process. We recommend immediate consultation on the creation of a specialized family court with all stakeholders, including women with lived experiences of violence.

While we wait for systemic change to the family law system, there is much to be done by individuals. Overwhelmingly, survivors described the significant need for lawyers to improve their practices to better facilitate safety for survivors of violence, and for judges to adapt their approach to family law files that involve allegations of violence. Conversely, individual police officers, advocates, transition home workers, counsellors, court staff, lawyers, and judges who responded with understanding and care had the power to make a tremendous positive impact.

Looking forward, Rise will continue to work on implementing the recommendations that have come from this research. Our staff at Rise is experienced in providing education in family law and family violence, and we hope to continually work with community partners and women with lived experience to improve our own approach to family law and develop new resources to share.

There was incredible support for our project from survivors and women-serving organizations throughout BC. In almost every focus group or interview, survivors told us that they were thankful that this work was being done, and that they had participated in hopes that another woman would not have to go through what they had been through in the family court system. While this report has outlined the significant failings of our current system, we hope that readers can also feel the momentum from survivors and advocates pushing for change. Individuals within the system who respond effectively to family violence can save lives. As one woman said, "somewhere along the way, there are specific people who made [the family court process] possible ... [Someone] helped me."

> “
>
> As one woman said "somewhere along the way, there are specific people who made [the family court process] possible... [Someone] helped me."

Introduction

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

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

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

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

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

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

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

ABOUT OUR CASE STUDY

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

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

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

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

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

Introduction

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

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

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

In her victim impact statement, Sarah Cotton stated:

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

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

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

We Have Been Here Before (Many Times)

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

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

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

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

- On September 4, 2007, in Victoria, Yong Sun Park, her son, and her parents were all stabbed to death by her husband, Peter Lee, who had only three weeks earlier been released on bail after he was charged with assaulting his wife. Park and Lee were going through a divorce at the time of the murder.[4] An inquest occurred, the Lee inquest resulted in 14 recommendations to the police and legal system.[5]
- On October 19, 2006, in Port Coquitlam, Gurjeet Ghuman was shot twice point-blank in the head by her estranged husband as she dropped off her daughter. Her ex-husband had been charged with assaulting her. She identified in the media that things began to "unravel" once she sought a divorce from her husband that summer. Gurjeet survived but is now blind.[6]
- In 2003, Sherry Heron and her mother, Anna Adams, were murdered at Mission Memorial Hospital by Sherry's estranged husband. Sherry had a restraining order in place while she was in the hospital.[7]

- In 2003, in Nanaimo, Denise Purdy was stabbed to death by her estranged husband. A restraining order was in place at the time of the murder.[6]
- In 2002, in Quatsino, Sonya Handel's six children were drugged, strangled, and shot and left to die in their burning home by their father, as "part of a multipronged plan to punish his wife" who had been talking about leaving him.[7]

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

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

> "I dread the day I have to begin attending multiple coroner hearings. The pain, trauma, and psychological harm will only continue if this has to be revisited every few years."
>
> — Sarah Cotton

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

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

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

The legal system has so far remained unable or unwilling to proactively make the necessary changes to be able to create safety for survivors of family violence, and in many cases accessing the legal system increases the level of risk that survivors of violence face.

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

Listening to the Experiences of Survivors of Family Violence

Between 2018 and 2019, we conducted 27 focus groups in 25 communities across BC and spoke to more than 160 women. Most had lived through family violence and the court system; the rest were the front-line workers who supported them. We also conducted 31 key informant interviews, conducted surveys with both family lawyers and focus group participants, and hosted five round-table discussions with interdisciplinary experts.[11]

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

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

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

Endnotes

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9 Rod Mickleburgh, "BC Father Found Guilty," Globe and Mail, October 2, 2003, https://www.theglobeandmail.com/news/national/bc-father-found-guilty/article20451307/

10 To learn more, please refer to our project report, Haley Hrymak and Kim Hawkins, Why Can't Everyone Just Get Along? How BC's Family Law System Puts Survivors in Danger (2021, Rise Women's Legal Centre). To access Rise's online training for lawyers, developed as part of this project, please contact Rise Women's Legal Centre.

11 Department of Justice Canada, *Best Practices for Representing Clients in Family Violence Cases* by Cynthia Chewter (2015), https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/bpfv-mpvf/viol2a.html, citing Melanie Rosnes, "The Invisibility of Male Violence in Canadian Child Custody and Access Decision-Making," *Canadian Journal of Family Law* 14, no. 1 (1997): 31

12 Susan Boyd and Ruben Lindy, "Violence Against Women and the BC *Family Law Act*: Early Jurisprudence," Canadian Family Law Quarterly 35 (2016) at 102 [*Boyd*]

13 Marta Burczycka and Shana Conroy, "Family Violence in Canada: A Statistical Profile, 2015" (February 2017), Statistics Canada at p 4, https://nesacanada.com/wp-content/uploads/2018/06/FamilyViolence2015.pdf.

14 Colleen MacPherson and Julie Czeck, "Early Childhood Exposure to Domestic Violence You Can Help: A Toolkit for Individuals Working with Children between the Ages 0–5" (2017), Government of British Columbia, https://earlyyearsbc.ca/wp-content/

Introduction

How do we decolonize something as colonially entrenched as Canada's legal system? Meaningful access to justice for Indigenous peoples in British Columbia is deeply connected to addressing the colonial roots of the legal system. Such access will require decolonizing strategies that are responsive to Indigenous peoples' own understandings of justice.

This research builds on Rise Women's Legal Centre's earlier work concerning the legal system's response to survivors' experiences of family violence. In a report titled *Why Can't Everyone Just Get Along? How BC's Family Law System Puts Survivors in Danger*, Rise highlighted how the legal system's response to survivors of family violence frequently exacerbated the risks women faced instead of enhancing their safety.[2] In that report, we discussed what was shared with us by Indigenous participants in focus groups and individual interviews. However, one limitation of that research was that it did not directly engage with the ways in which the family court system furthers colonial violence against Indigenous families, particularly women and children. We recognize that the experiences of Indigenous survivors of family violence need to be centered to shed light on their unique concerns and experiences navigating colonial legal systems. We have undertaken this follow-up research to reflect on how our own legal practices can support the ongoing work of decolonization, and to support other members of the legal system in this work, with the long-term goal of moving towards reconciliation.

This report focuses specifically on private family law, as set out in the BC *Family Law Act* (*FLA*)[3] and the *Divorce Act* (*DA*),[4] rather than on the practices and policies of the Ministry of Children and Family Development (MCFD) in connection with BC's child protection system.[5] A decolonizing lens has been more frequently applied, albeit with mixed results, to legal processes that involve the state as a party, such as the criminal justice and child protection systems. Family law, which is typically viewed as a dispute between two private individuals, has attracted much less attention. We intend for this report to be a small contribution to a long overdue discussion.

First, this report compiles the findings from interviews with experts who work with Indigenous people within the family law system. These experts highlighted the ways in which the colonial framework embedded in BC's family law system causes ongoing harm to Indigenous families and made recommendations for improving BC's family law system. Second, this report focuses on how people working within family law can better serve Indigenous clients. With this in mind, we have provided a toolkit (see Part 2) to help lawyers establish trauma-informed practices and practise cultural humility. In addition, we have compiled further resources in two appendices.

We recognize that the experiences of Indigenous survivors of family violence need to be centered to shed light on their unique concerns and experiences navigating colonial legal systems.

Methods

Co-authors Myrna McCallum and Haley Hrymak collaborated on the design and implementation of this research project. Myrna McCallum is a Métis-Cree mother, grandmother, lawyer, and educator, and an expert in trauma-informed legal practice. Haley Hrymak is a settler working at Rise Women's Legal Centre as the research and community outreach lawyer. This project commenced during the COVID-19 pandemic, which prevented travel to Indigenous communities or in-person interviews. In light of these limitations, we were not able to meet directly with Indigenous women who could speak to their personal experiences of navigating BC's family court system. We rejected the option of conducting interviews with this population remotely, as we were concerned about our ability to conduct them in a trauma-informed way (for example, with a support person available and with an opportunity to spend sufficient time developing relationships). We were mindful of the possibility that such interviews could cause further harm by asking these individuals to relive difficult and traumatic experiences. We instead decided to speak with key informants who have expertise in Indigenous people's experiences of family law. We interviewed nine experts and drew key themes from the interviews. The majority of these experts are themselves Indigenous and were able to draw on their own experiences as well as provide insights about the broader system. Interviews were conducted by Haley Hrymak and transcribed with the assistance of two alumni of Rise's legal externship program.

All participants in our research were provided with honoraria for their time. Those whom we sought to quote in this report were also given an opportunity to review their quotes before publication. Experts were given the choice of being named in the report or remaining anonymous. The latter experts are cited in the notes as "Interview with expert." We were transparent with participants about our processes and the limitations of the project. Limitations included the relatively small number of interviews and the need to conduct all interviews by phone or via Zoom due to the COVID-19 pandemic. We recommend that further research be done in collaboration with Indigenous families, using a trauma-informed approach and with the goal of reciprocity always at the forefront.

The Legal Context

Indigenous Legal Frameworks

> *Our ceremonies and songs and dances embodied the honor of all life. It wasn't just on paper and about rules and processes, but you were guided in a good way to know how to offer greatest respect for everyone and all life.*

For thousands of years, Indigenous legal systems effectively resolved disputes, protected children, and ensured safety and well-being for community members. Indigenous legal orders and laws existed successfully prior to contact and continue to persist today, outside of and despite the hegemony of the colonial legal system. As one expert described, "Most Indigenous nations would come together in a circle [with the starting point being:] 'We have a problem here, how can we handle it?'"[9]

According to scholar John Borrows, Indigenous peoples were the earliest "practitioners of law" in North America, and "Indigenous peoples' traditions can be as historically different from one another as other nations and cultures in the world."[10] North America's first treaties involved Indigenous laws and existed prior to the arrival of Europeans. For example, according to Borrows, the "Haudenosaunee of the eastern Great Lakes maintained a sophisticated treaty tradition about how to live in peace, that involved all of their relations: plants, fish, animals, members of their nations, and members of other nations."[11] Professor Val Napoleon writes:

> *Law is an intellectual process, not a thing, and it is something that people actually do. Indigenous peoples apply law to manage all aspects of political, economic, and social life including harvesting fish and game, accessing and distributing resources, managing lands and waters.*[12]

While there was, and continues to be, a wide diversity amongst Indigenous peoples' specific beliefs and practices, care for children and families was "generally provided according to a holistic world-view that viewed children as important and respected members of an interdependent community and ecosystem."[13] Indigenous cultures are relationship based, and there is a common teaching that "relationships are medicine."[14] These relational cultures are underpinned by the knowledge that "all of life is connected—not just at the human level, but to the earth, the plants, the animals, and the cosmos."[15]

Indigenous worldviews often focus on collective well-being as opposed to individualized, hierarchical, and competitive approaches to understanding the world.[16] In describing Indigenous family structure, Kahkakew Larocque explains that extended family is "very active and relationships may cross. For example, cousins are considered sisters and brothers. Everyone older than you is an aunt or uncle or a grandmother or grandfather. The idea is that everyone is related eventually."[17]

Indigenous legal systems often operated in stark contrast to Canada's colonial legal traditions and framework, which are based on an individual rights approach.[19]

Indigenous resistance has ensured that colonization has not abolished Indigenous laws, and there is a concerted effort underway to protect and revitalize them. Immediately prior to the appointment of Ardith Walpetkn We'dalx Walkem, QC to the BC Supreme Court, she released a report commissioned by the BC Human Rights Tribunal about improving BC's human rights processes for Indigenous people. She wrote, "Indigenous legal systems have their own human rights concepts that should form part of the human rights framework that is used to assess and resolve complaints brought by Indigenous Peoples."[20] Indigenous communities are asserting their own jurisdiction in many areas of social, economic, and political concern, including applying Indigenous laws to resolve concerns within their own communities. As we will discuss below, creating space for Indigenous family law concepts to inform and resolve family disputes affecting them will be an important step towards decolonization.

Colonial Legal Systems

The colonization of North America, an area many Indigenous peoples refer to as Turtle Island, has included recurring attempts at cultural genocide that seek to extinguish Indigenous cultural practices, including Indigenous legal systems. The law is an especially potent site for colonization. In the words of D'Arcy Vermette, "Colonial law provides the colonizer with the ability to exclude and with the exclusive power to interpret."[21] Canada's modern legal system has not only displaced all pre-existing legal orders, it is "culturally blind" to its own colonial structure, holding pretensions of neutrality and fairness.[22]

In the late nineteenth century, and well into the twentieth century, the assimilationist goals of the federal and provincial governments were discharged through a variety of laws, policies, and practices that were explicit in their intention to erase Indigenous culture. One notorious example of a destructive and assimilationist policy was the residential school policy, later incorporated into the *Indian Act*.[23] The aim of this policy was to cause Indigenous peoples "to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada."[24]

> "Any resistance will make you an angry person, a problematic person, a violent person, a troublemaker."[17]

The *Final Report of the Truth and Reconciliation Commission of Canada* quotes Sir John A. Macdonald's remarks to the House of Commons in 1883 in support of the residential school policy:

> *When the school is on the reserve the child lives with its parents, who are savages, he is surrounded by savages, and[…] though he may learn to read and write[…] his habits, and training and mode of thought are Indian. He is simply a savage who can read and write. It has been strongly pressed on myself, as the head of the Department, that the Indian children should be withdrawn as much as possible from the parental influence, and the only way to do that would be to put them in central training industrial schools where they will acquire the habits and modes of thought of white men…*[25]

Another example of the colonial attempt to extinguish Indigenous legal systems is reflected in section 10 of the original *Indian Act*, which made potlatch and other cultural ceremonies illegal between 1884 and 1951.[26] Judge Alfred Scow explained:

> *This provision of the Indian Act was in place for close to 75 years and what that did was it prevented the passing down of our oral history. It prevented the passing down of our values. It meant an interruption of the respected forms of government that we used to have, and we did have forms of government be they oral and not in writing before any of the Europeans came to this country. We had a system that worked for us. We respected each other. We had ways of dealing with disputes.*[27]

In combination, the federal government's residential school system and the provincial child welfare systems across Canada have had a devastating effect on Indigenous peoples and families.[28] In BC, Indigenous children make up less than 10 per cent of the child population, yet account for 64 per cent of children in care and 43.4 per cent of youth receiving MCFD residential services.[29]

The Need to Decolonize

The most prevalent theme that emerged from our interviews was that the colonial framework of family court proceedings is harmful to Indigenous families in and of itself; as Amber Prince and Myrna McCallum write, "This is a system which is imposed on Aboriginal people."[12] The colonial framework manifests in both substantive law, which excludes Indigenous worldviews and values, and in court processes that are inaccessible, rely heavily on European ways of communicating information, and are individualized rather than relational. As described by one of our experts, family court processes are deeply rooted in colonialism.

> *I mean, the entire structure is racist and so of course that leads to racist results. Indigenous people are just an afterthought and ... they're encountering systems that were never built for them ... you have to stand when the Judge enters the room ... you have to call a judge in Supreme Court "My Lord" and "My Lady." If you're an Indigenous person, good luck resisting any of this. You're coming into a very colonial system, steeped in the traditions of the people that have oppressed you and ... that's the only system available to you.*[13]

Notably, our interviewees often described Indigenous people's interactions with the family law system in terms that are very similar to those used to describe their interactions with the criminal law system, despite the fact that only one of these systems is designed to be punitive. Scholars Patricia Barkaskas and Sarah Hunt have written that barriers for Indigenous women in the criminal justice system include "the colonial culture of the Canadian justice system; racism; fear and mistrust; and individualized approaches"[14] and all of these barriers were repeatedly referenced during our interviews about family law. Experts described that Indigenous people going to family court also experience a lack of trust, because they have no choice but to seek to resolve family law problems using the very same court system where they may be fighting for the return of their children or have interactions with the criminal justice system.

Experts also identified that family lawyers and judges lack cultural humility and knowledge about Indigenous families, and this inhibits the ability of Indigenous people to participate fully and fairly in the existing family law system. Family law professionals also frequently

> "Addressing the unmet legal needs of Aboriginal people requires acknowledging that solutions must be found within Aboriginal cultures and developed in partnership with Aboriginal communities."[11]

lack knowledge of the barriers that Indigenous clients may be facing. Many members of the legal community appear to be unaware that Indigenous people living on reserve may not have access to the full range of municipal services available to people liv ng in downtown Vancouver, and this lack of access might impact their parenting decisions. Barkaskas gives an example of a family being judged harshly by child protection professionals for keeping bags of garbage inside their home; the professionals involved failed to recognize that there was no regular garbage pickup on-reserve, and that leav ng garbage outdoors would attract bears, thereby placing the children at risk. Legal professionals may also have little understanding or recognition of the importance of Indigenous c ients' cultural obligations to their communities or of important seasonal activities relating to food harvesting

When the colonial powers imposed Western laws on Indigenous peoples, they caused disorder, disruption, and disconnection. In their most devastating forms, these disruptions result in the denial of Ind genous parents' right to raise their own chi dren. While Indigenous legal traditions and cultures are diverse and distinct, Ind genous peoples "share a common experience that their ... legal traditions are not reflected in Canada's multi-jur dical state."[7] The project of deco onization must create the necessary space to recognize and reflect the diversity of Indigenous laws and experiences

Executive Summary

Courthouses are not always safe places, particularly for survivors of intimate partner violence. Courthouses in smaller communities in BC are frequently small buildings with no paging systems, where the survivor's only option is to sit in a small area close to their abuser, often for hours, while waiting for their matter to be called. These courthouses also often lack private spaces for people to speak with their lawyer, if they are being represented

Given the lack of safety in courthouse design and some court processes, attending court has the potential to increase the risk of violence and harm to survivors of violence. The danger of the lack of space in courthouses is especially concerning because women experience a higher incidence of intimate partner violence in rural communities compared to urban areas.

In research undertaken between April 2021 and March 2022, we asked: Is there a way to modify courthouses and court processes to make survivors less susceptible to violence by their abuser? To answer our research question, we conducted a literature review, interviewed 25 key informants, and surveyed 25 lawyers attending courthouses in smaller communities in BC. Our findings were evaluated by lawyers, court users, and advocates (31 in total).

This report details 25 recommendations for positive changes in courthouses in BC, including the following 12 highlights

- **PAGING SYSTEMS:** We recommend creating paging systems where clerks provide people with either on-premises paging (similar to the handheld devices that restaurants use) or cellphone texts, allowing them to wait outside the courtroom and in any part of the courthouse.
- **SAFE INTERVIEW ROOMS AND SEPARATE WAITING ROOMS:** People need interview rooms to meet with their lawyers and to have private conversations with advocates. Opposing parties should have separate waiting rooms, so they do not have to be in the same small space.
- **PARKING LOT TRAILER:** To create additional space without expensive modifications to courthouses themselves, we recommend installing a well-designed trailer outside the courthouse that could be soundproofed, only accessible to lawyers and their clients, and visually monitored in some way to ensure everyone inside is safe

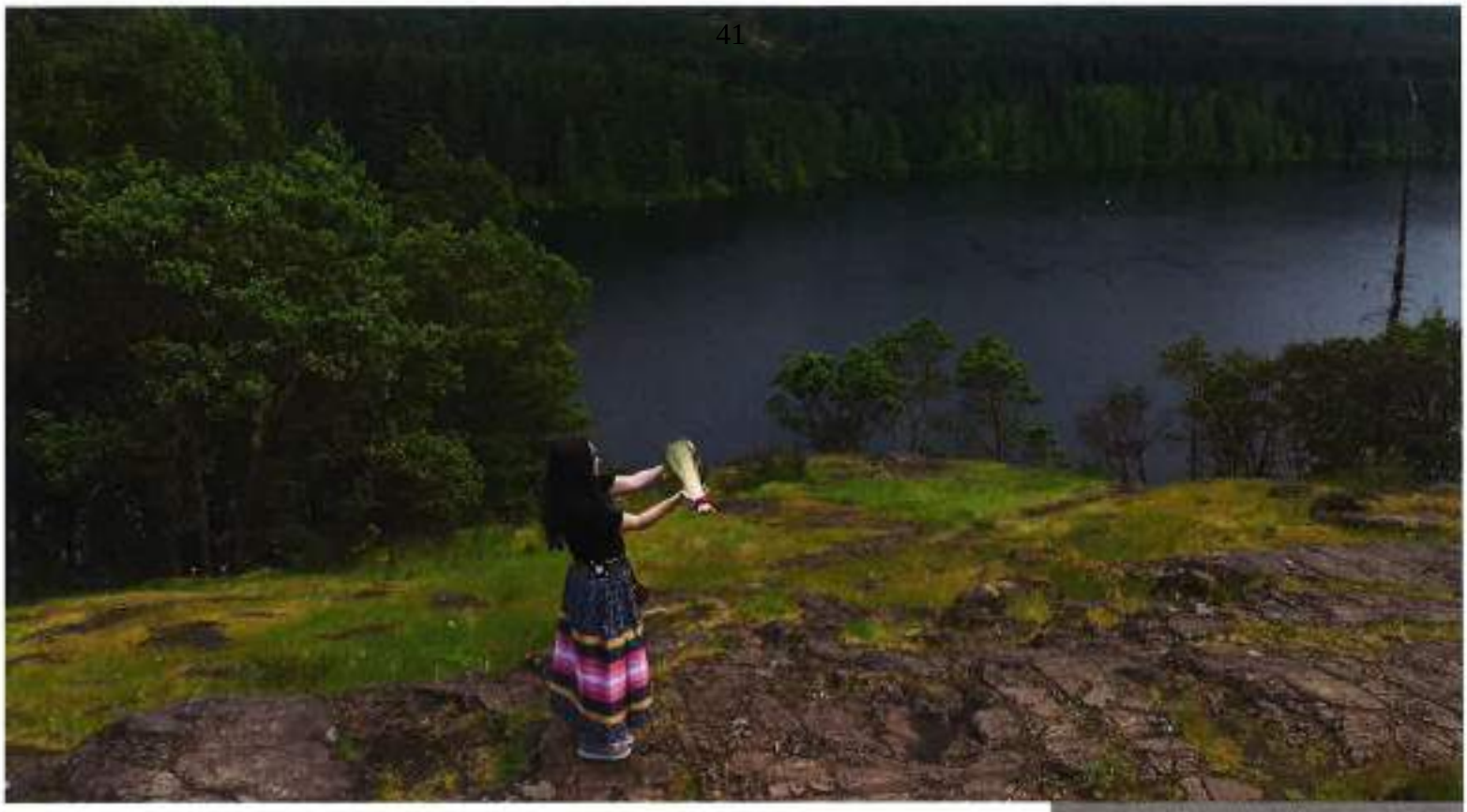

PHOTO MELODY CHARLIE

- **TWO ENTRANCE/EXITS:** Courthouses should have two entrance/exits that are clearly marked in the building and visible to someone on courthouse staff, so they are not unsafe.

- **COURTHOUSE NAVIGATORS OR "COURT CONCIERGES":** Many people arriving at a courthouse enter a space that feels unsafe, and they are unsure about what they should do next. We recommend courthouses be staffed with courthouse navigators who could assist court users in finding their way and by answering basic questions.

- **COURT SUPPORT WORKERS:** In addition to Rise's persistent recommendation that legal aid expand its family law services, particularly for survivors of violence, we recommend the extension of funding to people in support positions, with expertise in family violence. The support worker would provide family law court support and assist with safety planning. Ideally this person would support the client in addition to the survivor's lawyer.

- **EXPANDED ROLE FOR MCKENZIE FRIENDS, ADVOCATES, AND SUPPORT WORKERS:** Given that many people are unrepresented in family court, we recommend courts make it explicit that advocates and support workers can apply for protection orders on behalf of clients, as per section 183(1) of the Family Law Act.

Given the lack of safety in courthouse design and some court processes, attending court has the potential to increase the risk of violence and harm to survivors of violence.

"That room [the Victim Services room in the Smithers courthouse] is a game changer."

- **STREAMLINING PROCESSES AND COURT DESIGN:** The government should audit courthouses across the province for safety and accessibility concerns and implement recommendations. A courthouse advisory group, consisting of key informants, including court staff, advocates, court users, judges, and sheriffs, may be best situated to address scheduling and delay issues specific to each courthouse.
- **ONLINE REGISTRY ACCESSIBLE TO EVERYONE:** A comprehensive online registry would allow people to access their file for free and without travelling to the courthouse.
- **ATTENTION TO BASIC NEEDS (FOOD, WATER, WASHROOMS):** Court users should have access to drinking water in courthouses, plus a vending machine or some source of snacks. Washrooms should be modified to include gender neutral and trans-inclusive washrooms
- **ROOM FOR CULTURAL PRACTICES AND/OR PRAYER:** We recommend that courthouses create a room that people can use, to complete a prayer, smudge, and/or other practice that may be important for them, before or after their court hearing.
- **HYBRID MODEL:** Our research uncovered both positive and negative experiences with the current virtual appearances in BC courts. We recommend a hybrid model, allowing both in-person and virtual court appearances. Courts should also designate a separate room inside the courthouse with the technology to allow for virtual appearances in cases of family violence.

Executive Summary

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

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

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

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

Section 211 reports are profoundly influential in the l'ves of children and fami ies, because of their potential impact on both court decisions and out-of-court settlement of parenting arrangements.

Key Issues Identified in Our Research

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

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

Summary of Recommendations

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

Assessors' Training and Experience

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

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

Practice Standards for Both the Evaluation Process and Report Content

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

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

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

Further, we recommend consideration of two additional issues:

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

Financial Barriers

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

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

Judicial Gatekeeping and Court Oversight

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

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

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

Additional Recommendations (Not Intended for Legislation)

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

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

File No. 41061

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

KULDEEP KAUR AHLUWALIA

APPELLANT
(Respondent)

AND:

AMRIT PAL SINGH AHLUWALIA

RESPONDENT
(Appellant)

MEMORANDUM OF ARGUMENT OF THE PROPOSED INTERVENERS, WEST COAST LEGAL EDUCATION AND ACTION FUND ASSOCIATION and RISE WOMEN'S LEGAL CENTRE
(Pursuant to Rules 47(1)(a) and 55-59 of the *Rules of the Supreme Court of Canada)*

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. West Coast Legal Education and Action Fund Association ("West Coast LEAF") and Rise Women's Legal Centre ("Rise") seek leave to jointly intervene in this appeal (the "Appeal") pursuant to Rules 47 and 55 to 59 of the *Rules of the Supreme Court of Canada*.

2. West Coast LEAF and Rise share an interest in, and frequently collaborate to address, systemic family law issues. Their joint advocacy work has focused on legal responses to family violence and the rights and interests of survivors of it ("survivors"). The organizations' work is grounded in the recognition that family violence disproportionately affects women and children.

3. The Ontario Court of Appeal in the case at bar declined to recognize family violence as a cause of action in tort (the "Tort"). The proposed interveners say that, in doing so, the Court relied upon the myth that women lie about family violence to gain the upper hand in family law cases.[1] The Court also overlooked the ways in which existing torts may embed myths and stereotypes about family violence and may fail to adequately capture its harms.

4. If granted leave to intervene in the Appeal, West Coast LEAF and Rise will argue that the Court should:

    a. Acknowledge that myths and stereotypes about family violence persist at law;

    b. prohibit reliance on them in tort and family law claims by extending legal principles developed predominantly in the context of criminal cases involving sexual assault and interspousal violence; and

    c. apply the prohibition in determining whether to recognize the Tort.

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[1] *Ahluwalia v. Ahluwalia*, 2023 ONCA 476, at paras. 120 and 122 [*Ahluwalia ONCA*].

B. West Coast LEAF

5. Founded in 1985 when the *Charter*'s equality provisions came into force, West Coast LEAF is a non-profit society incorporated in BC and registered federally as a charity. West Coast LEAF's mandate is to use the law to create an equal and just society for all who experience gender-based discrimination in BC. With the support of about 342 members and 15 staff, it carries out its mandate through litigation, law reform, and public legal education activities.[2]

6. West Coast LEAF engages with the equality interests of women and gender-diverse people along intersecting axes of marginalization, including Indigeneity, race, immigration status, gender identity, sexual orientation, disability, age, and socioeconomic status.[3]

7. West Coast LEAF has intervened in litigation in this Court, all superior courts in British Columbia, and before administrative tribunals and commissions of inquiry. It has made submissions addressing the development of the common law, constitutional questions, discrimination under human rights legislation, and questions of statutory interpretation.[4]

C. Rise

8. Rise is a non-profit community legal centre and registered charity based in Vancouver. Rise opened in 2016 in response to the lack of affordable family law services for women and gender-diverse people. Rise runs a student legal clinic in cooperation with the Peter A. Allard School of Law at the University of British Columbia, a community legal clinic in the Lower Mainland, and a virtual legal clinic to serve the rest of BC. Rise also offers training and support programs for family law lay advocates and support workers.[5]

9. Between April 1, 2023, and March 31, 2024, Rise served approximately 2000 clients, more than 80 percent of whom reported having experienced family violence.[6]

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[2] Affidavit of Martina Zanetti, made September 9, 2024, at paras. 5 and 8 [Zanetti Affidavit].
[3] Zanetti Affidavit, at para. 7.
[4] Zanetti Affidavit, at para. 10.
[5] Affidavit of Vicky Law, made September 9, 2024, at paras. 7-11 [Law Affidavit].
[6] Law Affidavit, at paras. 3 and 4.

10. Rise advocates for systemic changes to improve the experiences of women and gender-diverse people within the family law system. Its work in this regard includes appellate-level litigation and interventions, research, publications, and submissions to government. As a frontline service provider, Rise has a unique and practical perspective about the barriers survivors experience litigating claims related to family violence.[7]

PART II – QUESTION IN ISSUE

11. Should West Coast LEAF and Rise be granted leave to jointly intervene in the Appeal?

PART III – STATEMENT OF ARGUMENT

12. The Court may grant intervener status where the proposed intervener: (1) has a real and substantial interest in the subject of the appeal; and (2) can provide submissions that are useful and distinct from those of the parties. West Coast LEAF and Rise meet this test.

A. West Coast LEAF and Rise have a Real and Substantial Interest in this Appeal

13. West Coast LEAF and Rise are committed to developing the law to more effectively combat and redress the harms of family violence and protect the dignity, equality, and security interests of survivors.

14. West Coast LEAF has intervened before this Court to highlight that family violence is a gendered barrier to accessing family law remedies.[8] Further, West Coast LEAF represented the plaintiff in *Single Mothers' Alliance of BC v. British Columbia et al*., a constitutional challenge to BC's legal aid scheme for family law cases involving family violence.[9] The action argued that this scheme unjustifiably infringed ss. 7, 15 and 28 of the *Charter*, and

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[7] Law Affidavit, at para. 12.
[8] Zanetti Affidavit, *supra* note 2, at paras. 16(d)-16(f) and 16(k); *Michel v. Graydon*, 2020 SCC 24 [*Michel*]; *Barendregt v. Grebliunas*, 2022 SCC 22 [*Barendregt*]. See also, *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 5; *Colucci v. Colucci*, 2021 SCC 24 [*Colucci*].
[9] Supreme Court of BC Action No. S1733843, Vancouver Registry.

violated s. 96 of the *Constitution Act, 1867*. The litigation, which was settled in early 2024, resulted in a significant expansion to legal aid eligibility and services for survivors.[10]

15. West Coast LEAF has also made submissions to this Court on the need to eradicate myths and stereotypes about sexual assault from the justice system.[11]

16. Rise has engaged in significant advocacy to expose the harms of family violence.[12] Rise represented the appellant mother in *K.M.N. v. S.Z.M.*,[13] which acknowledged the existence of myths and stereotypes about family violence, described reliance on such a myth or stereotype as a "reversible error," and re-affirmed that a child's indirect exposure to family violence is legally relevant to parenting arrangements.[14] In *L.D.B. v. A.N.H.*, the BC Court of Appeal cited Rise's report on the experiences of family violence survivors within BC's family law system – "Why Can't Everyone Just Get Along? How BC's Family Law System Puts Survivors in Danger" – in its discussion of the harms of litigation abuse.[15]

17. West Coast LEAF and Rise have also engaged in joint advocacy. In 2021, the organizations co-intervened in *Barendregt v. Grebliunas*,[16] primarily to elucidate the pernicious influence of myths and stereotypes about family violence in the adjudication of family law disputes. They have also co-authored several submissions to government on legislative reforms affecting survivors; these include submissions on the criminalization of coercive control and

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[10] Zanetti Affidavit, *supra* note 2, at para. 11.
[11] Zanetti Affidavit, at paras. 16(d) and 17; *Barendregt*, *supra* note 8; *R v. Kruk*, 2024 SCC 7 [*Kruk*]; *R. v. Kirkpatrick*, 2022 SCC 33; *R. v. J.J.* and *A.S. v. Her Majesty the Queen and Shane Reddick*, 2022 SCC 28; *Bent v. Platnik*, 2020 SCC 23.
[12] Law Affidavit, *supra* note 5, at paras. 12-15.
[13] *K.M.N. v. S.Z.M.*, 2024 BCCA 70 [*K.M.N.*].
[14] *K.M.N.*, at paras. 99-108 and 109-122. See also, Law Affidavit, *supra* note 5, at para. 13(a).
[15] *L.D.B. v. A.N.H.*, 2023 BCCA 480, at para. 113; Haley Hrymak and Kim Hawkins, "Why Can't Everyone Just Get Along? How BC's Family Law System Puts Survivors in Danger" (Vancouver: Rise Women's Legal Centre, 2021). See also, Law Affidavit, *supra* note 5, at para. 15(a) and Exhibit A.
[16] *Barendregt*, *supra* note 8.

amendments to BC's *Family Law Act*[17] and *Provincial Court Family Rules.*[18]

B. West Coast LEAF and Rise's Submissions Would Be Useful and Distinct

18. Gendered myths and stereotypes about family violence are a pervasive and pernicious problem in the legal system. They result in the unequal treatment of survivors at law and impede access to appropriate remedies.[19] Despite the mischief they cause, such myths and stereotypes have, until recently, received little sustained judicial attention.[20] This Court acknowledged myths and stereotypes about interpersonal violence, in a limited way, in the context of the criminal law's "battered woman defence."[21] It also implicitly addressed myths and stereotypes about family violence in *Michel v Graydon,*[22] *Colucci v Colucci,*[23] and *Barendregt v Grebliunas*.[24] However, it has not yet explicitly recognized the operation of these myths and stereotypes, and their legal implications, in the civil context. In a recent family law appeal, the BC Court of Appeal held that trial judges should "assiduously guard" against relying on myths and stereotypes about family violence in their reasoning processes.[25] This appeal presents the Court with the opportunity to do the same and confirm that myths and stereotypes about family violence, like those about sexual assault, "have no place in a rational and just system of law".[26]

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[17] *Family Law Act*, SBC 2011, c 25.
[18] *Provincial Court Family Rules*, BC Reg 120/2020; Zanetti Affidavit, *supra* note 2, at paras. 16(c), 16(d) and 16(g); Law Affidavit, *supra* note 5, at paras. 13(b), 14(a), and 14(d).
[19] Deanne Sowter and Jennifer Koshan, ""Weaponizing" The Tort of Family Violence? Myths, Stereotypes, Lawyers' Ethics and Access to Justice" (*under review*) [Weaponizing The Tort].
[20] Jennifer Koshan, "Challenging Myths and Stereotypes in Domestic Violence Cases," (2023) 35-1 Canadian Journal of Family Law 33 [Koshan 2023].
[21] See, *e.g.*, *R v. Lavallee*, 1990 CanLII 95 (SCC), [1990] 1 SCR 852 [*Lavallee*] and *R. v. Malott*, 1998 CanLII 845 (SCC), [1998] 1 SCR 123 [*Malott*].
[22] *Michel*, *supra* note 8, at paras 85-86 & 95.
[23] *Colucci*, *supra* note 8, at para 99.
[24] *Barendregt*, *supra* note 8, at paras 143 & 184.
[25] *K.M.N.*, *supra* note 13, at para. 122.
[26] *R. v. A.G.*, 2000 SCC 17, at para. 2. See also, *Kruk*, *supra* note 11, at paras. 43.

a. Myths and stereotypes about family violence are pervasive in tort and family law proceedings

19. This Court has recognized women's often disadvantaged position in the context of family violence, the economic consequences of relationship breakdown, and family law proceedings.[27] Myths and stereotypes perpetuate this disadvantage.

20. Myths and stereotypes are widely held ideas that are not empirically true but arise from disadvantageous beliefs, attitudes, and narratives.[28] Myths and stereotypes about family violence remain all too common in civil claims, including in family law proceedings, in submissions by parties, and in judicial reasoning.[29] The Appellant's factum describes common myths and stereotypes in family law proceedings, and the ways they inappropriately impact credibility assessments of survivors, [30] limit damage awards for torts related to family violence,[31] and feed a desire to reduce conflict between parties even where this may result in "might over right".[32]

21. The pervasive nature of myths and stereotypes about family violence can be seen in this case. The Ontario Court of Appeal's analysis imported reasoning based on myths and stereotypes, for example about "weaponization" of family law proceedings.[33] At trial, cross-examination and submissions relied on stereotypes that "real" family violence is reported to police and that true survivors do not stay in abusive relationships.[34]

b. This Court should prohibit reliance on myths and stereotypes

22. This Court has long recognized that the law must expunge myths and stereotypes about sexual violence and that it is an error of law to rely on them in adjudicating charges of sexual

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[27] *Michel, supra* note 8, at paras. 90 and 95-96.
[28] Koshan 2023, *supra* note 20, at 38; definition accepted in *K.M.N.*, *supra* note 13, at para. 110.
[29] *K.M.N.*, at para. 125, *Shipton v. Shipton*, 2024 ONCA 624 at paras. 60-63.
[30] SCC Court File No. 41061, Factum of the Appellant, at para. 86 [Appellant's Factum].
[31] Appellant's Factum, at para. 36.
[32] Appellant's Factum, at paras. 61-64.
[33] Appellant's Factum, at para. 70.
[34] *Ahluwalia v Ahluwalia*, 2022 ONSC 1303, at paras. 28, 63, 65 and 74 - 76.

assault.[35] In *R v Kruk*, this Court clarified that the prohibition against reliance on myths and stereotypes is grounded in the need to "remove discriminatory legal rules that contributed to the view that women, as a group, were less worthy of belief and did not deserve legal protection against sexual violence."[36] Justice Martin also commented that it "remains open" to parties in future cases to argue that analogous myths and stereotypes exist in other legal contexts and that reliance on such myths and stereotypes should be treated as errors of law.[37]

23. Myths and stereotypes about family violence are grounded in the same gendered social misconceptions about women as are myths and stereotypes about sexual assault and the myths and stereotypes about intimate partner violence recognized in the criminal context.[38] They conceal the law's inadequacy in redressing the harms survivors face. In particular, myths and stereotypes about family violence explain the abuse in a way that exonerates the abuser and blames the victim.[39] They have particular and disproportionate impacts on survivors who experience intersecting inequalities, including Indigenous women, racialized women, and women with disabilities, who face heightened risks of violence while also being more susceptible to prejudicial beliefs about their credibility and reliability.[40]

24. The legal mischief produced by myths and stereotypes about family violence is comparable to the mischief associated with myths and stereotypes about sexual assault. Both types of myths and stereotypes undermine trial fairness by impeding the equal treatment of survivors

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[35] Most recently, see *Kruk*, *supra* note 11, at paras. 38-43.
[36] *Kruk*, at para. 31.
[37] *Kruk*, at para. 96. As recognized in *Kruk*, such a prohibition would not be "unbounded". It would not prevent reliance on evidence that supports an argument that would, without such evidence, amount to an assumption based on myths and stereotypes.

[38] *Ahluwalia ONCA*, *supra* note 1, at para. 1; Joint Federal/Provincial Commission into the April 2020 Nova Social Mass Casualty, Mass Casualty Commission. "Final Report – Turning the Tide Together: Vol. 3 - Violence" (March 2023) at pp. 373-379 online (pdf): https://masscasualtycommission.ca/files/documents/Turning-the-Tide-Together-Volume-3-Violence.pdf [Turning the Tide, Volume 3]; see also, *Lavallee*, *supra* note 25, and *Malott*, *supra* note 25.
[39] Koshan 2023, *supra* note 20, at pp. 52-55.
[40] Turning the Tide, *supra* note 38, at pp. 373-379; Patrina Duhaney, "Criminalized Black Women's Experiences of Intimate Partner Violence in Canada" (2022) 28:11 Violence Against Women 2765, at pp 2767 & 2777-2780.

and undermining the courts' truth-seeking function.[41] They both artificially undermine the credibility of survivors and distort fact-finding – for example, by ignoring or minimizing the harms of family violence. They may also re-traumatize the survivor by subjecting them to invasive, humiliating, and ultimately irrelevant lines of inquiry.[42] Ultimately, both types of myths and stereotypes deny survivors equal legal protection from the gendered harms they face, and so rob them of the equal benefit of the law.[43]

25. West Coast LEAF and Rise will argue that this Court should endorse a comprehensive prohibition against reliance on myths and stereotypes about family violence in tort and family proceedings. The proposed prohibition would build on the Court's implicit repudiation of some myths and stereotypes about intimate partner violence in family law cases, and the Court's criminal law jurisprudence prohibiting reliance on myths and stereotypes in the adjudication of sexual assault charges.

26. The proposed interveners will invite the Court to define the prohibition as follows. First, in interpreting, applying and developing the law, courts must avoid reliance on myths and stereotypes about family violence. Second, a decision-maker's reliance on myths or stereotypes about family violence in fact-finding or legal reasoning will constitute reviewable error. Third, to reinforce the prohibition, courts should intervene against advocacy that incorporates or relies upon myths or stereotypes about family violence.[44]

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[41] *Kruk, supra* note 11, at para. 35 & 54.
[42] Koshan 2023, *supra* note 20, at pp. 57; Katirai Negar, "Retraumatized in Court" (2020) 62 Ariz L Rev 81, at pp. 85-86; Deborah Epstein & Lisa A. Goodman, "Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences" (2019) 167:2 U Pa L Rev 399, at pp. 447-451.
[43] Donna Martinson & Margaret Jackson, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases" (2017) 30 Can J Fam L 11, at pp. 34-35; Koshan 2023, *supra* note 20, at pp. 35; *Kruk*, *supra* note 11, at para. 31.
[44] Deanne Sowter, "Intimate Partner Violence and Ethical Lawyering: Not Just Special Rules for Family Law" (2024) 102 Can Bar Rev 130 at pp. 141-145 and 163; Weaponizing The Tort, *supra* note 19.

c. This Court should apply the proposed prohibition against family violence myths and stereotypes in deciding whether to recognize the Tort

27. West Coast LEAF and Rise will argue that the Court should apply the proposed prohibition in addressing the question on appeal. The prohibition will assist the Court to determine whether the Tort is required to make the law more responsive to survivors' needs, or whether the existing law is adequate or may be improved with adjustments short of recognizing a new cause of action at common law.

28. First, the prohibition will assist the Court in determining whether the law currently fails to provide survivors with appropriate remedies for the harms of family violence. The proposed interveners will show that the prohibition is a necessary tool for measuring the adequacy of existing remedies and assessing whether the law leaves a gap that cries out to be filled.[45]

29. Second, the prohibition will be useful in assessing whether existing torts, such as assault or intentional infliction of emotional distress, themselves embed myths and stereotypes in the common law, to the detriment of survivors. This assessment will help to identify areas of mismatch between the harms of family violence and existing tort law, and will aid the Court in determining whether contemporary tort law is properly equipped to address the insidious harms of family violence.[46]

30. Third, the prohibition is an appropriate standard against which to measure the likely impact of the Tort on the legal system and, if recognized, to provide guidance to prevent its misuse. By explicitly acknowledging the need to avoid myths and stereotypes, the prohibition will allow the Court to assess whether recognition of the Tort would represent an incremental and appropriate extension of the law, consistent with equality values.

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[45] *Nevsun Resources Ltd v Araya*, 2020 SCC 5, at paras. 238–240 [*Nevsun*], per Brown and Rowe JJ, dissenting in part.

[46] *Nevsun.* at paras. 237 and 241.

PART IV – SUBMISSIONS ON COSTS

31. West Coast LEAF and Rise seek no costs for this application and ask that none be awarded against them.

PART V – ORDER

32. West Coast LEAF and Rise request that they be granted leave to jointly intervene in this appeal on the following terms:

    a. permission to file a factum in accordance with Rules 37 and 42;

    b. permission to make oral argument at the hearing of this appeal; and

    c. such further or other terms as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Vancouver, in the Province of British Columbia, this this 9th day of September 2024.

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Monique Pongracic-Speier, KC, Kate Feeney, Gita Keshava, Rosanna Adams

PART VI – TABLE OF AUTHORITIES

Caselaw:

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1.	*Ahluwalia v. Ahluwalia*, 2023 ONCA 476	3, 23
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14.	*R. v. Kirkpatrick*, 2022 SCC 33	15
15.	*R v Kruk*, 2024 SCC 7	15, 18, 22, 24
16.	*R. v. Malott*, 1998 CanLII 845 (SCC), [1998] 1 SCR 123	18, 23
17.	*Shipton v. Shipton*, 2024 ONCA 624	20
18.	*Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 5	14

Secondary Sources:

No.	Secondary Source	Paragraph Reference
1.	Deanne Sowter, "Intimate Partner Violence and Ethical Lawyering: Not Just Special Rules for Family Law" (2024) 102 Can Bar Rev 130	26
2.	Deanne Sowter and Jennifer Koshan, ""Weaponizing" The Tort of Family Violence? Myths, Stereotypes, Lawyers' Ethics and Access to Justice" (*under review*).	18

No.	Secondary Source	Paragraph Reference
3.	Deborah Epstein & Lisa A. Goodman, "Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences" (2019) 167:2 U Pa L Rev 399	24
4.	Donna Martinson & Margaret Jackson, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases" (2017) 30 Can J Fam L 11, at pp. 34-35	24
5.	Haley Hrymak and Kim Hawkins, "Why Can't Everyone Just Get Along? How BC's Family Law System Puts Survivors in Danger" (Vancouver: Rise Women's Legal Centre, 2021)	16
6.	Jennifer Koshan, "Challenging Myths and Stereotypes in Domestic Violence Cases," (2023) 35-1 Canadian Journal of Family Law 33	18, 20, 23, 24
7.	Katirai Negar, "Retraumatized in Court" (2020) 62 Ariz L Rev 81	24
8.	Patrina Duhaney, "Criminalized Black Women's Experiences of Intimate Partner Violence in Canada" (2022) 28(11) Violence Against Women 2765	23
9.	SCC Court File No. 41061, Factum of the Appellant	20, 21
10.	SCC Court File No. 41061, Respondent's Response to Application for Leave to Appeal	21
11.	Joint Federal/Provincial Commission into the April 2020 Nova Social Mass Casualty, Mass Casualty Commission. "Final Report – Turning the Tide Together: Vol. 3 - Violence" (March 2023) online (pdf): https://masscasualtycommission.ca/files/documents/Turning-the-Tide-Together-Volume-3-Violence.pdf	23

Statutes, Regulations, Rules, etc.:

No.	Statute, Regulation, Rule, etc.	Paragraph Reference
1.	*Family Law Act*, SBC 2011, c 25.	17
2.	*Provincial Court Family Rules*, BC Reg 120/2020	17