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Compromise on Parenting and Family Violence? Reforms to Canada's Divorce Act

Robert Leckey[1]

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Abstract

This paper contributes to international feminist debates on shared parenting and family violence via reforms to Canada's Divorce Act, in force since 2021. Looking backwards, it reviews parliamentary debates and early judicial discussions. The documentary review reads the reforms as an unstable compromise between calls from feminist voices and experts on family violence and from groups representing fathers. Family violence is now defined broadly and declared relevant to children's welfare. But language in the statute may undermine its seriousness. Exposing the tensions underlying these reforms is useful for Canadian participants in family justice and for scholars, practitioners, and policy-makers elsewhere, exemplifying the promise and perils of reform in this area. Looking ahead, the paper offers recommendations to higher courts. Appellate judges should read rules on contact with both parents and parental cooperation in the light of the new recognition of family violence, taking the latter as an overarching objective of the statute.

Keywords Best interests of the child · Contact · Family law reform · Family violence · Shared parenting

Introduction

Under the overall goal of promoting children's welfare, laws on parenting aim to express an ideal of post-separation parental harmony and to furnish workable rules for the few cases to reach adjudication. This paper advances knowledge and contributes to feminist debates on such laws via reforms to the Parliament of Canada's Divorce Act, effective 1 March 2021.[1] These long-awaited amendments amount to

[1] Bill C-78, An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act, 1st Sess, 42nd Parl (assented to 21 June 2019), SC 2019, c 16.

✉ Robert Leckey
robert.leckey@mcgill.ca

[1] Faculty of Law, McGill University, 3644 Peel Street, Montreal, QC H3A 1W9, Canada

the first overhaul of its parenting provisions since passage of that statute in 1986. Among other things, they define family violence and stipulate its relevance to parenting decisions. Parliament replaced the language of 'custody' and 'access' with terms that ostensibly centre parental functions, while rejecting calls to enact a presumption of equal parenting. The reforms came in the wake of scholarly and parliamentary exchanges that drew on international sources and examples, including feminist research on Australia's provisions on equal parenting.

From a posture of wariness, if not paranoia (Sedgwick 2003, 125), this paper examines the Canadian reforms as a potentially fragile and unstable compromise between calls from feminist voices and experts on family violence and from groups representing fathers. The reforms' precursor was a bicameral report (Special Joint Committee on Child Custody and Access 1998) that had emerged from a contentious and highly polarising process (Laing 1999; Boyd 2001; 2004a; 2004b). Hearings branded as a 'gender war zone' (Bala 1999), during which policymakers engaged in a "diplomatic process" of "walking the line between women's groups and fathers' rights groups" (Rhoades and Boyd 2004, 127), had led to proposals with conflicting aims (Cossman and Mykitiuk 1998, 73; Bala 1999, 226). Admittedly, legislation often reflects compromises between competing demands (Farber and O'Connell 2010), including in family law (Maclean and Kurczewski 2011). But the Divorce Act's "compromise solution" (Brown 2022, 251) on parenting differs from one by which, say, Parliament fixes 16 as the age of consent over calls to go higher and lower. Instead of staking out a workable middle ground, subjecting discretionary decisions to conflicting factors may task the judiciary with hard choices on family policy.

Janus-faced, this paper looks to the past and the future. Looking backward, it reviews documentary sources to expose the contending ideas that propelled the 2019 reforms. The paper sets the scene with a survey of the former legislation, critical scholarship on themes including violence and shared parenting, and a selective overview of the amendments. Then it presents parliamentarians' avowed expectations for the reforms, including regrets that they did not go further (in incompatible ways). Next follow early judicial treatments of the reforms, including the first by the Supreme Court of Canada. It will become plain that readings of the reforms differ, as did those of the prior law. There are diverging views on the value of the terminological changes. The recognition of family violence has generated praise. But Parliament's failure to specify the gendered nature of that phenomenon has disappointed some. There is disagreement on the impact of tweaks to the legislative language on involvement by both parents in a child's life.

Complementing the emerging scholarly assessment of judgments applying the revised Divorce Act (see e.g. Bala 2022), this paper makes a major contribution by studying the parliamentary debates. Highlighting the tensions that animated the reforms while they are recent may help Canadian participants in family justice to strategise and make more informed decisions. For example, advocates who plead the new provisions on family violence might frame counterarguments to address Parliament's conflicting signals. The paper's backward look may instruct scholars, practitioners, and policymakers elsewhere, including in England and Wales, where the presumption that parental involvement furthers the child's welfare is under review

(Ministry of Justice 2020, 4–5).[2] It occasions fresh analysis of the pitfalls and potential of such reforms.

Looking forward, the paper makes a further contribution in its final part. Building on the critical feminist scholarship, it offers recommendations for lawyers and judges. Appellate courts might detect in the amendments an overall objective for the Divorce Act of protecting individuals from family violence. This broad objective could then condition judges' approach to the provisions on involvement by both parents, even where Parliament preserved language from the former statute. Moreover, judges should deploy procedural law to mitigate the risk that, by expanding the relevant evidence, the amended statute's many-factored lists will undermine access to justice, especially for women.

Approach

This part identifies strands of theorising that condition the paper and lays out the categories of documentary sources in the backward-looking parts. The overview of the debates and early case law on shared parenting and family violence may prove useful to readers who reject the recommendations. Yet that overview fits within this paper's integrated contribution to feminist debates, reflecting editorial choices informed by sources identified in the following paragraphs. It is thus unhelpful to contrast the documentary review—ostensibly neutral—with recommendations voiced in a normative register.

One useful resource through which the paper assesses its material is socio-legal scholars' observations of the dynamic, unpredictable processes of statutory interpretation. A statute's meaning may resist authoritative settlement and reduction to discrete propositions (Macdonald 1987, 491). Moreover, changes need not be textual and explicit but may arise non-textually and implicitly (Macdonald and Kong 2006, 32–45). Such distinctions bring into view how social and judicial practices in family matters can reform the law—implicitly and non-textually—despite legislative inaction (Leckey and Favier 2016). Conversely, explicit, textual reforms may not yield the changes intended. Family law's impact is unpredictable, with "no necessary causal relationship between legislative change and social, or even legal, outcomes" (Boyd 2004c, 266; see generally Ivanyi and Tremblay 2022).

The other fruitful resource is the skepticism about law reform, on the part of feminist and other critical scholars. Legislation will never be a sufficient response to inequalities and oppression (Armstrong 2004; 2006) and may offer an "illusion of protection" (see generally Hunter 2002; Anitha and Gill 2009). Arguably, the "resort to law … legitimates law even while individual legal statutes or legal practices are critiqued" (Smart 1989, 161). Reforms that are "a cause for feminist celebration", such as those on rape, may have "no appreciable impact" on the justice system and community (Larcombe 2014, 67). This cautionary vein of scholarship, combined with critical research on family violence presented in the second section of the subsequent part, provide the paper's feminist grounding.

[2] Children Act 1989, s 1(2A).

The documentary review situates the reforms to the Divorce Act in relation to three types of conventional legal sources. While there are recurring themes, the sources' different origins and potential interpretive function justify separating them. The first is international scholarship, much of it avowedly feminist, on laws addressing parenting and violence. A second is debates in the House of Commons and Senate of Canada (26 September 2018–18 June 2019). This primary source may eventually receive slight weight in statutory interpretation (Sullivan 2022, 646–73). But the debates' primary vocation here is to illustrate the discursive context from which the amendments issued (Reece 2011; see also Harding 2015; Leckey 2020). The third source is the early case law. It includes selected first-instance decisions and the Supreme Court of Canada's initial discussion of the reforms, ventured over one judge's protest "without the benefit of submissions and of a full evidentiary record".[3] As the jurisprudence develops, future research can study more systematically the judicial impact of the changes. Analysis of sources summarising and interpreting the reforms, such as materials for professional continuing education or public education, would complement this project (for such analysis in other contexts, see e.g. Reece 2015; Grieshofer 2022).

Research context

A selective presentation of the Divorce Act pre-reform will help readers to see the relevance to the Canadian context of insights from critical scholarship on violence, shared parenting, and the limits of law reform.

Prior act

The Parliament of Canada's Divorce Act applies during and after divorce proceedings; often it interacts with provincial family laws (Leckey and Rogerson 2017, 578–81). Family statutes may shape negotiations but, with "over 90 percent of divorce cases" resolved without a trial (Mossman et al. 2019, 415), judges apply them in just a fraction of cases, often those marked by serious conflict (Poitras et al. 2021).

The Divorce Act formerly authorised a competent court to "make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage".[4] 'Custody' was defined as "includ[ing] care, upbringing and any other incident of custody".[5] On a widespread (if controversial) reading, a parent who received custody became a "winner", in opposition to a "loser", who received a mere right to access (Parkinson 2014, 337; Bala 2015, 454; see also Bala et al. 2017, 514). This dynamic may have "poisoned" judicial proceedings and relations between former spouses (Dalphond and Nag 2019, 264 [author's translation]).

[3] *Barendregt v Grebliunas*, 2022 SCC 22, 469 DLR (4th) 1 at para 192, Côté J, dissenting.

[4] Divorce Act (1986), s 16(1).

[5] Divorce Act (1986), s 2(1) "custody".

The criterion for decision-making was the best interests of the child, left to judicial discretion by broad reference to a child's "condition, means, needs and other circumstances" (Bala 1986; Ehrcke 1987).[6] While there was no mention of family violence, two provisions about parental conduct qualified the court's discretion. One instructed courts to ignore past conduct "unless … relevant to the ability of that person to act as a parent of a child".[7] Positively, this qualifier may have helped to inaugurate a no-fault regime. Negatively, it may have discouraged judges from considering family violence when allocating custody (Boyd 2003a, 188–9).

The other qualifier, containing two elements, was glossed by the marginal note 'Maximum contact'. Former subsection 16(10) directed courts that a child should have "as much contact with each spouse as is consistent with the best interests of the child".[8] Next, to that end, courts had to consider "the willingness of the person for whom custody is sought to facilitate such contact"[9]—the 'friendly parent' rule. This provision drew criticism for favouring contact with even violent parents over children's safety and security (Rosnes 1997; Neilson 2000; 2003, 13; Cohen and Gershbain 2001; Kelly 2011; Bourassa 2021, 34, 93–4; but for a less pessimistic reading, see Clark 1990). In virtue of this rule, a parent who alleged violence by the other but failed to prove it might appear 'unfriendly' and uncooperative, even guilty of parental alienation (see generally Zaccour 2018; Sheehy and Boyd 2020; compare Paquin-Boudreau et al. 2022). In addition, the "important caveat" subordinating contact to the child's welfare may have been "oft-ignored" (Boyd 2003a, 131).

Critical scholarship

The present enterprise is informed by scholarship on legislative options regarding violence; the international push to foster active parenting by separated spouses; the intersection of violence and ongoing parental involvement; and the limits of law reform.

There have long been calls for legislation to stipulate the relevance of evidence of abuse in custody decisions (see e.g. Cahn 1991, 1090–1). Doing so might clarify the law and aid the education of lawyers, judges, and other professionals (Bala 1996, 284–5). Arguably, definitions of domestic violence need to be broad, extending to psychological violence and coercive control (Johnson 2008; Wright 2013; Côté and Lapierre 2021). Although a gendered lens may often be appropriate, given women's disproportionate position as victims or survivors (Bala 1996), men's advocates have sought to delegitimise such gendered constructions (Mann 2008). A legislature might enact a rebuttable presumption against custody for a battering parent (Lemon 2001; Bolotin 2008; for cautions, Garvin 2016). Or it might 'stream' cases with family violence away from those without (Grant 2005), including into specialised courts (Koshan 2018).

[6] Divorce Act (1986), s 16(8).

[7] Divorce Act (1986), s 16(9).

[8] Divorce Act (1986), s 16(10).

[9] Divorce Act (1986), s 16(10).

An international legislative trend has arisen from "men's complaints and government concerns about the legal position of non-custodial fathers" (Rhoades 2002b, 79–80 [footnote omitted]). Australia's presumption that equal, shared parental responsibility is in children's best interests has drawn substantial attention across two rounds of reform. On a negative reading, that country's reforms did more to uphold parents' rights than to respect children's welfare (Daniel 2009). A focus on shared parenting may burden mothers with addressing "the 'problem' of contact" with the nonresident parent (see generally Rhoades 2002a; Wallbank 2007, 218). Some expressed hope that Canada would avoid the errors of Australian legislation (Boyd 2003b). On a more optimistic view, Australia's experience offers "positive and negative lessons" (Parkinson 2014, 315). Meanwhile, a child's adaptation to post-separation life may depend more on the familial environment than on the mode of custody (Otis and Otis 2007; on the complexity of living arrangements and outcomes, see Galbraith and Kingsbury 2022). Relatedly, the benefit of regular contact with both parents may depend on low conflict and robust cooperation (Fehlberg et al. 2011), traits that judicial orders may not foster among the high-conflict minority of cases to reach court.

Questions of violence and of equal or shared parenting are often in tension. A presumption of joint custody may be "dangerous for victims of spousal abuse" (Greenberg 2005, 404). Legislating to recognise violence and to encourage contact by both parents post-separation may send "contradictory messages" (Rhoades 2002b, 103; see also Rathus 2020, 5). Reforms targeting spousal abuse "can be overwhelmed by other custody and access considerations" (see also Armstrong 2001, 130; Grant 2005, 90; Rhoades 2012), including "normative assumptions about the value of shared parenting" (Boyd and Lindy 2016, 102).

Lastly, research underlines the limits of law reform. The small number of adjudicated disputes makes it hard to pinpoint the social change attributable to Australia's amendments (Parkinson 2014, 327). The presumption favouring contact in England and Wales may make little difference in judicial practice, although harming women and children when it does (Kaganas 2018). Important as legislative recognition of domestic violence may be, better enforcing prior laws and bolstering support services are also essential (Bala 1996, 285) (as would be redressing the socio-economic inequalities that impede women's exit from abusive relationships). Social change and collective action might be needed to foster an evolution of professional 'knowledge' about abuse (Neilson 1997). Whatever language the legislature adopts, training is required to help judges develop it on the ground (Winstock 2014; Martinson and Jackson 2017; see e.g. Jaffe et al. 2018). Furthermore, if legislation does not guarantee change, change may arise without it, exemplifying the implicit, non-textual reform mentioned above. For instance, a norm of shared parenting may have emerged in Canada during decades of legislative inaction (Kirouack 2007; Boyd 2013; Côté and Gaborean 2015), just as a presumption of parental involvement may have preceded in practice one's insertion into the Children Act 1989 (Harwood 2021).

The 2019 amendments

Canada's reforms aimed to reaffirm children's best interests as the criterion for orders about them; to replace terminology based on custody and the right to access; to address family violence; to encourage parents to dejudicialise their disputes, including by encouragement of making voluntary "parenting plans" and introduction of procedures for a parent's intended relocation with a child; and to facilitate the payment of maintenance (Dalphond and Nag 2019, 261–2). For present purposes, the overlapping first three aims are of interest.

In a "linguistic, sociological, and legislative revolution" (Kirouack 2019, 36 [author's translation]), "[f]undamental legislative changes" (Payne and Payne 2022, 565) replaced the focus on child custody and access with several concepts related to 'parenting'. The "modernised" terminology (Bourassa 2021, 3 [author's translation]) is thought to be "more child-focused, with a greater emphasis on the actual tasks of parenting" (Lynch 2019, 102). Henceforth, the Divorce Act authorises judges to craft "parenting orders".[10] Such orders may allocate "parenting time"—by default accompanied by authority to make day-to-day decisions affecting the child during such time.[11] Distinct from parenting time, courts may assign "decision-making responsibility", relating to major matters such as a child's health, religion, and significant extracurricular activities.[12] A court may also make a "contact order" to allow an individual, for instance a grandparent, to spend time with a child.[13]

The reforms centred the "best interests of the child" as the criterion for parenting decisions.[14] A new provision directs that courts, when determining the best interests of the child, "shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being".[15] Parliament largely codified factors identified by case law or in provincial statutes. It rejected the suggestion—made on behalf of fathers—to enact a presumption of "shared" or "joint" custody (Dalphond and Nag 2019, 267 [author's translation]). The language on shared parenting underwent amendment. A new subsection 16(6) instructs a court to "give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child". The marginal note 'Maximum contact' has changed: the initial proposal of 'Maximum parenting time' gave way to "Parenting time consistent with best interests of the child" (Standing Senate Committee on Legal and Constitutional Affairs 2019, 4). Yet, in a sign of continuity, the new list of factors relevant to a child's welfare in subsection 16(3) retains from the former 'friendly parent' rule "each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse"[16] and "the ability and

[10] Divorce Act, s 16.1(1).

[11] Divorce Act, ss 2(1) "parenting time", 16.2(2).

[12] Divorce Act, ss 2(1) "decision-making responsibility", 16.3.

[13] Divorce Act, s 16.5(1).

[14] Divorce Act, ss 16(1), 16(3).

[15] Divorce Act, s 16(2).

[16] Divorce Act, s 16(3)(c).

willingness" of affected persons "to communicate and cooperate, in particular with one another, on matters affecting the child".[17]

Finally, the factors on best interests now include 'family violence'. A "modern and extended definition" (Dalphond and Nag 2019, 296 [author's translation]) recognises that "family violence takes many forms and … can cause significant harm to both victims and witnesses" (Payne and Payne 2022, 568). 'Family violence' means conduct, criminal or not, "that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person".[18] Following scholarly consensus (Chiesa et al. 2018), Parliament added to the list a child's "direct or indirect exposure" to conduct constituting family violence.[19] The definition offers nine examples of family violence, such as "psychological abuse",[20] "financial abuse",[21] and "threats to kill or harm an animal or damage property".[22] Although triggering no set outcome, a finding of family violence requires a court to consider six factors, including its "nature, seriousness and frequency".[23] It remains to be seen how often judges will find family violence that is not serious enough to affect the parenting order (on British Columbia's statute, see Boyd and Lindy 2016, 118). Parliament may have muddied its message on family violence by making relevant to a child's welfare the "ability and willingness" of a perpetrator to care for a child (Neilson and Boyd 2020, 10–2).[24] Might this language evoke varieties of family violence, making it possible for a child to maintain contact with a perpetrator of situational or common couple violence? Parliament's attention to indirect exposure of a child to family violence arguably militates against such a reading by increasing the likelihood that violence between spouses will be relevant to parenting. While the Divorce Act moderates its strong steer towards alternative dispute resolution (ADR) by acknowledging that such means will not always be "appropriate",[25] it neither cautions against ADR in cases of family violence nor requires professionals to screen for family violence (Koshan et al. 2020, 152).

Although long in the making, these amendments were ultimately adopted in haste. Major concerns about the potential interpretation of the proposed section 16 reached the Standing Senate Committee on Legal and Constitutional Affairs. But, since the pending dissolution of Parliament precluded further amendments, the committee merely filed ten "observations", calling to review the legislation within five years (Standing Senate Committee on Legal and Constitutional Affairs 2019, 6).

[17] Divorce Act, s 16(3)(i).

[18] Divorce Act, s 2(1) "family violence".

[19] Divorce Act, s 2(1) "family violence".

[20] Divorce Act, s 2(1) "family violence" (f).

[21] Divorce Act, s 2(1) "family violence" (g).

[22] Divorce Act, s 2(1) "family violence" (h).

[23] Divorce Act, s 16(4)(a).

[24] Divorce Act, s 16(3)(j)(i).

[25] Divorce Act, ss 7.3, 7.7(1), 7.7(2)(a).

Conflicting parliamentary aspirations

The debates reviewed in this part suggest that the reforms sought to take on board potentially conflicting aims. While the reforms garnered support beyond the governing Liberal Party of Canada, doubts and criticisms were voiced about the terminological changes, the recognition of family violence, and the approach to shared parenting.

Terminology

Many lawmakers praised the terminological changes, endorsing the view of the prior language of "custody" and "access" as "fuelling" parental conflict,[26] casting children "as the spoils of war" in "a contested, gladiatorial struggle to win custody".[27] The justice minister introducing the bill called those terms "relics from property law, reflecting a time when children were legally considered to be their parents' property".[28] The bill "replaces the terminology pertaining to custody and access with terms that reflect the parental role"[29] and might "help parents collaborate and focus on their child's best interests".[30] There was skepticism, however, about the new language. Whatever the wording, divorce is inevitably "an emotional experience and with children in the mix, reason sometimes escapes the participants".[31] Perhaps "simply changing the terminology w[ould] not in the end make a huge difference",[32] especially if sufficient efforts were not made to provide individuals with the "necessary tools" to assist in resolving family disputes.[33] Parental fights over custody might "turn into fights over who has 'decision-making responsibility'"[34] (and more parenting time).

[26] House of Commons Debates, 42-1, No 326 (26 September 2018) at 21,866 (Hon Jody Wilson-Raybould).

[27] House of Commons Debates, 42-1, No 374 (30 January 2019) at 25,039 (Elizabeth May).

[28] House of Commons Debates, 42-1, No 326 (26 September 2018) at 21,866 (Hon Jody Wilson-Raybould). See also similarly House of Commons Debates, 42-1, No 332 (4 October 2018) at 22,202 (Michael Cooper); Senate Debates, 42-1, No 273 (21 March 2019) at 7,685 (Hon Julie Miville-Dechêne); House of Commons Debates, 42-1, No 326 (26 September 2018) at 21,870 (David Tilson); Senate Debates, 42-1, No 267 (26 February 2019) at 7,466 (Hon Pierre Dalphond).

[29] House of Commons Debates, 42-1, No 374 (30 January 2019) at 25,042 (Luc Berthold); also House of Commons Debates, 42-1, No 332 (4 October 2018) at 22,220; House of Commons Debates, 42-1, No 326 (26 September 2018) at 21,870 (David Tilson); House of Commons Debates, 42-1, No 332 (4 October 2018) at 22,215 (John Brassard).

[30] House of Commons Debates, 42-1, No 326 (26 September 2018) at 21,866 (Hon Jody Wilson-Raybould).

[31] House of Commons Debates, 42-1, No 326 (26 September 2018) at 21,870 (David Tilson).

[32] House of Commons Debates, 42-1, No 332 (4 October 2018) at 22,209 (Cathay Wagantall); see similarly House of Commons Debates, 42-1, No 332 (4 October 2018) at 22,211 (Blake Richards).

[33] House of Commons Debates, 42-1, No 332 (4 October 2018) at 22,209 (Cathay Wagantall).

[34] House of Commons Debates, 42-1, No 326 (26 September 2018) at 21,871 (David Tilson).

Violence

For the minister tabling the reforms, redressing the Divorce Act's "conspicuous[]" silence on family violence was overdue.[35] The bill's champion in the Senate called family violence "a devastating reality of life" for too many Canadians, "particularly for women".[36] The definition of family violence received praise as "evidence-based", one "that highlights common indicators of abusive behaviour".[37] "[I]ntentionally broad",[38] it gives examples without "a closed list".[39] The gender-neutral definition was said to be "all-encompassing", recognising that family violence "can impact persons of all genders".[40] Inclusion of a child's direct or indirect exposure to violent conduct was "important" because a majority of victims of spousal violence believed their child had witnessed violence.[41]

Predictably, the proposals drew criticism. One was that the "subjective" legislative language about family violence would leave "everything" to the courts.[42] The reform proposed "still makes the woman responsible for proving the father's violent behaviour".[43] Echoing scholarly criticism of the 'friendly parent' rule, a senator expressed concern about how "the new paragraphs 16(3)(c) and (i), relating to parental willingness and ability to communicate and work together", would interact with family violence.[44] Several speakers objected that the definition of family violence, although capacious, omitted to name the experiences of those groups it disproportionately harms. Moreover, the definition failed to recognise the phenomenon as "gendered and intersectional".[45] In particular, there was thus a "risk of excluding the voices of Indigenous LGBTQ2I and Two-Spirited communities" (for critical context, see National Inquiry into Missing and Murdered Indigenous Women and

[35] House of Commons Debates, 42-1, No 326 (26 September 2018) at 21,867 (Hon Jody Wilson-Raybould); see also House of Commons Debates, 42-1, No 332 (4 October 2018) at 22,205 (Randeep Sarai); Senate Debates, 42-1, No 275 (2 April 2019) at 7,716 (Hon Donna Dasko).

[36] Senate Debates, 42-1, No 267 (26 February 2019) at 7467 (Hon Pierre Dalphond); see also House of Commons Debates, 42-1, No 332 (4 October 2018) at 22,205 (Randeep Sarai) (Chief Public Health Officer of Canada having "identified family violence as an important public health issue").

[37] House of Commons Debates, 42-1, No 326 (26 September 2018) at 21,867 (Hon Jody Wilson-Raybould); see also House of Commons Debates, 42-1, No 332 (4 October 2018) at 22,201 (Nick Whalen); House of Commons Debates, 42-1, No 332 (4 October 2018) at 22,203 (Arif Virani); House of Commons Debates, 42-1, No 374 (30 January 2019) at 25,036 (Brigitte Sansoucy).

[38] Senate Debates, 42-1, No 305 (18 June 2019) at 8,706 (Hon Pierre Dalphond).

[39] House of Commons Debates, 42-1, No 374 (30 January 2019) at 25,039 (Elizabeth May).

[40] House of Commons Debates, 42-1, No 374 (30 January 2019) at 25,035 (Michael Cooper); see also House of Commons Debates, 42-1, No 374 (30 January 2019) at 25,039 (Elizabeth May) (not all cases involving cisgendered individuals in heterosexual relationships).

[41] Senate Debates, 42-1, No 267 (26 February 2019) at 7467 (Hon Pierre Dalphond).

[42] House of Commons Debates, 42-1, No 326 (26 September 2018) at 21,873 (Brigitte Sansoucy).

[43] Senate Debates, 42-1, No 273 (21 March 2019) at 7,686 (Hon Julie Miville-Dechêne).

[44] Senate Debates, 42-1, No 275 (2 April 2019) at 7,716 (Hon Donna Dasko).

[45] Senate Debates, 42-1, No 275 (2 April 2019) at 7,716 (Hon Donna Dasko); see also Senate Debates, 42-1, No 275 (2 April 2019) at 7,717 (Hon Yvonne Boyer); House of Commons Debates, 42-1, No 374 (30 January 2019) at 25,034, 25,041 (Brigitte Sansoucy); Senate Debates, 42-1, No 273 (21 March 2019) at 7,685 (Hon Julie Miville-Dechêne).

Girls 2019).[46] Parliamentarians seconded the literature on the need to complement legislative reform with training for workers in the justice system, with a view to culture change.[47] For example, tragedies in a province where legislation already linked family violence to children's best interests showed legislation's limits.[48]

Shared parenting

The second justice minister to sponsor the bill noted that "most were strongly opposed" to a presumption of equal shared parenting.[49] Such a presumption would undermine the commitment to "tailor parenting orders to the needs of each particular child".[50] Presumptions of equal parenting had "been tried" and "failed" elsewhere.[51] A presumption could endanger children in cases of violence, forcing the non-violent parent "to engage fees and efforts to rebut the presumption".[52]

This approach drew criticism from at least two sides. The view was expressed that the law should presume equal parenting,[53] rebuttably to accommodate situations where shared parenting would not serve the child's welfare.[54] A letter from a member of the support group 'Fathers Equal Parenting' contended that "the vast majority of Canadians … support a Rebuttable Presumption for Equal Shared Parenting".[55] Conversely, a senator who opposed an explicit presumption of equal shared parenting worried that the proposed amendment "creates an implicit presumption".[56] She pointed to practice under the existing principle of 'maximum contact' which, with "a very similar title" [the reforms initially proposed "Maximum parenting time" as the new marginal note] "and words, has been interpreted as imposing joint-care

[46] Senate Debates, 42-1, No 275 (2 April 2019) at 7,718 (Hon Yvonne Boyer); see similarly Senate Debates, 42-1, No 273 (21 March 2019) at 7,685 (Hon Julie Miville-Dechêne).

[47] House of Commons Debates, 42-1, No 374 (30 January 2019) at 25,031 (Elizabeth May); see also House of Commons Debates, 42-1, No 374 (30 January 2019) at 25,036 (Brigitte Sansoucy). This need is emphasised in Standing Senate Committee on Legal and Constitutional Affairs (2019: 5). But, given the constitutional division of powers, provincial and territorial authority over law societies might preclude legislation on the matter by the Parliament of Canada: Senate Debates, 42-1, No 305 (18 June 2019) at 8,706 (Hon Pierre Dalphond).

[48] House of Commons Debates, 42-1, No 374 (30 January 2019) at 25,039 (Elizabeth May).

[49] House of Commons Debates, 42-1, No 374 (30 January 2019) at 25,030 (Hon David Lametti).

[50] House of Commons Debates, 42-1, No 374 (30 January 2019) at 25,030 (Hon David Lametti); see similarly House of Commons Debates, 42-1, No 326 (26 September 2018) at 21,871 (Arif Virani); Senate Debates, 42-1, No 267 (26 February 2019) at 7,466 (Hon Pierre Dalphond).

[51] House of Commons Debates, 42-1, No 379 (6 February 2019) at 25,343 (Hon David Lametti).

[52] Senate Debates, 42-1, No 305 (18 June 2019) at 8,706 (Hon Pierre Dalphond).

[53] House of Commons Debates, 42-1, No 326 (26 September 2018) at 21,871 (David Tilson); see also House of Commons Debates, 42-1, No 332 (4 October 2018) at 22,204 (Michael Cooper).

[54] House of Commons Debates, 42-1, No 332 (4 October 2018) at 22,204 (Michael Cooper); see similarly *House of Commons Debates*, 42-1, No 332 (4 October 2018) at 22,209 (Cathay Wagantall); House of Commons Debates, 42-1, No 332 (4 October 2018) at 22,213 (Sylvie Boucher); House of Commons Debates, 42-1, No 379 (6 February 2019) at 25,347 (Michael Barrett).

[55] House of Commons Debates, 42-1, No 332 (4 October 2018) at 22,215 (John Brassard).

[56] Senate Debates, 42-1, No 275 (2 April 2019) at 7,716 (Hon Donna Dasko).

parenting presumptions and supporting contact in all but the most extreme cases".[57] Evoking the critical feminist scholarship, she added that courts "have ignored" the instruction to subordinate the principle of maximum contact to children's welfare.[58]

Judicial understandings

Using language that verges on boilerplate, some judges have repeated the parliamentarians' assertion that the terminological changes "modernised" the concepts, promising to reduce conflict by shifting the focus to parents' responsibilities for their children.[59] This part's three sections report the more substantive judicial discussion of violence, of shared parenting, and of the quantity of evidence adduced under the new measures.

Violence

Judicial readings of the amendments on violence augur enduring tensions. There has been favourable acknowledgement of Parliament's explicit recognition of family violence, defined "broadly"[60] to reach "beyond physical assaults".[61] The amendments send a "clear" signal "that actual harm is not a prerequisite to a finding of family violence", with "such a notion ha[ving] long been considered archaic".[62] On one reading, the upshot is that "allegations of family violence must be taken seriously and not dismissed peremptorily".[63] For the Supreme Court of Canada, the 2019 amendments "recognize that findings of family violence are a critical consideration in the best interests analysis".[64]

But by a reading that downplays the reforms' novelty, family violence "has always been an important factor in the adjudication of parenting disputes".[65] Nuancing praise of the broad definition, Veenstra J has cautioned "not to label conduct as 'family violence' where there is no evidence the child has suffered any physical or emotional harm as a result of the parents' conduct".[66] Orders addressing "real and substantial risks" to children's "safety, security and well-being" would promote their

[57] Senate Debates, 42-1, No 275 (2 April 2019) at 7,716 (Hon Donna Dasko).

[58] Senate Debates, 42-1, No 275 (2 April 2019) at 7,716 (Hon Donna Dasko).

[59] See e.g. *Pereira v Ramos*, 2021 ONSC 1737 at para 11, Jain J; *McBennett v Danis*, 2021 ONSC 3610, 57 RFL (8th) 1 at paras 74–5, Chappel J; *Leinwand v Brown*, 2021 ONSC 6866 at paras 15–6, Kraft J; *JDM v SJC-M*, 2021 NBQB 159 at para 88, Robichaud J.

[60] *Barendregt v Grebliunas*, *supra* n 3 at para 146, Karakatsanis J, for the majority.

[61] *Ahluwalia v Ahluwalia*, 2022 ONSC 1303 at 43, Mandhane J (remarkably, this judgment recognises family violence as a new tort); see also *KM v JR*, 2022 ONSC 111 at para 53, Pazaratz J.

[62] *JDM v SJC-M*, *supra* n 59 at para 111, Robichaud J.

[63] *Phillips v Phillips*, 2021 ONSC 2480 at para 48, Kurz J.

[64] *Barendregt v Grebliunas*, *supra* n 3 at para 146, Karakatsanis J, for the majority.

[65] *S v A*, 2021 ONSC 5976 at para 24, McGee J, aff'd (sub nom *WS v PIA*), 2021 ONCA 923, cited on this point in *Epshtein v Verzberger-Epshtein*, 2021 ONSC 7694 at para 110, Kurz J.

[66] *MW v NLMW*, 2021 BCSC 1273 at para 108, Veenstra J.

welfare; in contrast, orders "too broad" might harm a child's interests,[67] for example, depriving her of time with a parent.

Shared parenting

In the parliamentarians' footsteps, judges have assessed the reforms regarding a child's contact with both parents inconsistently. One reading takes the changes as cosmetic, with new subsection 16(6) "continuing the maximum contact principle".[68] For Kurz J, removal of the reference to 'maximum' contact in the marginal note would make little difference, since "the operative terms in the section remain the same".[69] Although the ideas traceable to the former 'friendly parent' rule—a spouse's willingness to support the child's relationship and her ability and willingness to cooperate with the other spouse (paragraphs 16(3)(c)) and 16(3)(i), respectively)—are separated in the non-exhaustive list of eleven factors relevant to a child's best interests, judges have joined them.[70]

In contrast, Mandhane J's observation that "maximal contact", the former marginal note, "is no longer found in the *Divorce Act*"[71] hints at a change welcome to feminist critics of 'maximum contact' and the 'friendly parent' rule. The Supreme Court of Canada's first discussion of the amendments detects change on this point. Referring to the altered marginal note, Karakatsanis J for the majority said that the amended Divorce Act "recasts the 'maximum contact principle' as '[p]arenting time *consistent with best interests of child*'".[72] By her reading, this "more neutral" language "affirms the child-centric nature of the inquiry".[73]

Evidence

A worry that did not figure centrally in Parliament is the reforms' impact on evidence. Identifying "evidentiary overkill",[74] Pazaratz J has noted that the amendments "have greatly expanded all of the things judges are supposed to consider in deciding children's issues".[75] He referred to the non-exhaustive list of factors relevant to a child's best interests, none of which has priority, noting that the "the analysis—and the range of possibly relevant evidence—is further expanded" by allegations of

[67] *MW v NLMW*, *supra* n 66 at para 109, Veenstra J.

[68] *DM v MM*, 2022 SKQB 44 at para 98, Brown J.

[69] *Phillips v Phillips*, *supra* n 63 at para 49, Kurz J.

[70] *S v A*, *supra* n 65 at para 29, McGee J; *Epshtein v Verzberger-Epshtein*, *supra* n 65 at para 112, Kurz J.

[71] *EMB v MFB*, 2021 ONSC 4264 at para 69, Mandhane J.

[72] *Barendregt v Grebliunas*, *supra* n 3 at para 135, Karakatsanis J, for the majority [emphasis in original].

[73] *Barendregt v Grebliunas*, *supra* n 3 at para 135, Karakatsanis J, for the majority.

[74] *KM v JR*, *supra* n 61 at para 44, Pazaratz J.

[75] *KM v JR*, *supra* n 61 at para 44, Pazaratz J; see also at para 57 ("list of potentially relevant evidence gets longer, the further you read through the legislation").

violence.[76] Parents would "inevitably want to adduce evidence addressing as many of those factors as possible",[77] increasing the length and costs of litigation.

Judicial work after legislative reform

Informed by the review of parliamentary debates and early judicial discussions, this part recommends how judges might advance Parliament's aims in relation to family violence. It is worth anticipating the objection that this part essentially asks judges to substitute a new compromise for Parliament's, perhaps altering what emerged from the reform process's "institutionalized and formalized site of power struggles" (Smart 1989, 138). While appellate judges defer substantially to the decision-maker at first instance in family matters (Payne and Payne 2022, 665–6),[78] they retain their role of guiding lower courts (for discussion, see Leckey 2010). By drafting the Divorce Act in broad terms and amending it rarely, Parliament has long implicitly assigned heavy normative lifting to the higher courts, for instance on children's welfare, as observed in the section above on the prior act; on maintenance (Rogerson 2004); and on spouses' agreements (Rogerson 2012). This part proposes, then, less a departure from the revised statute than a way to navigate its ambivalent or conflicting signals on family violence.

Concern for family violence as an overarching objective?

This section proposes an avenue to bury the 'friendly parent' rule and correct the overemphasis on contact with both parents, as long desired by feminist critics of custody decisions and intended by some parliamentarians. It argues that the Supreme Court of Canada might shift its statutory interpretation to a higher level, identifying the protection of family members from family violence as an overarching objective of the Divorce Act.

Although efforts to shift judicial practice have foregrounded the legislative tinkering, Parliament's textual adjustments are too insubstantial to justify a major change. As reported above, some readers—including on the Supreme Court—have cited the replacement of the marginal note 'Maximum contact' with 'Parenting time consistent with best interests of child'. However, whilst marginal notes may be "legitimate indicators of legislative meaning", they typically receive little weight (Sullivan 2022, 461). Moreover, the text articulating the principle of maximum contact with both parents is virtually unaltered. Thus, former subsection 16(10) referred to a child's having "as much contact with each spouse as is consistent with the best interests of the child", while the new subsection 16(6) refers to "as much time with each spouse as is consistent with the best interests of the child". And as noted, some judges have recognised a spouse's willingness to cooperate (paragraph 16(3)(c)) and

[76] *KM v JR*, *supra* n 61 at paras 49–51, Pazaratz J.

[77] *KM v JR*, *supra* n 61 at para 49, Pazaratz J [emphasis in original].

[78] See e.g. *Hickey v Hickey*, [1999] 2 SCR 518, 172 DRL (4th) 577.

to support the child's relationship with the other spouse (paragraph 16(3)(i)) as joint successors to the 'friendliness' prioritised by former subsection 16(10). Given the critical scholarship on statutory interpretation and law reform, it seems technical and legalistic to focus on these tweaks. Indeed, substantial feminist criticism—including concern that the new section 16 failed to capture parliamentary intentions to protect children—drove the call to monitor that provision's application and possibly amend it sooner than after five years (Standing Senate Committee on Legal and Constitutional Affairs 2019, 7).

The judicial discussions cited above have overlooked a promising path in the 2019 amendments. This path could lead the Supreme Court to direct judges to place children's safety above their relationship with both parents, sometimes deciding differently than before. The substantive basis for such a change lies in Parliament's unequivocal signal that family violence—even indirect—is relevant to 'the best interests of the child'. The addition of more than two dozen lines about family violence elsewhere in the statute must alter how that criterion materialises in children's lives, even if its talismanic language is unaltered. Specifically, those abiding "'friendly parent provisions' should be read in light of the provisions … that emphasize and require consideration of family violence and that prioritize safety and emotional security and well-being for a child" (Koshan et al. 2021a, section 2.2.4; see also Neilson and Boyd 2020, 8–9). In the light of the focus by judges of the Supreme Court of Canada and other courts on the minor amendments relating to shared parenting, presented in the preceding part, this discussion builds on the interpretive arguments of Koshan et al. (2021a) as well as Neilson and Boyd (2020).

It is important to shift attention from the small changes to the legislative language on shared parenting towards the new provisions on family violence. Changes to the marginal note represent an explicit, textual reform of law—but a lesser one than that entailed by explicit, textual changes elsewhere in the statute, once the latter receive "such fair, large and liberal construction and interpretation as best ensures the attainment of [their] objects".[79] The present proposal is to read Parliament's addition of family violence as adding an overarching policy goal—protecting vulnerable family members, chiefly women and children, from family violence—that appropriately conditions existing language in the statute. Naming such an overarching policy might help judges in adjusting the balance between Parliament's attention to family violence and the countervailing signals of ambivalence, detailed above in the survey of the 2019 amendments. Methodologically, judges recognising such a policy goal would follow the majority of the Supreme Court of Canada. In *Miglin v Miglin*, an appeal on separation agreements, the Court inferred "overall objectives" of "certainty, finality and autonomy" from provisions of the Divorce Act that did not use those words.[80] The many lines accorded by the legislative drafters to family violence give this notion a firmer claim to such a privileged interpretive status than those objectives identified in *Miglin*. Arguably, the textual link between family violence and the best interests of the child—surely another overarching objective

[79] Interpretation Act, s 12.

[80] *Miglin v Miglin*, 2003 SCC 24, [2003] 1 SCR 303 at para 78, Bastarache and Arbour JJ.

of the statute, if not a "principle of fundamental justice" in Canadian constitutional law[81]—grants further interpretive weight to the objective relating to family violence.

Consecrating the protection of individuals from family violence as an overarching objective might help judges in countering a significant limit of the amendments. The numerous examples of family violence in the amended statute will not resolve the evidentiary problems, including ones of credibility, which remain "among the most significant challenges" confronting survivors of family violence in litigation (Boyd and Lindy 2016, 112). For example, women may be disbelieved when they disclose or report violence and/or viewed as less credible for having stayed in the relationship. Addressing this challenge requires attitudinal changes, which judicial continuing education might help to bring about. Judges might adjust their approach to credibility if they took Parliament's concern with family violence as rising above its textual toeholds in the statute.

The Supreme Court might have been understandably impatient to guide the judges of lower courts about the 2019 reforms. But had those justices open to changing the approach waited for "a proper case" (Thompson 2022, np), being then able to consider the interpretations of lower courts and to benefit from thorough argument by counsel and—dare one say it?—fuller scholarly commentary, they might not have hung their hat on the frail peg of the marginal note. Rather, they might have reflected on the possibility that Parliament has signaled an overarching objective that modulates the interpretation of substantial elements of the statute, irrespective of whether they underwent direct amendment in 2019.

Curbing the evidence

Will the reforms' expansive approach to evidence undermine access to justice? The gender wage gap (Pelletier et al. 2019) means that the costs of litigation bear disproportionately on women, although legal aid may play a mitigating role (Mossman 1994; Wong and Cain 2019; Biland 2022). Domestic violence erects distinctive barriers to access to justice (see e.g. Koshan et al. 2021a, 2021b). Although the reformed Divorce Act reflects attention to access to justice, or at least to extrajudicial dispute resolution, it does not address evidence beyond listing numerous factors in non-exhaustive lists (as observed by a judge). Will efforts to take domestic violence seriously lead courts to demand ever more evidence, motivated in part by concern to be fair to the "accused" (Meier 2021, 72)?

Since one statute is never the sole source of norms, a solution may come from outside the Divorce Act. For instance, judges might use the tools of provincial procedural law, such as rules on proportionality (see e.g. Piché 2009; Bachand 2015),[82] to discourage excessive evidence and cross-examination. Doing so would require courage in articulating a basis for adjudicating what amounts to a disproportionately large evidentiary record. The need for such guidance is especially strong given

[81] *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, [2004] 1 SCR 76 at para 7, McLachlin CJ.

[82] Arts 2, para 2, 18 CCP (Quebec); Supreme Court Civil Rules, BC Reg 168/2009, r 1–3(2); The King's Bench Rules (Sask), r 1–3(4).

the rise in self-representation and such litigants' challenges with evidence (see e.g. Birnbaum et al. 2012; Richards 2022). The success of this initiative would require judicial restraint in not chiding litigants too readily for mounting a selective record. Given the enactment of norms about proportionality and the subjection of family disputes to provincial civil procedure, this suggestion—like the one in the preceding section—asks judges not to change the law made by the legislature but to adapt it to legal practice and contemporary family life.

Conclusion

Tethered to the 2019 reforms to Canada's Divorce Act, this paper has looked backward and forward. It has looked back to the divergent parliamentary aspirations for the amendments and the divergent understandings in the early case law. Socio-legal and feminist literatures on statutory interpretation, law reform, and family violence warn against supposing that legislative change suffices to alter the broad forces that sustain inequality and shore up patriarchy, including in the system of family justice. The call to complement legislative reform with judicial education and a culture change, voiced in the critical scholarship reviewed above, remains germane. Coercive control, now in the definition of family violence,[83] involves an especially complex set of behaviours that invites specialised training on the part of participants in family justice (Lux and Gill 2021). The limits of legal reform may be especially pronounced where reforms 'walk the line' between calls voiced by feminist voices and conflicting interests, ultimately subjecting judicial discretion to conflicting factors.

Whatever the reform's limits, though, it may be worth continuing to engage with law (Smart 1989, 164–5). Accordingly, informed by its documentary review, the paper has looked ahead, recommending how judges may give further shape to those amendments. An appellate or Canada's apex court might recognise that Parliament's extended attention to family violence results in an overarching objective for the Divorce Act of protecting vulnerable family members from that phenomenon. This policy may entail a rereading of provisions that were unaltered or merely tinkered with during the reforms. Acknowledgement of this objective would provide a firmer basis for prioritising children's protection from potential violence over their interest in a relationship with both parents than a new marginal note and other tweaks. Lastly, the judiciary might fruitfully discipline the tendency of the reforms' multifactored lists to expand the evidence relevant.

Legal scholars will track the amendments' effects in various ways. The extent to which changing from 'custody' and 'access' to 'parenting time' and 'decision-making responsibility' lessens conflict may be a question for sociologists. Methodological rigour will be required, given the challenges in fixing a pre-reform baseline of interspousal animosity and isolating the changes' causal effect. This functional language may sometimes help a parent to save face. Yet might individuals vested with fewer parenting 'functions' feel less a 'parent' than their former spouse? In the former language, the term 'parent' applied equally to 'custodial parent' and 'access

[83] Divorce Act, s 2(1) "family violence".

parent'. In any event, spouses who receive far less parenting time or decision-making responsibility than they sought will know a loss when it comes, whatever the words. What's more, provincial rules of procedure usually make the loser pay the winner's costs.[84] It is to be hoped that the reforms, interpretation of which will continue against a backdrop of conflicting desires and considerations—inside and outside courtrooms—will meaningfully advance the safety and well-being of children and their caregivers.

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[84] See e.g. Family Law Rules, O Reg 114/99, r 18(14) (party entitled to costs from the other where having made an offer as good as or more favourable than what adjudication gave them).

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