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A Comparison of Gender-Based Violence Laws in Canada: A Report for the National Action Plan on Gender-Based Violence Working Group on Responsive Legal and Justice Systems

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Part I: Introduction[1]

This report undertakes a comparison of laws related to gender-based violence across Canada with a view to identifying promising practices.[2] We use the definition of gender-based violence from the United Nations as our frame, analyzing laws relating to "any act of gender-based violence that results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[3] While the UN definition includes both intimate partner violence and sexual violence, our focus is largely on violence in the context of intimate relationships (including intimate partner sexual violence).[4] We are guided by a broad conception of access to procedural and substantive justice that encompasses equal protection of the law, equal access to legal rights and remedies, and safety for women and children.[5]

We consider the potential for national uniformity of laws through a comparison of provincial, territorial, and federal laws pertaining to gender-based violence to identify gaps and best practices, including an examination of how various forms of status (marital and immigration for example) impact relevant legal entitlements.[6] Because our focus is on a comparison of legislation, one

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[1] Funding for this mapping research is provided by the Social Sciences and Humanities Research Council and the Law Foundation of Ontario Access to Justice Fund. We rely on our work in the following publications: "The Costs of Justice in Domestic Violence Cases" in Trevor Farrow and Les Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020), available online: <https://ssrn.com/abstract=3598277>; Domestic Violence and Access to Justice: A Mapping of Relevant Laws, Policies and Justice System Components Across Canada (2020 CanLIIDocs 3160), online: <https://canlii.ca/t/szxl>.

[2] Throughout this report we use "gender-based violence" (GBV) as the broadest term, while domestic / family / intimate partner / sexual violence are used in more specific contexts. Frequently we use the term "women." This term—particularly because it invokes a rigid gender binary of women and men—runs the risk of obscuring the experiences of gender diverse people, including trans women and men, non-binary folks, and two-spirited individuals. Much of the data and research we rely upon reports on the experiences of those who identify as "women," and women continue to be disproportionately victimized by GBV, in comparison to men. See Statistics Canada, Intimate partner violence in Canada, 2018 (26 April 2021), online: The Daily, <https://www150.statcan.gc.ca/n1/daily-quotidien/210426/dq210426b-eng.htm>. However, many gender diverse folks—especially trans women and men—experience significantly higher rates of GBA, online: The Daily, <https://www150.statcan.gc.ca/n1/daily-quotidien/200909/dq200909a-eng.htm>. We also use the term "survivor" where possible, though in some cases "victim" is used in reference to specific legislation.

[3] *Declaration on the Elimination of Violence against Women*, GA resolution 48/104 (20 December 1993), art 1.

[4] We exclude child sexual abuse and its implications in the family law / child protection and other contexts.

[5] For further discussion of access to justice and gender-based violence see Costs of Justice, *supra* note 1.

[6] Our focus is also on comparison within Canada rather than with other jurisdictions. We excluded laws where GBV is less directly engaged (e.g. insurance laws, adult guardianship laws). We have also not included forms of federal income support (for example, Employment Insurance) available in some circumstances. While we include an

limitation of this report is that we have not considered case law interpreting the various laws we discuss here. Judicial interpretation of laws related to gender-based violence can also create barriers to the safety of women and children and their access to legal rights and remedies, but a consideration of case law was beyond our scope.[7] Neither have we examined how laws translate into equal and accessible protections for the safety of women and children on the ground through the actions or inactions of other legal actors such as police, Crown, child welfare workers, or immigration officials. The (in)actions of these actors may also result in adverse consequences for members of marginalized groups such as racialized, migrant and Indigenous women, and while we have tried to flag those concerns in connection with specific laws, the practical application of these laws was again beyond our scope. One overarching observation from our research is that governments do not routinely monitor and evaluate the implementation and enforcement of their legislation and policy related to gender-based violence, which is an important site for further research.

Part II examines and compares provincial/territorial and federal laws and where relevant, highlights intersections between provincial/territorial and federal laws, identifying inconsistencies (for example between provincial/territorial family law and federal divorce law) and promising practices. Part II also reviews the impact of different forms of legal status on access to legal entitlements (for example Indigeneity and access to protection orders; marital status and family property; immigration status and social assistance) and will identify promising statutory initiatives related to status. Part III is our conclusion, which includes a brief review of a specific jurisdiction, Alberta, to illustrate why common definitions and eligibility for remedies across legal domains, systems, and jurisdictions are important.

Part II: A Comparison of Gender-Based Violence Laws in Canada

A. Protection Orders

Legislative protection orders for gender-based violence exist in all Canadian provinces and territories except Ontario.[8] In most jurisdictions the scope of the legislation is restricted to

examination of some policies (for example in relation to social housing and legal aid), we do not include all government policies pertaining to GBV (for example, we exclude policies related to Crown / police practices and information sharing protocols). We also do not review preventive strategies, such as education / healing or treatment programs or services for survivors and their partners (or former partners).

[7] For a discussion of case law in several realms—family law, child protection, criminal law, and protection / restraining orders—during the initial months of the COVID-19 pandemic, see Jennifer Koshan, Janet Mosher and Wanda Wiegers, "COVID-19, the Shadow Pandemic, and Access to Justice for Survivors of Domestic Violence" (2021) 57(3) Osgoode Hall LJ 739, online: <https://digitalcommons.osgoode.yorku.ca/ohlj/vol57/iss3/8/>.

[8] *Family Law Act*, SBC 2011, c 25, Part 9 (BC FLA); *Protection Against Family Violence Act*, RSA 2000, c P-27 (AB PAFVA); *The Victims of Interpersonal Violence Act*, SS 1994, c V-6.02 (SK VIVA); *The Domestic Violence and Stalking Act*, CCSM c D93 (MB DVSA); *Code of Civil Procedure*, CQLR c C-25.01, arts 509, 510 (QB CCP); *Intimate Partner Violence Intervention Act*, SNB 2017, c 5 (NB IPVIA); *Domestic Violence Intervention Act*, SNS 2001, c 29 (NS DVIA); *Victims of Family Violence Act*, RSPEI 1988, c V-3.2 (PEI VFVA); *Family Violence Protection Act*, SNL 2005, c F-3.1 (NL FVPA); *Family Violence Prevention Act*, RSY 2002, c 84 (YK FVPA); *Protection Against Family Violence Act*, SNWT 2003, c 24 (NWT PAFVA); *Family Abuse Intervention Act*, SNu 2006, c 18 (NU FAIA). In Ontario, restraining orders are available as an alternative to civil protection orders. See the *Family Law Act*, RSO

protection against intimate partner violence, though in Québec, the *Code of Civil Procedure* allows for protection orders in situations of violence more broadly.[9]

Under these statutes, survivors are able to obtain both emergency and non-urgent protection orders where violence or abuse has occurred or the victim has a reasonable fear that it will occur. Protection orders typically include provisions for no contact or communication with the survivor and sometimes, children, and may also include orders for exclusive possession of the family home and other remedies.[10] All jurisdictions define violence to include actual and threatened physical and sexual violence either explicitly or implicitly, and most include threats to damage property as well.[11] One key difference across jurisdictions is whether emotional, psychological, and financial abuse and/or stalking are included, with some combination of these forms of violence in most provinces and territories:

- British Columbia, New Brunswick, Newfoundland and Labrador and Nunavut include psychological / emotional / mental and financial abuse and stalking / harassment.
- Manitoba includes psychological / emotional abuse and stalking, and also creates a tort of stalking, as does Nunavut.
- Alberta, Saskatchewan, and Nova Scotia include stalking or harassment but not psychological or emotional abuse.
- Prince Edward Island and Yukon include emotional abuse but not stalking.
- Northwest Territories includes psychological, emotional, and financial abuse but not stalking.[12]

The broadest and therefore most protective definitions are found in British Columbia, Manitoba, and New Brunswick, which also include coercive controlling behaviour.[13] Given what we know about the harms of coercive control, including its links to serious physical and lethal violence, this is a promising practice that should be considered in other jurisdictions.[14] Manitoba's definition of

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1990, c F.3, s 46 (ON FLA) and *Children's Law Reform Act*, RSO 1990, c C.12 (ON CLRA). Restraining orders also continue to be used in other jurisdictions, as discussed in Section C.

[9] QB CCP, *ibid*, arts 509, 510.

[10] Some statutes also provide for warrants permitting entry into premises for survivors who are being forcibly confined, but anecdotal evidence suggests this type of order is rarely used. See AB PAFVA, s 10; SK VIVA, s 11; YK FVPA, s 11 (all *supra* note 8).

[11] Québec does not include threats to property. See QB CCP, *supra* note 8, arts 509, 510.

[12] See BC FLA (s 1, also including threats respecting pets); AB PAFVA, s 1(1)(e), also excluding reasonable force applied by a parent to discipline a child; SK VIVA, s 2(e.1); MB DVSA, ss 2(1.1), 26; NB IPVIA, s 2; NS DVIA, s 5(1); PEI VFVA, s 2(2)(e); NL FVPA, ss 3(1)(f), (f.1), (f.2); YK FVPA, s 1; NWT PAFVA, s 1(2)(e); NU FAIA, ss 3(1)(e), (g), 24. Québec defines violence to include threats to life, health or safety and violence based on a concept of honour (QB CCP, art 509). Some other jurisdictions include deprivation of the necessaries of life, which could cover some cases of financial abuse (see e.g. SK VIVA, s 2(e.1); PEI VFVA, s 2(2); YK FVPA, s 1) (all *supra* note 8).

[13] BC FLA, ss 1, 184(1)(c); MB DVSA, s 6.1(1)(d); NB IPVIA, ss 2(a), 4(3)(d) (all *supra* note 8).

[14] Most recently see the Report of the Standing Committee on Justice and Human Rights, *The Shadow Pandemic: Stopping Coercive and Controlling Behaviour In Intimate Relationships* (2021), online: <https://www.ourcommons.ca/DocumentViewer/en/43-2/JUST/report-9/> (JUST Report).

stalking also provides a useful model, as it includes specific reference to stalking by electronic means, a concerning form of gender-based violence.[15]

Another best practice is found in British Columbia, Nova Scotia, Newfoundland and Labrador, and Nunavut, which explicitly exempt reasonable use of defensive force from the definition of family violence.[16] This is an important recognition that survivors who use force to defend themselves or their children should not be subject to protection orders.

Another key difference across jurisdictions is whether protection orders are available to survivors who have not cohabited or parented children together. In some provinces and territories, orders are also available to persons in dating / romantic relationships (Manitoba, New Brunswick, and Nunavut) and intimate companions (Yukon).[17] Again, broader definitions of the relationships included will offer the most protection to survivors.

Jurisdictions also differ in terms of the procedures for obtaining and confirming protection orders. Emergency protection orders are typically issued *ex parte* by courts, and in some jurisdictions, by justices of the peace. In many jurisdictions, applicants may rely on a designated person such as a police officer or lawyer to apply on their behalf by telecommunication. During the COVID-19 pandemic, Alberta extended the ability to apply by telecommunication to survivors.[18] This practice has some advantages in ensuring the accessibility of protection orders, and in Alberta, there is a safeguard against the potential abuse of this process — including against survivors — by requiring a review of all EPOs, as discussed below. Alternatively, legislation should include the option of allowing a broad range of authorized persons to apply on behalf of survivors with their consent, including shelter workers and other service providers, as New Brunswick does, for example.[19]

Another procedural difference is whether EPOs are automatically reviewed by a court or only reviewed where one of the parties applies. The latter approach, used in British Columbia, Manitoba, and Newfoundland and Labrador, is preferable as it lessens the possibility of multiple court appearances for survivors.[20] Manitoba also provides for an evidentiary burden on respondents at the review, which is another more favourable approach for survivors.[21] One issue on review in some jurisdictions is the use of mutual protection orders or restraining orders to replace initial emergency protection orders.[22] British Columbia has a provision requiring courts to consider specific factors before imposing mutual protection orders, including the history of

[15] MB DVSA, ss 2(2), 2(3), *supra* note 8.
[16] BC FLA, s 1; NS DVIA, s 5(1)(a); NL FVPA, s 3(1)(a); NU FAIA, s 3(2) (all *supra* note 8).
[17] See MB DVSA, s 2(1)(d); NB IPVIA, s 1; YK FVPA, s 1; NU FAIA, ss 2(3), (4) (all *supra* note 8).
[18] Ministerial Order No 2020-011 (Alberta Community and Social Services) (April 7, 2020); *Protection Against Family Violence Regulation*, Alta Reg 80/1999, s 4.
[19] *General Regulation*, NB Reg 2018-34, s 3(2).
[20] See BC FLA, s 187; MB DVSA s 11(1); NL FVPA, ss 10, 12 (all *supra* note 8).
[21] MB DVSA, s 12(2) (providing that the onus is on the respondent to demonstrate, on a balance of probabilities, that the protection order should be set aside). This section was read down following a *Charter* challenge in *Baril v. Obelnicki*, 2007 MBCA 40, to create an evidentiary burden only.
[22] This is common practice in Alberta. See e.g. *SL v AAHI*, 2020 ABCA 172; *DCM v TM*, 2021 ABCA 127.

violence and respective vulnerability of the parties.[23] This approach is recommended for other jurisdictions given the negative consequences that can flow from survivors being bound by unwarranted protection orders.

Also differing across jurisdictions is the duration of protection orders. Some jurisdictions provide for the length of the order to be within the judge's discretion, with a default period if none is specified[24] or discretion up to a certain maximum period, sometimes with the explicit possibility of extensions.[25] Other jurisdictions provide for different duration periods depending on the nature of the order—for example, Nunavut places a maximum period of 90 days duration on orders for exclusive possession of personal belongings and the family home and surrender of firearms and permits, with other conditions having a maximum duration of one year.[26] Still others do not provide any default or maximum length of time for protection orders.[27] An outlier is Nova Scotia, where protection orders can only be made for periods of 30 days, though applications for renewal are possible (in contrast to Newfoundland and Labrador, where orders of up to 90 days can be made but are explicitly not renewable). Longer orders—such as the three years provided for in Manitoba and Québec, or the non-expiring orders in Saskatchewan and Yukon—are in the best interests of survivors from the standpoint of accessibility and safety, as they do not require repeated applications for renewal or extension. Even though police might lay charges with no contact orders in some cases, protection orders can still be an important backup if the criminal orders expire or are overturned, and this sort of layering of orders is most effective where protection orders have a reasonably lengthy duration period.

At the same time, breaches of protection orders are not at all uncommon. They may be dealt with explicitly in the legislation with provisions permitting arrest and creating offences and penalties, which is the case in Alberta, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon, and the Northwest Territories.[28] Québec provides for civil contempt for breaches of protection orders, and in the jurisdictions where the legislation is silent on breaches, section 127 of the *Criminal Code* will apply.[29] There are benefits to and challenges with all of these approaches, but this can only be assessed by evaluation of how protection order legislation is implemented in practice. For example, concerns have been raised that the criminalization approach of using section 127 may deter police from enforcing breaches, and some survivors may

[23] BC FLA, s 184(2), *supra* note 8.
[24] BC FLA, 1 year (s 183(4)); MB DVSA, 3 years (s 8.1); PEI VFVA, 90 days (s 4(4)) (all *supra* note 8).
[25] AB PAFVA, 1 year (s 7, extendable); QB CCP, 3 years (art 509); NB IPVIA, 180 days (s 5); NS DVIA, 30 days, extendable (ss 8(2), 12(4)); NL FVPA, up to 90 days, no extensions (s 7(2) and (4)); NWT PAFVA, 90 days, (s 4(5)) (all *supra* note 8).
[26] NU FAIA, ss 7, 10, *supra* note 8.
[27] SK VIVA (silent on this issue); YK FVPA (s 4(5) (expiry date must be recorded but none specified)), *supra* note 8.
[28] See AB PAFVA, ss 13.1–13.2; NB IPVIA, s 17; NS DVIA, s 18; PEI VFVA, ss 16–17; NL FVPA, s 18; YK FVPA, s 16; NWT PAFVA, s 18 (all *supra* note 8).
[29] QB CCP, *supra* note 8, art 62; *Criminal Code*, RSC 1985, c C-46, s 127 (providing a general offence for disobeying a court order without lawful excuse, and where no other punishment or mode of proceeding is provided by law).

not wish to see their partners face criminal sanctions.[30] There is also anecdotal evidence that protection order legislation is used much more in some jurisdictions than in others, or even inconsistently within jurisdictions. The best practice here is to ensure that protection order legislation is evaluated regularly to ensure it is being used, applied, and enforced as intended. In particular, whether protection orders benefit or have adverse consequences for members of marginalized communities should be monitored by governments.

Protection orders are also available federally under the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (FHRMIRA) for survivors of family violence who reside on First Nations reserves.[31] This legislation authorizes First Nations to develop their own laws for the possession of family homes and the division of property interests on reserves. It also creates provisional rules that apply in the interim, including provisions for emergency protection orders (EPOs) that are similar to those discussed above. EPOs are available to spouses and common law partners under FHRMIRA only if at least one of them is a First Nation member or an "Indian" as defined under the *Indian Act*.[32]

Emergency protection order applications under FHRMIRA are made to "designated judges" and to date, only three provinces—New Brunswick, Prince Edward Island, and Nova Scotia—have designated judges to hear applications.[33] Although it is unclear to what extent FHRMIRA EPOs are being sought, other provinces should designate judges so that EPOs are uniformly available to Indigenous women on First Nations reserves across Canada. This is especially important because provincial protection orders granting exclusive possession of the family home will not apply on reserves for jurisdictional reasons.[34] At the same time, FHRMIRA does provides for exclusive occupation orders (EOOs) for the family home in circumstances that include family violence, and applications for EOOs do not rely on judges designated by the provinces.[35] Ongoing evaluation of the accessibility of the legislation for First Nations women is also recommended.[36]

FHRMIRA could also include a more encompassing definition of family violence, as it currently omits emotional and financial abuse and coercive control for the purposes of EPOs.[37] Psychological abuse is included as a consideration for EOOs, however, which may cause confusion

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[30] See e.g. Jennifer Koshan and Wanda Wiegers, "Theorizing Civil Domestic Violence Legislation in the Context of Restructuring: A Tale of Two Provinces" (2007) 19 Can J Women & L 145.
[31] *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20.
[32] FHRMIRA, *ibid*, s 6; *Indian Act*, RSC 1985, c I-5.
[33] Indigenous Services Canada, Matrimonial real property on reserve, online: <https://www.sac-isc.gc.ca/eng/1100100032553/1581773144281> (accessed April 12, 2021).
[34] Provincial legislation providing for exclusive possession orders does not apply on First Nations reserves. See *Derrickson v Derrickson*, [1986] 1 SCR 285; *Paul v Paul*, [1986] 1 SCR 306.
[35] FHRMIRA, *supra* note 31, s 20.
[36] Some evaluative work has been done by the Centre of Excellence for Matrimonial Real Property, but it is dated. See online: COERMP, <https://www.coemrp.ca/resources/the-family-homes-on-reserves-matrimonial-interests-or-rights-act/>. See also Elysa Darling, Assessing Matrimonial Real Property Law on First Nation Reserves: Domestic Violence, Access to Justice, and Indigenous Women (LLM thesis, University of Calgary, 2019), online: http://hdl.handle.net/1880/111047.
[37] FHRMIRA, *supra* note 31, s 16(9).

and contribute to a lack of accessibility of remedies under FHRMIRA.[38] Any changes to FHRMIRA would of course require full consultation with Indigenous women.

A final issue is whether protection orders obtained in one jurisdiction are explicitly recognized as enforceable in another. This is currently the case in British Columbia and Manitoba.[39] There is case law indicating that protection orders from one Canadian jurisdiction cannot be enforced in another absent such provisions,[40] so other jurisdictions should follow suit and provide for recognition and enforceability of protection orders obtained in another province or territory. This would align with the interjurisdictional enforcement of custody and access/parenting orders as discussed in Section C below. A related issue is with respect to the possibility of inconsistency or conflict between particular protection orders, whether within one province or territory or amongst different jurisdictions. Several provinces and territories provide for the resolution of such conflicts,[41] and given the multiplicity of different orders that are available for no-contact/ communication and exclusive possession of the family home, other jurisdictions should do so as well.

B. Domestic Violence Disclosure Laws

A few provinces have introduced domestic violence disclosure laws, often called "Clare's Laws" after predecessor legislation in England and Wales, but to date only Saskatchewan and Alberta have developed the regulations and protocols that give effect to the legislation.[42] These jurisdictions permit individuals who believe they are at risk of interpersonal violence, and other authorized persons, to apply to the police for "disclosure information" regarding the intimate partner of the person at risk (the "right to ask").[43] Police may also proactively initiate the process when they have reason to suspect that domestic violence is reasonably likely to occur (the "right to know").[44] Interpersonal violence is defined in the Saskatchewan Protocol identically to

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[38] FHRMIRA, *ibid*, s 20(3).

[39] BC FLA, *supra* note 8, s 191 (noting the application of the *Enforcement of Canadian Judgments and Decrees Act*, SBC 2003, c 29, to protection orders made in another jurisdiction of Canada); *The Enforcement of Canadian Judgments Act*, CCSM c E116, Part 3, Canadian Civil Protection Orders. In Alberta, the *Children First Act*, SA 2013, c C-12.5, s 19(5) would have amended the AB PAFVA, *supra* note 8, to allow the Minister to make regulations for the recognition and enforcement of protection orders from other jurisdictions, but that section never came into effect.

[40] See e.g. *DH v TH*, 2018 ABQB 147.

[41] BC FLA (s 189); NB IPVIA (s 12); NS DVIA (s 8(4)); NL FVPA (s 13); NU FAIA (s 9(1)) (all *supra* note 8).

[42] *Disclosure to Protect Against Domestic Violence (Clare's Law) Act*, SA 2019, c D-13.5 (Alberta Act); *Disclosure to Protect Against Domestic Violence Regulation*, Alta Reg 66/2021; *The Interpersonal Violence Disclosure Protocol (Clare's Law) Act*, SS 2019, c I-10.4 (Saskatchewan Act)*; The Interpersonal Violence Disclosure Protocol (Clare's Law) Regulations*, RRS c I-10.4 Reg 1; *Interpersonal Violence Disclosure Protocol Act*, SNL 2019, c I-18.1. In Ontario, a Private Member's Bill, Bill 274, *Intimate Partner Violence Disclosure Act, 2021*, online: <https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2021/2021-04/b274_e.pdf> was introduced in April 2021 but was defeated at Second Reading to allow for further consultations.

[43] Other authorized persons include parents and guardians of persons at risk who are under 18 years old or who lack capacity.

[44] Government of Alberta, Justice & Solicitor General, "Disclosure to Protect Against Domestic Violence (Clare's Law) Protocol" (April 2021), online: <https://open.alberta.ca/publications/disclosure-to-protect-against-domestic-violence-clares-law-act-protocol> (Alberta Protocol); Saskatchewan Association of Chiefs of Police, "Interpersonal

Saskatchewan's protection order legislation and does not include emotional or psychological abuse or coercive control.[45] Alberta takes a different approach by defining domestic violence more broadly than in its protection order legislation, adding threats to harm children, other family members or pets; control over movements, communications or finances; and emotional or psychological abuse.[46] Alberta's broad definitional approach is preferable in light of the aims of the legislation in identifying and disclosing risks of future violence.

In both Saskatchewan and Alberta, the Protocols indicate that disclosure information is limited to the level of risk faced by the person at risk (high, medium/moderate, low), and additionally in Alberta, the context surrounding the risk. Saskatchewan police will also provide information about relevant criminal convictions, if applicable.[47] Both Protocols also require police to provide safety planning information and referrals for support and services to persons at risk.[48] The Protocols mandate that persons to whom disclosure is provided must keep the information confidential and must sign confidentiality agreements.[49] Although the legislation itself permits disclosure that is otherwise authorized under the Act or the law more broadly, it is unclear what this will mean in practice.[50] In addition, the Alberta Protocol states explicitly that disclosure information cannot be used and will not be considered in any court proceedings or litigation.[51] At the same time, if the process uncovers information that could amount to a criminal offence, police may be required to investigate and may not be able to maintain the applicant's confidentiality.[52]

Although the legislation purports to balance safety and confidentiality/privacy, it should explicitly enable persons at risk to disclose the information they receive to lawyers and service providers to allow them to obtain legal advice and undertake safety planning. Further, the ban on providing disclosure information to courts, and on courts using this information, raises concerns. Parties to court proceedings should be able to provide evidence that is relevant to the protection of themselves and their children, for example in family litigation or protection order review proceedings. At the same time, in light of the documented occurrence of litigation harassment against survivors of violence, as well as the potential to deter or inhibit use of the legislation, information that persons at risk did or did not apply for, receive, or act on disclosure information

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Violence Disclosure Protocol" (November 25, 2019), online: <https://pubsaskdev.blob.core.windows.net/pubsask-prod/114796/Approved%252BProtocol%252Band%252BAppendices-%252Bfinal.pdf> (Saskatchewan Protocol).

[45] Saskatchewan Protocol, *ibid* at 20; see also SK VIVA, *supra* note 8, s 2(e.1).

[46] *Disclosure to Protect Against Domestic Violence Regulation*, Alta Reg 66/2021, s 1(a).

[47] Alberta Protocol, *supra* note 44 at 6; Saskatchewan Protocol, *supra* note 44 at 5.

[48] Alberta Protocol, *ibid* at 5, Saskatchewan Protocol, *ibid* at 8, 11.

[49] Alberta Protocol, *ibid* at 18 (requiring that a confidentiality agreement be signed by the person at risk and anyone else police permit to attend the disclosure interview); Saskatchewan Protocol, *ibid* at 10 (requiring that a confidentiality agreement be signed by the applicant and any third party involved in the process).

[50] Alberta Act, *supra* note 42, s 8 (otherwise authorized by law); Saskatchewan Act, *supra* note 42, s 6 (otherwise authorized under the Act). For a discussion of privacy legislation see Section P.

[51] Saskatchewan does not permit the applicant to share disclosure information (except with the permission of the police), which effectively means that the information cannot be used in court (see Saskatchewan Protocol, *supra* note 44 at 10, 34).

[52] Alberta Protocol, *supra* note 44 at 19 (also noting that outstanding warrants concerning the person at risk may be executed because of police duties), Saskatchewan Protocol, *supra* note 44 at 6-7.

should not be permitted to be used as evidence against them, which was recognized in Ontario's proposed legislation.[53]

More broadly, whether this type of legislation will protect women from violence remains to be seen, and training of police and other justice personnel is necessary to ensure there are no adverse consequences such as blaming survivors who fail to apply or fail to act on disclosure information.[54] This is a particular concern for marginalized survivors given the disproportionate use of child protection legislation against families that are racialized and Indigenous. Ontario's proposed legislation addressed this concern by stating that "No police force and no government agency or office may deny access to services or protection for an applicant or person at risk who receives disclosure information and remains in their relationship on the basis that the applicant or person at risk remained in the relationship."[55] Other jurisdictions should adopt this approach as well.

C. Family Laws

Restraining and Exclusive Possession Orders

In addition to civil protection statutes, most provinces and territories allow for orders restraining contact or communication between parties in statutes that govern parenting or spousal relationships. Typically, such orders restrain a person from "annoying, molesting, harassing or communicating with" an applicant or a child in their care under legislation that determines custody and access or parenting issues[56] and/or that governs family property division or support.[57] A statute may also authorize orders that restrain a spouse from attending or coming near one or more locations.[58]

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[53] Bill 274, *supra* note 42, s 13.

[54] Jennifer Koshan and Wanda Wiegers, "Clare's Law: Unintended Consequences for Domestic Violence Victims?" (October 18, 2019), online: ABlawg, <http://ablawg.ca/wp-content/uploads/2019/10/Blog_JK_WW_Bill17.pdf>. Bill 274 requires that the Minister develop a training program (*supra* note 42, s 14).

[55] Bill 274, *ibid*, s 9.

[56] *The Children's Law Act, 2020*, SS 2020, c 2, s 38 (where an applicant has decision-making responsibility) (SK CLA) and see also, *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01, s 100 (would apply to unmarried, non-parents) (SK QBA);*The Child Custody Enforcement Act*, CCSM c C360, s 8 (MB CCEA) and *The Child and Family Services Act*, CCSM c C80, s 80(1) (MB CFSA); ON CLRA, *supra* note 8, s 35(1) (on application, against any person); *Family Law Act*, SNB 2020, c 23, s 81 (NB FLA); *Children's Law Act*, RSPEI 1988, c C-6.1, s 72 (PEI CLA); *Children's Law Act*, RSNL 1990, c C-13, s 42 (NL CLA); *Children's Law Act,* RSY 2002, c 31, s 36 (YK CLA); *Children's Law Act*, SNWT 1997, c 14, s 59 (NWT CLA); *Children's Law Act,* SNWT (Nu) 1997, c 14, s 59 (NU CLA); BC FLA, *supra* note 8. In Alberta, common law restraining orders are available, see *Lenz v Sculptoreanu*, 2016 ABCA 111 at paras 25-30.

[57] *The Family Maintenance Act*, CCSM c F20, s 10(1)(j), 14(2) (MB FMA); ON FLA, *supra* note 8, s 46 (applies where applicant has reasonable grounds to fear for their safety or that of a child in their lawful custody as against a spouse or former spouse or anyone the applicant is cohabiting with or has cohabited with for any period of time) and *Child Youth and Family Services Act*, SO 2017, c 14, Sched 1. (ON CYFSA); NB FLA, *ibid*, s 81 (on application for support, a parenting or contact order); *Family Law Act*, RSPEI 1988, c F-2.1, ss 29, 45 (if married, cohabiting conjugally for 3 years or if the natural or adoptive parents of a child) (PEI FLA); *Family Law Act*, RSNL 1990, c F-2 (married) s 81 (NL FLA); *Family Law Act*, SNWT 1997, c 18, s 59 (if married, lived in a conjugal relationship for at least 2 years or in a relationship of some permanence if the biological or adoptive parents of a child) (NWT FLA).

[58] ON FLA, *supra* note 8, s 46(3) applies to spouses defined in this section to include unmarried persons who have cohabited continuously for at least three years or in a relationship of permanence, if they are the parents of a child.

Under their family or matrimonial property legislation or under legislation providing for support or parenting orders, all jurisdictions also allow for orders for exclusive possession or occupation of a family home and its contents. Such orders directly restrain the other party from entering the family home or from removing any of its contents. However, as with family property statutes generally, differences exist between federal, provincial and territorial jurisdictions as to who qualifies for relief:

- In six jurisdictions, Ontario, Québec, New Brunswick, Prince Edward Island, Newfoundland and Labrador and Yukon, only married persons or, in some of these jurisdictions, those who have entered into a marriage in good faith that is void or voidable, may apply for exclusive possession of a family home.[59]

- Other jurisdictions extend relief beyond married persons to those who have lived in a marriage-like or conjugal relationship continuously for a certain period of time. The time limits vary from one year, as in provisional rules under the *Family Homes on Reserves and Matrimonial Interests or Rights Act*,[60] to two[61] and three years.[62] Orders may also be available to persons who have cohabited or lived in a relationship of "some permanence" where they are the parents of a child[63] or to partners who have registered their relationship or union with a prescribed authority.[64] Alberta's legislation is unique in that it extends to those who may not be in a conjugal relationship but have entered into an adult interdependent agreement.[65]

- Applicants may also be required to apply within a specific time period and these periods vary by jurisdiction.[66]

- The burden of proving that an exclusive possession order should be made typically falls on the claimant. Relevant factors, where specified, usually include the needs or best interests

[59] ON FLA, *supra* note 8, s 24; *Civil Code of Québec*, CQLR c C-1991, arts 401, 409, 500 (QB CCQ); QB CCP, *supra* note 8, art 158; NB FLA, *supra* note 56, s 1, 21(2)(d),(f) and *Marital Property Act*, SNB 2012, c 107, s 1, 23, 27 (NB MPA); PEI FLA, *supra* note 57, s 25; NL FLA, *supra* note 57, s 15; *Family Property and Support Act*, RSY 2002, c 83, ss 1, 27(2)(a) (YK FPSA).

[60] FHMIRA, *supra* note 31; provisional rules apply to married persons or those who have in good faith entered into a void or voidable marriage, and common law partners who are defined under the *Indian Act*, RSC 1985, c I-5 as persons who have cohabited in a conjugal relationship for at least one year. These rules apply where the First Nation has not enacted its own laws pursuant to this Act, or the *First Nation Land Management Act*, SC 1999, c 24, or have not done so under a self-government agreement.

[61] BC FLA, *supra* note 8, ss 3, 88, 90; *The Family Property Act*, SS 1997, c F-6.3 ss 2, 7, 17 (SK FPA); *Parenting and Support Act*, RSNS 1989, c 160, s 2, 7 (NS PSA); NWT FLA, *supra* note 57, s 1; *Family Law Act*, SNWT (Nu) 1997, c 18, s 1 (NU FLA).

[62] *Family Law Act*, SA 2002 c A-4.5, s 3 where proceedings for child or spousal support to apply to a spouse or adult interdependent partner, ss 68, 69 (AB FLA) and *Family Property Act*, RSA 2000, c F-4.7 (AB FPA) ss 19-22; *The Family Maintenance Act*, CCSM c F20, ss 2, 4, 10(1) (MB FMA).

[63] NWT FLA, *supra* note 57, s 1; NU FLA, *supra* note 61, s 1; MB FMA, *ibid*, s 1 (one year); NS PSA, *supra* note 61, ss 2, 7 (must have cohabited with each other and have a child).

[64] MB FMA, *supra* note 62, s 2 (those registered under *The Vital Statistics Act*, CCSM c V60, s 13.1); QB CCQ, *supra* note 59, arts 500, 521.6; NS PSA, *supra* note 61, ss 2, 7.

[65] AB FLA, *supra* note 62, s 7.

[66] E.g. SK FPA, *supra* note 61, s 3.1 (applications under the Act must be commenced before a divorce or if unmarried, within 2 years after the parties have ceased to cohabit), see note 127.

of the children and the availability of other shelter but violence is also an explicitly relevant consideration in six jurisdictions;[67] others identify "danger of injury" to an applicant or child as a result of the respondent's conduct.[68] Most of these statutes do not define violence specifically to include coercive and controlling violence or intimidation or emotional abuse.

Obtaining the benefit of the above protections will generally depend upon being a parent or a spouse as this is variously defined across jurisdictions. Those who lack such status in their province or territory may have to depend on bail conditions that restrain attendance near a family residence where criminal charges have been laid, on peace bonds or on protection or occupation orders, if these are available. Relative to these orders, exclusive possession orders may also allocate expenses between the parties and provide greater security for a longer period of time. In Saskatchewan, for example, a court may also deem the spouse with exclusive possession to be a tenant under a lease of the family home.[69] Residential security is important in maintaining safety and to minimizing disruptions in the lives of survivors and their children in relation to schools, neighborhoods and support systems.[70]

Parenting Orders

In determining parenting arrangements, courts are to consider only the best interests of a child in almost all jurisdictions within Canada.[71] As of March 1, 2021, the *Divorce Act* provides that the primary objective in identifying the best interests of a child in a parenting dispute is to achieve physical, emotional and psychological safety, security and well-being for a child.[72] As well, judges are now required to consider family violence and its impact on the willingness and ability of the party responsible for the violence to care for and meet the needs of the child and the appropriateness of requiring cooperation between the parties.[73] Family violence is also defined broadly under s 2(1) to include behavior that "constitutes a pattern of coercive and controlling behavior" or that causes fear for one's safety or that of another and the "direct or indirect exposure" of a child to such behavior. A number of different forms of family violence and threatening behaviour are identified including physical and sexual abuse, psychological or financial abuse,

[67] FHRMIRA, *supra* note 31, psychological abuse against a partner, child or family member is relevant, s 20(3) as is the "collective interests of First Nation members in their reserve lands"; Other statutes simply reference any violence committed by a spouse against the other spouse or children, see ON FLA, *supra* note 8, s 24(3)(f); PEI FLA, *supra* note 57, s 25(4)(f); NWT FLA, *supra* note 57, s 55(3); NU FLA, *supra* note 61, s 55(3)(f) or reference a finding of domestic violence, NS PSA, *supra* note 61, s 7(3)(d) without defining the terms.
[68] AB FLA, *supra* note 62, ss 19-22; SK FPA, *supra* note 61, s 17 (without notice).
[69] SK FPA, *supra* note 61, s 5(2)(j). Note though that the rights of the spouse with exclusive possession are limited by and dependent upon the rights of the other spouse under the lease, s 13.
[70] See sections on Spousal Support and Family Property Division for further discussion of distinctions based on marital status.
[71] Manitoba and Nova Scotia provide that the best interests is the "paramount" rather than sole consideration, MB FMA, *supra* note 57, s 2(1); NS PSA, *supra* note 61, s 18(5). QB CCQ, *supra* note 59, arts 514, 521.7 provide that where a civil union dissolves or there is separation from bed and board, the court is to decide "as to the custody, maintenance and education of the children, in their interest and in the respect of their rights, taking into account, where appropriate, any agreements made between the spouses".
[72] *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 16(2).
[73] *Ibid*, s 16(3)(j).

harassment, failure to provide necessaries and threats of or conduct that harms or kills an animal or damages property. In assessing the impact of family violence, judges must consider a number of factors that include: the nature, seriousness, frequency of the violence and when it occurred; whether the violence was coercive and controlling; whether it was directed at a child or a child was exposed directly or indirectly; the physical, emotional and psychological harm or risk of harm to children; whether the violence has compromised safety or causes fear for safety; steps taken to address the behavior; and any other relevant factor (s 16(4)). These changes are consistent with research that has consistently documented harm or an elevated risk of harm to children who are exposed directly or indirectly to family violence and that can consist of: a higher risk of physical and sexual harm or cross-fire violence; emotional and psychological disturbances (such as anxiety and PTSD); developmental and neurological harm (from prolonged exposure to a toxic environment), and impaired attachments with abused mothers, among other adverse outcomes.[74]

Most provincial and territorial jurisdictions in Canada now also require consideration of family or domestic violence in determining parenting arrangements. Four jurisdictions have substantially replicated the amended provisions of the *Divorce Act.*[75] British Columbia had included mandatory consideration of family violence in amendments that came into force in 2013, defining it broadly to include sexual abuse, unreasonable restrictions on or prevention of a family member's financial or personal autonomy and in assessing its impact, taking account of "any psychological or emotional abuse [that] constitutes, or is evidence of, a pattern of coercive and controlling behaviour"; whether a child was exposed to family violence (directly or indirectly) and harm to the child's safety, security and well-being as a result.[76] Two other jurisdictions had previously incorporated requirements to consider domestic or family violence and defined it to include sexual abuse and emotional or psychological abuse.[77] Four jurisdictions require consideration of family violence but do not define it or do not define it in terms that include coercive or controlling behaviour.[78] Alberta limits the definition to physical harm, forced confinement and sexual abuse or acts that cause a reasonable fear for one's safety but excludes "acts of self-protection or protection of another" as well as "reasonable" corrective force used by a parent or guardian against a child.[79] Provisions in two jurisdictions still do not appear to require consideration of family or domestic violence.[80] All jurisdictions should not only mandate consideration of family violence

[74] See Linda C Neilson, Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases, Canadian Legal Information Institute, 2nd ed (2020), 2017 CanLIIDocs 2, online: <https://canlii.ca/t/ng>.
[75] SK CLA, *supra* note 56, ss 2(1), 10(2), 10(3)(j); ON CLRA, *supra* note 8, ss 18(1),(2), 24(3)(j), 24(4); NB FLA, *supra* note 56, ss 1, 50(2)(j), 50(4); PEI CLA, *supra* note 56, ss 36(2), 33 but references the PEI VFVA, *supra* note 8, s 2 in defining family violence to include emotional abuse and the deprivation of necessities.
[76] BC FLA, *supra* note 8, ss 38, 37(2).
[77] MB FMA, *supra* note 57, s 1 references the definition in the MB DVSA, *supra* note 8, s 2(1.1) which includes conduct that "reasonably, in all the circumstances, constitutes psychological or emotional abuse"; NS PSA, *supra* note 61, ss 18(7), 2(da) includes "psychological or emotional abuse that constitutes a pattern of coercive or controlling behavior" and "unreasonable restrictions on financial or personal autonomy."
[78] AB FLA, *supra* note 62, s 18(3)(conduct that causes physical harm, including forced confinement and sexual abuse or causes reasonable fear for safety); NL CLA, *supra* note 56, s 31(3) (not defined); NWT CLA, *supra* note 56, s 17(3) (not defined); NU CLA, *supra* note 56, s 17(3) (not defined).
[79] AB FLA, *supra* note 62, s 18(3).
[80] YK CLA, *supra* note 56; QB CCQ, *supra* note 59, arts 514, 521.7.

but also define it to include coercive and controlling behaviour, which is a common form of violence that can cause serious harm to mothers and children.

Many jurisdictions now also require courts to consider whether there have been civil or criminal proceedings that are relevant to the safety, security and well-being of the child when making parenting orders.[81] While court rules or forms may require the parties to provide an affidavit that discloses whether they have been or are now involved in child protection or criminal proceedings,[82] many jurisdictions lack the capacity to verify accounts provided by the parties. This places an onus on victims to attempt to access such records through applications to courts or through freedom of information applications to police or child protection authorities. In British Columbia, applicants for guardianship must agree to a child protection record check in addition to disclosing in an affidavit any incidents of family violence.[83] In Ontario, non-parents who apply for a parenting order must provide criminal record and child protection checks and a clerk of the court may be required to provide information regarding such proceedings.[84] A court is also empowered to inquire of the parties and to review information "that is readily available and that has been obtained through a lawful search."[85] Respondents, who have personal knowledge of such events and can more readily access their records, should be required to produce such record checks whenever family violence and criminal or child protection involvement is alleged.

Several jurisdictions include a provision in their legislation that allows each parent as much contact as is consistent with the child's best interests.[86] In the *Divorce Act*, this provision is now situated in the section dealing with best interests and the previous reference to "maximum contact" in the marginal note has been removed. As well, the friendly parent provision has been removed from the previous section and now appears in a modified form as one of many factors that must be considered relevant to a child's best interests.[87] These changes were intended to address concerns that the previous provisions were being interpreted as a presumption of equal time or were failing to adequately protect children and parents in cases of family violence. It is questionable whether these changes go far enough in protecting children in such circumstances. In particular, concerns

[81] E.g. *Divorce Act*, *supra* note 72, s 16(3)(k); AB FLA, *supra* note 62, s 18(2)(viii)(B); SK CLA, *supra* note 56, s 10(3)(k); ON CLRA, *supra* note 8, s 33.3; *Regulation of the Superior Court of Québec in family matters*, CQLR c C-25.01, r 0.2.4, s 16; NB FLA, *supra* note 56, s 7; PEI CLA, *supra* note 56, s 5.

[82] For example, in Saskatchewan, see online: <www.qp.gov.sk.ca/documents/gazette/part1/2017/G1201709.pdf> page 400.

[83] *Family Law Act Regulation*, BC Reg 347/2012, s 26.1, Form 5 and *Provincial Court (Family) Rules*, BC Reg 417/98, Form 34.

[84] ON CLRA, *supra* note 8, ss 21.1, 21.2, 21.3 and for the affidavit provided by the parties, see s 21(2); see also PEI CLA, *supra* note 56, which authorizes a court to require an investigation and report by the Director of Child Protection in some circumstances, s 37.

[85] ON CLRA, *ibid*, 33.3(3).

[86] *Divorce Act*, *supra* note 72, s 16(6); ON CLRA, *ibid*, s 24(6); NB FLA, *supra* note 56, s 50(6); NS PSA, *supra* note 61, s 18(8) (though specific reference is made in the section to "consideration of the impact of any family violence, abuse or intimidation"); PEI CLA, *supra* note 56, s 40(1). Jurisdictions that do not include such a provision, QB CCQ, *supra* note 59, art 514; BC FLA, *supra* note 8; AB FLA, *supra* note 62; SK CLA, *supra* note 56; MB FMA, *supra* note 57; NL CLA, *supra* note 56; YK CLA, *supra* note 56; NWT CLA, *supra* note 56; NU CLA, *supra* note 56. In Alberta, such a provision was read into the Act, *DAF v SRG* 2020 ABCA 25 at para 21.

[87] *Divorce Act*, *supra* note 72, s 16(3)(c) (willingness to support a child's relationship with the other parent) and s 16(3)(i) (ability and willingness to communicate and cooperate with the other spouse).

persist that 'friendly parent provisions' and claims of parental alienation may be used to undermine and sideline the significance of family violence. Studies of case law have found that domestic violence allegations are often met with counter-claims of alienation and that victims of domestic violence are less likely to be believed in such circumstances.[88] In a study by Boyd and Sheehy, courts paid more attention to parental alienation claims than to domestic violence and where the latter was established, mothers were still required to cooperate and speak positively of fathers or run the risk of being seen as alienating parents.[89] The recent amendments were intended to bring greater attention to family violence and its outcomes and to prioritize the safety and emotional security and well-being of children. The various provisions of the *Divorce Act* should now be interpreted in light of such objectives.[90]

The amended *Divorce Act* continues to lack any presumptions in favour of any particular parenting arrangement.[91] British Columbia, however, is the only jurisdiction to provide explicitly that no particular parenting arrangement is presumed to be in the best interests of a child.[92]

A number of other trends are evident across jurisdictions in relation to parenting disputes:

- Notice of an intention to relocate should be given or a judicial exemption from the notice provisions should be obtained including where there is a risk of family violence. Failure to do so will be taken into account in authorizing any relocation.[93] Such provisions may be

[88] Neilson found that about 42% of 357 reported cases involving parental alienation in Canada between 2007 to 2017 also involved allegations of intimate partner violence and child abuse, with about 77% of the former advanced by alleged perpetrators of intimate partner violence and 23% by alleged victims, who were overwhelmingly fathers and mothers respectively. In 40 cases or 36.7% of the 109 cases in which PA was claimed by an alleged perpetrator, the court made a positive finding of alienation against the alleging parent. In 39 of these cases, children were removed and placed with the allegedly abusive parent and in 24 of these, contact was limited to supervised access or denied entirely. By contrast, courts granted unsupervised parenting time in the vast majority of cases to alleged perpetrators, Linda C Neilson, "Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?" (2018: Fredericton: Muriel McQueen Fergusson Centre for Family Violence Research and Vancouver: The FREDA Centre for Research on Violence Against Women and Children. Neilson also found that courts were more apt to restrict contact with mothers than with fathers where alienation was found, *ibid* at 34. In another study of 90 Canadian cases involving claims of both intimate partner violence and parental alienation between 2014 and 2018, intimate partner violence was usually seen as irrelevant, left unresolved, discounted or neutralized i.e. seen as a one-off occurrence or as part of a high conflict relationship; and found relevant in only 10% of the cases, Elizabeth Sheehy & Susan B. Boyd, "Penalizing women's fear: intimate partner violence and parental alienation in Canadian child custody cases" (2020) 42 J *Social Welfare and Family Law* 80. These findings are consistent with those of an extensive study of US cases involving intimate partner violence or child abuse and parental alienation where a cross-claim of alienation by a father was found to be significantly correlated with reduced acceptance of abuse claims by mothers and increased by three times the odds of a father obtaining primary custody from mothers, see Joan S. Meier, "U.S. child custody outcomes in cases involving parental alienation and abuse allegations: what do the data show?" (2020) 42:1 Journal of Social Welfare and Family Law 92. See also Suzanne Zaccour, "Parental Alienation in Quebec Custody Litigation" (2018) 59 Cahiers de Droit 1073; BJ Fidler & N Bala "Concepts, Controversies And Conundrums Of "Alienation:" Lessons Learned In A Decade And Reflections On Challenges Ahead" (2020) 58:2. *Family Court Review* 579.

[89] Sheehy and Boyd, *ibid* at 88.

[90] See an interpretative guide that takes account of such concerns, , Linda C Neilson and Susan B Boyd, *Interpreting the New Divorce Act, Rules of Statutory Interpretation & Senate Observations*, online: FREDA Centre, <https://www.leaf.ca/wp-content/uploads/2020/03/Interpreting-the-New-Divorce-Act.pdf>.

[91] Note however that the burden of proof may shift in cases involving relocation, *Divorce Act*, *supra* note 72, s 16.93.

[92] BC FLA, *supra* note 8, s 40(4); Saskatchewan's Act now includes a clause that bars any presumptions or inferences as to a preferred parent but it is unclear how this will be interpreted: SK CLA, *supra* note 56, s 11.

[93] E.g. *Divorce Act*, *supra* note 72, ss 16.8, 16.9, 16.92(1)(d); BC FLA, *supra* note 8, ss 65-71.

difficult to meet for survivors of domestic violence depending on their ability to access legal counsel in a timely way;

- Provisions for the enforcement of parenting orders are common in most jurisdictions and typically include the search for and apprehension of a child by police where authorized by a court order.

The legislation in British Columbia provides specifically that denial of parenting time or contact is not wrongful where it is reasonably believed that a child might suffer family violence if parenting time or contact is exercised.[94] Such a provision might assist survivors in resisting claims of parental alienation while attempting to protect their children.

As for jurisdiction and the inter-jurisdictional enforcement of court orders, most provinces and territories allow courts to assume jurisdiction if a child is habitually resident there. If the child is not habitually resident there, courts in most jurisdictions may assume jurisdiction in some specified situations, among them where a child is physically present and would suffer "serious harm" if they were forced to remain with or be returned to the other parent or if removed from the province or territory.[95] However, in several provinces, there are no statutory references to a "serious harm" threshold in establishing jurisdiction.[96] While extraprovincial or extraterritorial orders are normally recognized in each jurisdiction, courts in many jurisdictions may also override or supersede such orders in limited situations, including again where a child is physically present in the jurisdiction and would suffer "serious harm" as a result of compliance with such an order.[97] Here also, some jurisdictions do not include a "serious harm" test.[98] To assist with consistency and to ensure that the risks of domestic violence for mothers and children are taken into account, the threshold for the assumption of jurisdiction and for non-compliance with extra-jurisdictional

[94] BC FLA, *ibid*, s 62.

[95] BC FLA, *ibid*, s 74(2)(c); ON CLRA, *supra* note 8, s 23; NB FLA, *supra* note 56, s 69; PEI CLA, *supra* note 56, s 35(2); NL CLA, *supra* note 56, s 29; YK CLA, *supra* note 56, s 38; NWT CLA, *supra* note 56, s 26; NU CLA, *supra* note 56, s 26. In Ontario, New Brunswick, Prince Edward Island, Yukon, Northwest Territories and Nunavut, a court also has discretion to decline jurisdiction if better or more appropriately exercised elsewhere.

[96] In case law, Alberta has applied a substantial connection test in determining jurisdiction, see *JB v JPC*, 2005 ABQB 99 at para 28. A Saskatchewan court will have jurisdiction if a child is habitually resident or physically present in Saskatchewan and their habitual residence cannot be determined. Removal or retention of the child does not change habitual residence unless there is an agreement between the parties or failure to bring an action for return of the child for at least one year after they knew or should have known of the child's whereabouts and the child is settled in the new jurisdiction, SK CLA, *supra* note 56, ss 6-7. Common law rules apply in Manitoba and require a child to be present, resident or domiciled in Manitoba at the time of the application. Québec courts will assume jurisdiction if a child is domiciled in the province but may decline jurisdiction in exceptional cases where another state is in a better position to decide the matter, CCQ, Arts 3142 and 3135. In Nova Scotia jurisdiction is also subject to common law principles.

[97] BC FLA, *supra* note 8, s 76(1)(a); *Enforcement of Custody Orders Act*, SA, s 4; MB CCEA, *supra* note 56, s 5; ON CLRA, *supra* note 8, s 42 (and if material change in circumstance, s 43); NS PSA, *supra* note 61, s 4(1); PEI CLA, *supra* note 56, s 57; NL CLA, *supra* note 56, s 51 (and if material change in circumstance or contrary to public policy, s 50); YK CLA, *supra* note 56, s 52; NWT CLA, *supra* note 56, s 36; NU CLA, *supra* note 56, s 36.

[98] Saskatchewan, as an exception, does not reference "serious harm" but does allow for non-compliance in some circumstances including where an order is "manifestly contrary to public policy in Saskatchewan", SK CLA, *supra* note 56, s 24(6). Québec and Alberta do not have such a test in their governing legislation.

orders should be standardized across all Canadian jurisdictions to include the risk of serious harm to the child.

All jurisdictions have adopted the Hague Convention on international child abduction.[99] Under the Convention, a child is to be returned to a signatory country if the child has been habitually resident there prior to a wrongful removal or retention of the child. However, this provision is subject to an exception under Article 13 where a child would then be exposed to a "grave risk" of physical and psychological harm or be placed in an "intolerable situation." This standard has been held to include exposure to domestic violence, but the Ontario Court of Appeal has also held that the standard is more stringent than the "serious harm" threshold under Ontario law.[100] To rely on this exception, a claimant may also have to establish that the country of the child's habitual residence would be unwilling or unable to protect the child from further harm, even with undertakings in place.[101]

In summary, it is extremely important that judges, lawyers and other professionals working in this field understand the different forms that family violence can take, particularly the dynamics and the tactics that are employed to effect coercive control in family relationships both before and after separation of the parties and further, fully understand how family violence affects and harms children.

Child and Spousal Support

Child support is generally available under the federal *Divorce Act* and under all provincial/territorial statutes for children under the age of majority and at or over the age of majority if they remain dependent on the claimant and under their charge for reasons such as disability, illness or attendance at a post-secondary educational institution. However, six jurisdictions identify the age of majority as 18 (Alberta, Saskatchewan, Manitoba, Ontario, Québec, Prince Edward Island) and seven as 19 (Newfoundland and Labrador, Yukon, Northwest Territories, Nunavut, British Columbia, New Brunswick, Nova Scotia).

In some jurisdictions, a child who has withdrawn from a parent's charge may lose the right to support unless they did so because of family violence or for similar reasons.[102] All jurisdictions apply the federal *Child Support Guidelines* or some variation thereof (in Québec and Manitoba) in determining the amount of child support payable. A promising development or trend in some jurisdictions is the establishment of Child Support Recalculation Services that will in some situations help parents to recalculate support with updated information and, in some jurisdictions, help to establish child support payments from the outset.[103] These services may help to both minimize contact with abusive spouses and avoid the cost of litigation.

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[99] *Hague Convention on the Civil Aspects of International Child Abduction*, October 25 1980.
[100] *MSS v DEME*, 2020 ONCA 486
[101] See e.g. *DR v AAK*, 2006 ABQB 286; *JP v TNP*, 2016 ABQB 613, and see *Achakzad v Zemaryalai*, 2010 ONCJ 318, where undertakings were found insufficient to control the risk of harm.
[102] E.g. BC FLA, *supra* note 8, s 147(1)(b); ON FLA, *supra* note 8, s 31(2) (child 16 or older).
[103] See Department of Justice, "Inventory of Government-Based Family Justice Services", online: <https://www.justice.gc.ca/eng/fl-df/fjs-sjf/sch-rch.aspx?typeID=6>.

There are more significant variations between jurisdictions in terms of entitlement to spousal support. Women, who are more likely to have primary care of children, to perform more domestic labour and earn less in the labour market, are the claimants in the vast majority of spousal support cases. Spousal support is generally intended to relieve hardship or needs flowing from a spousal relationship or its breakdown, and to compensate for economic disadvantage arising from the roles assumed during the relationship. Under the *Divorce Act,* only those married spouses who are seeking a divorce can claim spousal support. In the common-law provinces and territories, however, spousal support is also available to those who have registered their relationship in a prescribed manner[104] or to those who have lived in a conjugal or marriage-like relationship continuously for 2 years,[105] or 3 years,[106] or for a lesser period of time (generally where the parties are parents of a child).[107] In some of these jurisdictions, claims may also have to be made within a certain time-frame.[108] In some, support may be available for mothers who would not otherwise be eligible in order to address a loss of income or other costs associated with giving birth to a child but only for a limited period of time before and after the birth.[109]

In Québec, an unmarried cohabitant is not entitled to spousal support at all unless the relationship has been solemnized as a civil union or spousal support has been agreed to under a cohabitation or separation agreement.[110] Four judges of the Supreme Court of Canada in 2013 found that this exclusion of unmarried cohabitants did not violate a claimant's rights to equality or constitute discrimination on the basis of marital status because it did not perpetuate prejudice or stereotyping. A fifth judge, McLachlin CJ, found that in any case, such a violation was a reasonable limit under the *Canadian Charter of Rights and Freedoms.*[111] In upholding the exclusion, the plurality

[104] AB FLA, *supra* note 62, s 1(n), 7; MB FMA, *supra* note 57, ss 1, 4(1); NS PSA, *supra* note 61, s 2(m).
[105] BC FLA, *supra* note 8, s 3; *The Family Maintenance Act, 1997,* SS 1997, c F-6.2, ss 2, 5 (SK FMA); NS PSA, *supra* note 61, s 2(m); NL FLA, *supra* note 57, s 35; NWT FLA, *supra* note 57, s 1(1); NU FLA, *supra* note 57, s 1(1).
[106] AB FLA, *supra* note 62, s 3; MB FMA, *supra* note 62, s 1; ON FLA, *supra* note 8, s 14(2); NB FLA, *supra* note 56, s 14(2)(a) (if the claimant has been "substantially dependent" on the other for support); PEI FLA, *supra* note 57, s 29(b)
[107] BC FLA, *supra* note 8, ss 3(1); AB FLA, *supra* note 62, s 3; SK FMA, *supra* note 105, s 2; MB FMA, *supra* note 62, s 1 (at least one year if parents of a child); ON FLA, *supra* note 8, s 29; NB FLA, *supra* note 56, s 14(2); NS PSA, *supra* note 61, s 2(m); PEI FLA, *supra* note 57, s 29(b); NL FLA, *supra* note 57, s 35; NWT FLA, *supra* note 57, s 1(1); NU FLA, *supra* note 61, s 1(1); YK FPSA, *supra* note 59, 37 (available to those who have cohabited in a relationship "of some permanence").
[108] E.g. PEI FLA, *supra* note 57, ss 49, 38.1(4) (2 years from date or separation or default in payment of support); BC FLA, *supra* note 8, s 198(2) (2 years after divorce judgment, declaration of nullity or date of separation); YK FPSA, *supra* note 59, s 37 (if unmarried, can apply during cohabitation or not later than 3 months after); NWT FLA, *supra* note 57, s 32 (within 2 years of separation or default in payment of support under a domestic contract); NU FLA, *supra* note 61, s 32 (within 2 years of separation or default in payment of support under a domestic contract).
[109] E.g. SK FMA, *supra* note 105, s 9(1)(f); NB FLA, s 15.
[110] QB CCQ, *supra* note 59, arts 501-02, 585. A civil union is defined as a commitment by two persons 18 years of age or over who consent to live together and contract openly before an official competent to solemnize marriages in front of two witnesses in accordance with formalities that include prior publication, art 521.1-.5. Parties to a civil union have rights similar to those who are married, art 521.6. The total number of civil unions between 2002 and 2019 has been only 4277, see Québec, Banque de donnees des statistiques officielles sur le Québec, *Mariages et unions civiles selon le sex des conjoints, Québec*, online: <bdso.gouv.qc.ca/pls/ken/ken213_afich_tabl.page_tabl?p_iden_tran=REPERWIYZSO571704364686286*2P~&p_lang=1&p_id_ss_domn=817&p_id_raprt=814>.
[111] See *Québec v A*, 2013 SCC 5.

emphasized autonomy and a *de facto* spouse's freedom to choose whether to opt into the protections of marriage or of a civil union. By contrast, Abella J, in dissent, found that the purpose of the legal regimes as they applied to married and civil union spouses in Québec was to protect economically vulnerable spouses, who were disproportionately women, upon the breakdown of relationships of interdependence. According to her and three other judges, the failure to provide a right to spousal support, given the functional similarities between marriages and many unmarried relationships, perpetuated a historic disadvantage based on marital status and could not be justified as a reasonable limit under s 1.

The claimant in *Québec v A* did not claim to be a victim of domestic violence and no one in the judgment referenced the situation of spouses who have experienced domestic violence. However, rates of spousal violence, including homicides, are known to be higher among cohabiting couples who are unmarried.[112] Women in coercive and controlling common-law relationships may also be forced to surrender their salaries, abandon jobs or sacrifice promotions and be subjected to many other forms of financial abuse. As with married spouses, the economic disadvantages experienced by unmarried cohabitants as a result of the roles they assume in these relationships should be capable of being addressed through spousal support. The inability to obtain spousal support in cases of domestic violence affects not only unmarried survivors but also their children who will generally have access to less economic support than they would have had if their mother had been married or in a civil union.

Violence or abuse also undermines the conditions that would support the exercise of free and voluntary choice to enter into a civil union or agreement. Chief Justice McLachlin stated that the claimant in *Québec v A* did not choose to forgo the protection of marriage: "A's real choice was of a different nature: she could either remain in a *de facto* relationship with B, or walk away from it after having become accustomed to the lifestyle she shared with him."[113] In relationships involving domestic violence, well documented barriers to leaving include an escalation of retaliatory violence, the psychological impact of abuse and the potential for increased risk to children in the post-separation period, along with structural barriers such as traditional gender roles, unpaid child care, inadequate social assistance, unaffordable alternative housing, precarious employment, and immigration uncertainties. In *Fraser v Canada*, the Supreme Court recently held that 'choice' should not be unduly emphasized to undermine equality concerns in the employment context, and similar reasoning could be applied in the context of claims by unmarried cohabitants.[114] Québec has undertaken a review of the legal status of conjugal relationships but has not released a report as yet. It is hoped that the province will choose to embark on reforms.

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[112] Maire Sinha, "Intimate partner violence" in Homicide in Canada, 2012, online: <https://www150.statcan.gc.ca/n1/pub/85-002-x/2013001/article/11805/11805-3-eng.htm> suggesting that women were four times more likely to be killed by a common-law partner than a married spouse between 2007 and 2011. Rates of spousal violence may generally be higher because individuals in common-law unions are more likely to be younger and have lower socio-economic status, rendering exit more difficult: Holly Johnson 2006, *Measuring Violence Against Women: Statistical Trends 2006.* Statistics Canada Catalogue no 85-570-X.

[113] *Supra* note 111 at para 428.

[114] 2020 SCC 28 at para 91 per Abella J (for the majority of six judges).

Differences in the requirements for and definitions of spousal status as between jurisdictions have also been found not to violate the *Charter*.[115] However, enhanced eligibility and greater consistency within and between jurisdictions would be desirable not only to provide greater relief for the mothers and children subjected to domestic violence, who need time to recover and heal from their experiences,[116] but also to minimize confusion for claimants as to their legal entitlements. Common-law partners may lack accurate information as to their rights as definitions of status can change depending on the right or benefit in question. Spousal definitions may differ as between private and public benefits and between federal and provincial benefits as well as change as one moves across jurisdictions, giving rise to substantial confusion.

For those who are entitled to claim spousal support in their jurisdiction, domestic violence may be relevant to the amount of support ordered as it may cause, prolong or increase the need for support i.e. the capacity of the claimant/victim to achieve self-sufficiency. Several statutes explicitly recognize that misconduct may be relevant in this way[117] or have allowed for consideration of a "course of conduct that is so unconscionable as to constitute an obvious and gross repudiation of the relationship."[118] None explicitly identify domestic violence.

Domestic violence may also be relevant to the impact of domestic contracts or separation agreements that waive or limit the payment of spousal support. Under the *Divorce Act*, courts will generally look at whether the agreement was fairly negotiated; whether it substantially complies with the objectives of spousal support and whether there are new circumstances not reasonably anticipated at the time of the agreement.[119] Several jurisdictions provide that domestic contracts will be binding unless they are unconscionable, or the claimant qualifies for or is dependent upon social assistance, or there has been default in the payment of support.[120] The test of unconscionability in the commercial arena of contract law is a stringent test to meet. In British Columbia, an agreement may be overturned in what appear to be broader circumstances such as significant non-disclosure, taking improper advantage of vulnerability including ignorance, need or distress; lack of understanding of the nature of the agreement or its consequences; other circumstances that would cause the agreement to be voidable (e.g. duress); or where the agreement is "significantly unfair" in light of conditions since the agreement or in light of the objectives of spousal support.[121] These are still high thresholds to meet; however, courts should be sensitive to

[115] See *Brebic v Niksic*, 2002 CFLG para 25.814 (OCA) where the 3 year prerequisite in the Ontario act was found to be a justifiable "attempt to target only those relationships of sufficient duration and demonstrated permanence as to justify the imposition of ongoing support obligations after the termination of the relationship."

[116] While civil claims for damages arising from domestic violence may be launched, drawbacks include more substantial emotional and legal costs, relatively low awards and a reduced chance of enforcing awards. Civil claims are discussed more fully in Section I.

[117] BC FLA, *supra* note 8, s 166; AB FLA, *supra* note 62, s 59; ON FLA, *supra* note 8, s 33(9); YK FPSA, *supra* note 59, s 34(4) (but may refuse support if dependent has remarried or is cohabiting in another relationship of some permanence, s 34(5)); NB FLA, *supra* note 56, s 23(2).

[118] E.g. NL FLA, *supra* note 57, s 39(10); NWT FLA, *supra* note 57, s 16(10); NU FLA, *supra* note 61, s 16(10).

[119] See *Miglin v Miglin*, 2003 SCC 24.

[120] NB FLA, *supra* note 56, s 27; PEI FLA, *supra* note 57, s 32(4); NL FLA, *supra* note 57, s 46; YK FPSA, *supra* note 59, s 34(3); NWT FLA, *supra* note 57, s 19 (in default for 3 months); NU FLA, *supra* note 61, s 19 (in default for 3 months); MB FMA, *supra* note 62, s 9(3) (if in default, if amount inadequate given circumstances at the time of the agreement, or if claimant receiving public assistance);

[121] BC FLA, *supra* note 8, s 164(5).

the distinctive experiences and vulnerabilities of survivors, particularly those who are experiencing coercive control and who enter into agreements to waive or limit support.[122]

Family Property Division

Provincial and territorial statutes allowing for claims to property division generally aim to recognize that there is joint contribution in a spousal relationship that presumptively entitles each spouse to an equal share of family property upon the breakdown of the relationship.[123] Again, women are more likely to be claimants for the distribution of family property given their primary role in the rearing of children and the greater chance that assets are held or controlled by male partners.

As with spousal support and claims to exclusive possession, however, there are significant differences based on marital status across jurisdictions in terms of entitlement to a share of family property. All recognize that married persons or those who have entered into a marriage that is void or voidable in some circumstances may apply for division of family property. However, claims by unmarried persons may be made in some jurisdictions by those who have entered into an agreement or registered their relationship in a prescribed manner[124] or have cohabited in a conjugal or marriage-like relationship continuously for two years[125] or three years.[126] In most jurisdictions, claims must be made within a limited time frame.[127] An equal sharing of family property is typically presumed, subject to some exceptions or equitable considerations.[128]

Misconduct between spouses is generally relevant only if a spouse has intentionally or recklessly dissipated, squandered, or transferred property in an attempt to defeat the claim of the other spouse.

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[122] Among other reasons, mothers may agree to such waivers as a result of a fear of retaliation, pressure or intimidation, or the normalization and psychological impact of abuse or in an effort to secure custody or primary residence of children or end the abuse as soon as possible.

[123] See also the discussion of FHRMIRA, below.

[124] *The Family Property Act*, CCSM c F25, s 1(1) (MB FPA); QB CCQ, *supra* note 59, arts 521.1ff; AB FPA, *supra* note 62, s 7; *Adult Interdependent Relationships Act*, SA 2002, c A-4.5; NS MPA, *supra* note 127, s 2(g); *Vital Statistics Act*, RSNS 1989, c 494, s 54(2)(g).

[125] BC FLA, *supra* note 8, s 3; SK FPA, *supra* note 61, s 2(1); NWT FLA, *supra* note 57, s 1(1) (or have lived in a conjugal relationship of "some permanence" and are the biological or adoptive parents of a child); NU FLA, *supra* note 61, s 1(1) (or have lived in a conjugal relationship of "some permanence" and are the biological or adoptive parents of a child).

[126] AB FPA, *supra* note 62, s 7 (must also be divorced or have lived separate and apart for one year unless seeking an order to restrain dispositions under s 34); MB FPA, *supra* note 124, s 1(1).

[127] E.g. BC FLA, *supra* note 8, s 198(2) (within two years after divorce judgment, declaration of nullity or date of separation for unmarried cohabitants); AB FPA, *supra* note 62, ss 5-6 (includes 2 years after divorce judgment or after cohabitation ceases, whichever occurs first); SK FPA, *supra* note 61, s 3.1 (prior to divorce or within 2 years after cohabitation ceases for unmarried claimants); MB FPA, *supra* note 124, ss 19, 19.1 (within 60 days of divorce taking effect or from dissolution of partnership or 3 years of separation, subject to possible extensions); *Matrimonial Property Act*, RSNS 1989, c 275, s 2 (prior to divorce or declaration of nullity) (NS MPA); PEI FLA, *supra* note 57, s 7(3) (earlier of 2 years after divorce or judgment of nullity; six years after separation); NL FLA, *supra* note 57, s 21(3) (earliest of 2 days after divorce or judgment of nullity, 6 years after separation); see also, ON FLA, *supra* note 8, s 7(3); NB MPA, *supra* note 59, ss 3(2), (4); YK FPSA, *supra* note 59, s 22; NWT FLA, *supra* note 57, ss 38(3), 51; NU FLA, *supra* note 61, ss 38(3), 51. Different limitation periods apply to claims made after the death of a spouse.

[128] E.g. SK FPA, *supra* note 61, s 20. Some statutes distinguish between the family home and other assets or between family and commercial assets and apply different presumptions to each, e.g. MB FPA, *supra* note 124; NB MPA, *supra* note 59 (marital and non-marital property).

Most jurisdictions allow for orders that restrain such conduct or take account of it in making an equalization order.[129] Misconduct may also be relevant to the validity of agreements with respect to a division of assets entered into before, during or after separation. However, agreements are generally binding subject to fairly narrow exceptions, none of which explicitly identify domestic violence.[130] This is particularly true if agreements have been negotiated with adequate disclosure and the assistance of legal counsel[131] although the Supreme Court of Canada has held that courts should not assume that "the mere presence of professional assistance automatically [has neutralized] vulnerabilities."[132] Courts must be attentive to trauma and the impact of coercive control on survivors, particularly those in long term relationships, when deciding whether to set such agreements aside. These outcomes also underscore the importance of screening by lawyers and FDR professionals along with measures to ensure safety and support for survivors in their recovery from abuse in order to achieve substantively fair agreements.

Unmarried partners have no statutory rights to family property division in five jurisdictions,[133] and in two jurisdictions, have rights only if they are able to, and have, registered their relationships in a prescribed manner.[134] They may be able to advance claims under the law of unjust enrichment for a constructive trust[135] but lacking presumptions of equal sharing, such claims are much less predictable in terms of outcomes, often generate lower awards, and are more difficult to prove and costly to litigate.

Exclusions arising from marital status to the statutory regime governing the distribution of family property have been upheld in two Supreme Court of Canada challenges, including the *Québec v A* decision previously discussed.[136] In both cases, a majority or plurality of the Supreme Court emphasized autonomy and freedom of choice in relation to spousal obligations while dissenting

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[129] E.g. BC FLA, *supra* note 8, s 91; YK FPSA, *supra* note 59, s 42.

[130] E.g. BC FLA, *ibid*, s 93 (where improper advantage" was "taken of other spouse's vulnerability" such as ignorance, need or distress); SK FPA, *supra* note 61, s 24 (unconscionable or grossly unfair if an interspousal contract); NS MPA, s 29 (if "unconscionable, unduly harsh on one party, or fraudulent"); PEI FLA, *supra* note 57, s 55(4) (e.g. failure to disclose significant assets or debts); ON FLA, *supra* note 8, s 56(4) (may set aside if failure to disclose significant assets, failure to understand nature or consequences of the contract when entered into or otherwise according to contract law).

[131] See e.g. *Hartshorne v Hartshorne*, 2004 SCC 22 and see BC FLA, *ibid* (amended in 2013).

[132] *Rick v Brandsema*, 2009 SCC 10 at para 60.

[133] ON FLA, *supra* note 8 (applies only to married spouses or those who have entered in good faith into a marriage that is void or voidable upon a breakdown of their marriage); NB MPA, *supra* note 59, s 1 (only married parties); NL FLA, *supra* note 57, s 21(1) (if getting a divorce, marriage a nullity or have separated with no reasonable prospect of resuming cohabitation; if marriage voidable must apply before a judgment of nullity and if void, must have cohabited within preceding year); YK FPSA, *supra* note 59, s 1 (if void have cohabited within preceding year and if voidable have applied before a judgment of nullity); PEI FLA, *supra* note 57, s 1, 2.1 (married or marriage is voidable or void and entered into in good faith).

[134] The QB CCQ, *supra* note 59, provides rights in relation to the family patrimony and a sharing of gains through a partnership of acquests but only for parties who are married or have registered their relationship as a civil union, arts 396, 432, 414ff, 521ff; NS MPA, *supra* note 127, s 2(g); NS *Vital Statistics* Act, *supra* note 124 (applies upon breakdown of the spousal relationship to married persons, those in a voidable marriage not yet annulled, those who entered into a void marriage in good faith and have cohabited the preceding year, or to those in a registered domestic partnership).

[135] See *Peter v Beblow*, [1993] 1 SCR 980*; Kerr v Baranow*, 2011 SCC 10 and QB CCQ, *supra* note 59, arts 1493-1496.

[136] *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83; *Québec v A*, *supra* note 111.

judges emphasized the need for protection of vulnerable women and the lack of informed choice and equal bargaining power in situations of cohabitation. However, three judges in *Quebec v A* who had found the exclusion of spousal support to be unjustifiable because of its failure to meet the basic needs of a common-law partner were unwilling to make a similar finding in relation to property division. This left only Abella J finding both exclusions to be unjustified. The right of unmarried cohabitants to property division is far more controversial than the rights to spousal support, in part because of perceived differences in the nature and impact of the obligation and the diversity of cohabiting relationships. The lack of access to family property legislation, however, can pose significant hardships, particularly for cohabiting spouses with children who are experiencing violence. Arguably, heterogeneity in the population affected can be reduced by imposing threshold requirements of cohabitation for a set period of time, as most jurisdictions have done, and by allowing parties to opt out of the legislation by way of contract, with appropriate safeguards in place.

In addition to constraints arising from marital status, the ability of First Nations women to obtain a division of family property on reserves has been a longstanding concern. The FHRMIRA recognizes the authority of First Nations to enact their own laws regarding interests in land or structures on reserves as between married and common law partners (those who have lived together for one year) and until such time, provides provisional default rules for the division of rights and interests. These rules set out a presumptive half interest in the family home and a share of additional interests if they are a First Nation member or Indian.[137] Applications must be made within 3 years after the parties have ceased to cohabit, subject to an extension in some circumstances.[138] The depletion of assets may be restrained.[139] Given the many barriers to usage by Indigenous women of Canadian courts, more research is needed to determine whether this Act has been at all effective in improving their access to a division of family property on reserves.

Family Dispute Resolution (FDR)

Legislatures and courts have for some time encouraged the resolution of family law disputes through processes other than court-based adjudication. Such processes may include negotiation, mediation, collaborative law services, parenting coordination, arbitration, and judicial dispute resolution. The amended provisions of the *Divorce Act* now impose a duty on the parties to try to resolve conflict through family dispute resolution processes "to the extent it is appropriate."[140] Legal advisors also have a duty to advise their clients of dispute resolution processes and encourage their use, unless "clearly" inappropriate.[141] Several provinces had either before the amendments or have, in their wake, incorporated some or all of these duties in their family legislation.[142]

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[137] FHRMIRA, *supra* note 31, s 28 subject to factors set out in s 29.
[138] FHRMIRA, *ibid*, s 30.
[139] FHRMIRA, *ibid*, s 32.
[140] *Divorce Act*, *supra* note 72, s 7.3.
[141] *Ibid*, s 7.7(2)(a).
[142] E.g. AB FLA, *supra* note 62, s 5(1)(b) (duty on lawyers to inform clients of types of DR); SK FPA, *supra* note 61, s 44.1(1); SK FMA, *supra* note 105, s 16; SK CLA, *supra* note 56, s 20 (lawyers must advise of mediation and collaborative law services); ON CLRA, *supra* note 8, s 33.1, 33.2; QB CCQ, *supra* note 59, art 2; NB FLA, *supra*

A number of issues arise in this context: are such processes being mandated at some stage of the litigation process and how does mandatory FDR affect women experiencing violence? Are family dispute resolution professionals required to be adequately trained in and screen for domestic violence? Is independent legal advice being provided before parties are required to engage in such processes? What costs are being imposed on parties to family disputes?

Under the *Divorce Act*, a judge may order a DR process[143] and under most provincial and territorial statutes, judges may also be empowered, on the request of a party or on their own initiative, to order a mediation session and/or adjourn family proceedings for such a purpose.[144] In some of these instances, it appears that mediation may occur without the consent of both parties.[145] In only a few of these are courts expressly required by statute to consider whether there has been an equal balance of power between the parties or family or spousal violence.[146]

While the *Divorce Act* stops short of otherwise requiring parties to engage in FDR, several provinces and territories in their family legislation or rules of court do generally mandate participation in family dispute resolution at some stage of the proceedings.[147] For example, the Rules of Court may require that triage and case conferences be held before parties can proceed with their claims.[148] In Manitoba, these conferences normally explore the possibility for settlement but applicants may request an "emergent hearing" where there is "immediate or imminent risk of harm to a party or a child of a party," the loss or destruction of property or removal of a child from

note 56, ss 5(3), 6; NS PSA, *supra* note 61, s 54C(1) (lawyers must advise of negotiation and alternative dispute resolution); PEI CLA, *supra* note 56, ss 3(3), 4

[143] *Divorce Act*, *supra* note 72, s 16.1(6).

[144] E.g. AB FLA, *supra* note 62, s 97; SK QBA, *supra* note 56, s 96; SK FMA, *supra* note 105, s 15; SK CLA, *supra* note 56, s 18; *The Court of Queen's Bench Act,* CCSM c C280, s 47(1) (MB QBA); ON CLRA, *supra* note 8, s 31(1); QB CCP, *supra* note 8, art 420; NB FLA, *supra* note 56, ss 8, 52(4)(d); *Nova Scotia Civil Procedure Rules*, Royal Gaz Nov 19, 2008, ss 59.18, 59.30, 59A.040 (NS SC Rules); *Family Court Rules*, NS Reg 20/93 as amended, ss 6.14-6.16 (court-based ADR) (NS PC Rules); PEI FLA, *supra* note 57, s 3; PEI CLA, *supra* note 56, ss 13(2), 39(6); NL CLA, *supra* note 56, s 37, NL FLA, *supra* note 57, s 4; YK CLA, *supra* note 56, s 42; NWT CLA, *supra* note 56, s 71, NWT FLA, *supra* note 57, s 58; NU CLA, *supra* note 56, s 71, NU FLA, *supra* note 61, s 58. In BC, a party may give notice of mediation to the other party and each must attend a pre-mediation meeting, sign an agreement to mediate and attend a mediation session, *Law and Equity Act*, RSBC 1996, c 253, s 68; *Notice to Mediate (Family) Regulation*, BC Reg 296/2007 (BC Notice), s 16, subject to some exemptions such as where a protection order has been obtained or a peace bond or the mediator finds it inappropriate or likely to be unproductive, ss 23, 26 (court may exempt where not likely to succeed or for any other appropriate reason).

[145] AB FLA, *supra* note 62, s 97; SK QBA, *supra* note 56, s 96; MB QBA, *ibid*, s 47(1), QB CCP, *supra* note 8, art 420; NB FLA, *supra* note 56, ss 8, 52(4)(d); NS SC Rules, *ibid*, ss 59.18, 59.30, 50A.040 and NS PC Rules, *ibid*, ss 6.14-6.16.

[146] QB CCP, *supra* note 8, art 420; PEI CLA, *supra* note 56, ss 31(2), 39(6); *Rules of the Supreme Court, 1986*, SNL 1986, c 42, Sch D F24.01(2)(f) (NL SC Rules).

[147] Parties may also be required to attend parenting education sessions, e.g. SK QBA, *supra* note 56, s 44.1, though a party may be exempted if they have sought interim custody incidental to an *ex parte* application for a restraining order where there has been domestic violence, where a child has been kidnapped or abducted, or where a judge finds "extraordinary circumstances," s 44.1(9). Parties may be exempt from mandatory parenting education sessions. In Québec if they file a certificate verifying that they have sought help at a victim assistance association as a victim of domestic violence, QB CCP, *supra* note 8, art 417.

[148] E.g. *Court of Queen's Bench Rules*, Man Reg 553/88, ss 70, 70.24(12) (MB QB Rules). In Ontario, at least one case conference is required at the beginning of each proceeding and parties are to attend unless the court orders otherwise (*Family Law Rules*, O Reg 114/99, Rules 17(1), 15). A judge may also require the parties to attend an intake meeting with a court-affiliated mediation service (Rule 8(b)(iii)).

the province.[149] Legislation in some provinces has recently encouraged the arbitration of family disputes[150] and also allowed for the appointment of parenting coordinators who will have the authority to determine minor parenting disputes between the parties.[151]

In Alberta and Saskatchewan, parties are further required to certify that they have participated in an FDR process or obtain an exemption from or waiver of such a requirement.[152] In both jurisdictions, a FDR process appears to be defined narrowly to exclude conventional negotiations between lawyers.[153] Exemptions from or waivers of such requirements entail a court application and proof of a "compelling reason" in Alberta[154] or in Saskatchewan, among other circumstances, proof of a restraining order against one party or a "history of interpersonal violence."[155] In Manitoba, a Family DR (Pilot Project), when in effect, will require that a resolution officer first assist parties in reaching agreement on support, parenting and property issues and failing settlement, that an adjudicator recommend an order before a court hearing.[156] These requirements will not apply to proceedings under the *Divorce Act* and a party can request an expedited order where circumstances would justify an emergent hearing, or where there is a no contact order in effect.[157] Problematically, these requirements force a survivor to either disclose violence or participate in the process, both of which options can place her at risk. Short of abandoning mandatory FDR entirely and in light of the serious consequences for survivors in failing to obtain an exemption, all jurisdictions should exempt cases from the FDR process whenever allegations of family violence are advanced and an exemption sought.

[149] MB QB Rules, *ibid*, s 70.24(12). In Ontario, a motion for a temporary order may proceed without a conference if the court finds that "there is a situation of urgency or hardship or that a case conference is not required for some other reason in the interest of justice", *ibid*, Rule 14(4.2).
[150] *The Arbitration Act*, CCSM c A120 s 31.1; e.g. SK CLA, *supra* note 56, s 19. In both Manitoba and Saskatchewan arbitral awards must accord with provincial and federal law to be enforceable, *The Arbitration Act, 1992*, SS 1992, c A-24.1, s 32(2); see also *Arbitration Act, 1991*, SO 1991, c 17 but see QB CCQ, *supra* note 59, art 2639 which prohibits the use of arbitration in family matters.
[151] E.g. BC FLA, *supra* note 8, ss 14-19; SK CLA, *supra* note 56, ss 30-36; PEI CLA, *supra* note 56, s 14(1).
[152] Alberta Court of Queen's Bench, "Notice to the Profession & Public - Enforcement of Mandatory Alternative Dispute Resolution Rules 8.4(3)(A) and 8.5(1)(A) (July 2019), extended indefinitely in Sept 2020 by a Notice to the Profession, online: <https://albertacourts.ca/qb/resources/announcements/extension-mandatory-ADR-rule>; SK QBA, *supra* note 56, s 44.01 (in prescribed judicial centres). Parenting education or information sessions have also been mandated in some jurisdictions, see e.g. SK QBA, *ibid*, s 44.
[153] *Alberta Rules of Court*, Alta Reg 124/2010, s 4.16(2) (includes mediation, arbitration, court-based DR process, a collaborative law process or judicial dispute resolution) (AB Rules); SK QBA, *supra* note 56, s 44.01(1) (includes the services of an arbitrator, family mediator, family arbitrator or parenting coordinator, other collaborative law services or any other process or service prescribed by the regulations). A failure to participate may result in the striking out of pleadings, denial of submissions, an order to participate or costs and other relief, s 44.01(5).
[154] AB Rules, *ibid*, s 4.16(2).
[155] SK QBA, *supra* note 56, s 44.01(6).
[156] *The Family Law Modernization Act*, SM 2019, c 8 contains *The Family Dispute Resolution (Pilot Project) Act* (FDRPPA).
[157] *Ibid*, s 3(3).

In terms of the FDR process itself, some jurisdictions explicitly require that FDR professionals screen for domestic violence[158] and/or receive training in the dynamics of domestic violence.[159] However, screening and training does not appear to be required in Alberta, where participation in an FDR process is mandatory, and in Manitoba, resolution officers and adjudicators need only ask the parties questions regarding a history of domestic violence and contact with law enforcement agencies and training is not required. In all jurisdictions, thorough screening for family violence should be mandatory before a FDR process is undertaken and training in family violence and power imbalances should also be required.

Further research is required to identify the emotional and financial cost of many of the above measures for litigants who are experiencing family violence along with the risks they may be exposed to. The use of arbitrators, parenting coordinators, mediators or collaborative lawyers or the dispute resolution process to be adopted in Manitoba will all impose additional financial costs on parties unless such services are publicly funded in some measure. In addition, there appears to be no requirement that parties are able to access and receive independent legal advice before they are required to use such processes. Independent legal advice is needed to ensure that parties understand what they are entitled to at law in their particular circumstances, especially where they have been subject to coercive control, abuse and manipulation by the other party. Many of the legal norms in family law were developed to protect vulnerable parties through presumptions of equal division and support obligations and to protect children through norms such as the best interests of the child. In the absence of legal advice, parties may give up legal entitlements or expose themselves to unanticipated risks.

Mandatory FDR is highly controversial and gives rise to numerous other issues that cannot be canvassed here. These issues include: the role of children in such processes; how family violence should be defined; whether FDR professionals can accurately screen for or manage power imbalances and how an exemption process should be designed; the impact of forced disclosure by victims on their safety (both physical and emotional security) and the need for confidentiality of disclosures and information that can compromise safety. In any case, where mandatory FDR is being implemented, it should be subject to: consideration of the impact of family violence on safety

[158] BC FLA, *supra* note 8, s 8 (FDR professionals, including family law lawyers, must assess whether family violence is present and its impact on the safety of the parties and ability to negotiate a fair agreement); BC Notice, *supra* note 144, s 13. In the Manitoba FDRPPA, *supra* note 156, both the resolution officer and adjudicator must consider whether resolution could "expose a party or a child to a risk of DV or stalking" and must ask regarding a history of DV, police involvement and prior or existing orders restricting contact or communication, s 39. Arbitrators must also ask the parties whether there has been a history of domestic violence or stalking or related contact with a law enforcement agency or a no-contact order, see also *Family Arbitration Regulation,* Man Reg 105/2019 but there is no requirement for training; PEI CLA, *supra* note 56, s 11 (DR professional or lawyer must screen for family violence and its impact).

[159] *Family Law Act Regulation*, BC Reg 347/2012, ss 4-6 require training for mediators, arbitrators and parenting coordinators, see also the BC Notice, *supra* note 144; in Saskatchewan, see *The Queen's Bench Regulations,* c Q-1.01 Reg 1, s 7.4 (14 hours of training for mediators and collaborative lawyers), *The Arbitration Regulations*, A-24/1 Reg 1. s 3(1)(b)(iii) (14 hours for arbitrators); *The Children's Law Regulations, 2021,* SR9/2021, s 4 (14 hours for parenting coordinators). Arbitrators in Ontario must receive 14 hours of training on screening for domestic violence and power imbalance and certify to screening, *Arbitration Act, 1991,* SO 1991, c 17, s 58; O Reg 134/07, ss 2-4; *Regulation Respecting Family Mediation.* CQLR c C-25.01, r 0.7, s 2(4) (mediators must complete at least 6 hours of domestic violence training); in PEI, *Children's Law Act Parenting Coordinator Regulations*, PEI Reg EC99/21, s 4(3)(viii), (must have 12 hours of family violence training).

and the ability to negotiate a fair agreement; free or affordable FDR services and independent legal advice; automatic exemptions for those disclosing domestic violence, and appropriate training in and screening requirements for family violence for FDR professionals.

D. Child Protection Laws

Child protection statutes are intended to authorize the provision of services to families where children are experiencing harm or are likely at risk of harm. In the absence of adequate supports and services, mothers who are experiencing IPV may be seen to have failed in their duty to protect their children. Child protection agencies are generally authorized to remove children from parents or caregivers where there are reasonable/probable grounds to believe that they are in need of protection or intervention and/or are at risk of serious harm or cannot otherwise be adequately protected.[160] These statutes are known to disproportionately impact mothers and children who are Indigenous, Black (in some locales) or who are living with disabilities or in poverty.[161]

A child is generally defined to be in need of protection where they have been or are likely to be physically, sexually or emotionally harmed by their parent or caregiver.[162] Emotional harm may explicitly include living in a situation where there is domestic violence by or towards a person who the child lives with.[163] Several statutes specifically identify "exposure" to family violence or

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[160] *Child, Family and Community Services Act*, RSBC 1996, c 46, s 27 (BC CFCSA) (where health or safety is in immediate danger); *Child, Youth and Family Enhancement Act*, RSA 2000 c C-12 (AB CYFEA), ss 17-18; *The Child and Family Services Act*, SS 1989-90, c C-7.2 (SK CFSA) (where at risk of incurring serious harm and no other arrangements are practicable), s 17(1)); MB CFSA, *supra* note 56, s 21; ON CYFSA, *supra* note 57, s 81(7); *Youth Protection Act*, CQLR c P-34.1 (QB YPA), ss 25, 46; *Family Services Act*, SNB 1980 c F-2.2 (NB FSA), s 32; *Children and Family Services Act*, SNS 1990 c 5 (NS CFSA), s 33; *Child Protection Act*, RSPEI 1988, c C-5.1, (PEI CPA) s 23; *Child, Youth and Families Act*, SNL 2018 c C-12.3, (NL CYFA) s 20(3) (immediate risk without warrant); *Child and Family Services Act*, SY 2008, c 1 (YK CFSA), s 39(1) (to protect from "immediate danger"); *Child and Family Services Act*, SNWT 1997, c 13, (NWT CFSA) ss 10,11; *Child and Family Services Act*, SNWT (Nu) 1997, c 13 (NU CFSA), ss 10, 11.

[161] See e.g. Barbara Fallon et al, "Ontario Incidence Study of Reported Child Abuse and Neglect-2018 (OIS-2018)" (2020) Toronto, ON: Child Welfare Research Portal at 41-48; online: <https://cwrp.ca/sites/default/files/publications/Ontario%20Incidence%20Study%20of%20Reported%20Child%20Abuse%20and%20Neglect%202018.pdf> and Ontario Human Rights Commission, "Interrupted Childhoods: Over-Representation of Indigenous and Black Children in Ontario Child Welfare" (2018), online (pdf): <www.ohrc.on.ca/sites/default/files/Interrupted%20childhoods_Over-representation%20of%20Indigenous%20and%20Black%20children%20in%20Ontario%20child%20welfare_accessible.pdf> (finding that Black children are over-represented in 30% and Indigenous children are over-represented in 93% of the 27 agencies under review, at 4).

[162] BC CFCSA, s 13(1); MB CFSA, s 17 (where child's "life, health or emotional well-being" is "endangered by the act or omission of a person" or is abused or likely to suffer harm or injury due to the "behavior, condition, domestic environment or associations of the child or of a person having care, custody, control or charge of the child;" ON CYFSA, s 74(2) (the child has suffered or there is a risk the child is likely to suffer physical harm, sexual abuse or exploitation or emotional harm (shown by serious anxiety, depression, withdrawal, self-destructive or aggressive behavior or delayed development, where reasonable grounds to believe the emotional harm results from the conduct of the parent); NL CYFA, s 10(1)(f); YK CFSA, s 21(1), (3) (emotional harm by exposure to a "pattern of behavior by the parent or another person that is detrimental to the child's emotional or psychological well-being, where the parent does not protect the child") (all *supra* note 160).

[163] E.g. BC CFCSA, s 13(1.2); QB YPA, s 38 (psychological ill-treatment is indicative of danger and defined as a situation in which a child is seriously and repeatedly subjected to behaviour on the part of the child's parents or another person that could harm the child, and the child's parents fail to take the necessary steps to put an end to the situation.

"severe domestic disharmony" itself as a ground for intervention or as relevant to best interests.[164] Domestic violence is not defined in several statutes[165] and in some the definition may not include coercive or controlling violence.[166] The Alberta statute is unique in that it also provides that intervention services should be provided to the family in a way that supports the abused family member and prevents the need to remove the child from their custody.[167] The mandate to provide services, if followed through in practice, could prevent removal of a child from a survivor and support her in parenting her children.

Statutes usually allow for mediation or alternative dispute resolution processes such as plan of care committees with consent of the parties.[168] Our statutory scan does not reveal requirements for training in domestic violence by social workers or those involved in mediation or ADR but policy manuals may require screening for domestic violence and presumably some training.[169] Two jurisdictions explicitly provide for the exclusion of persons who are subject to no contact orders from participation in plan of care committees or cooperative planning processes.[170] Such provisions should be in place across all jurisdictions.

This includes denigration, emotional rejection, excessive control, isolation, threats, exploitation, and "exposure to conjugal and domestic violence" (these terms are not defined). Justification of any such situation by way of ideology or "other consideration," including the concept of honour, is expressly prohibited.); NL CYFA, s 10(3)(h) (all *supra* note 160).

[164] AB CYFEA, s 1(3)(ii)(c); SK CFSA, s 11 (includes a child who is or likely to be exposed to "interpersonal violence or severe domestic disharmony that is likely to result In physical or emotional harm to the child"); NB FSA, s 31(1), (2); NS CFSA, s 22(2)(i) (child has been exposed to or made aware of violence by or towards a parent and the parent or guardian fails or refuses to obtain services or treatment or take other measures to remedy the violence); PEI CPA, s 9(m)(n); NL CYFA, s 10(1)(l), (m), (n); YK CFSA, s 4(1)(j) (relevant to best interests); NWT CFSA, s 7(3)(j)(k) (exposure to domestic violence and child has suffered or is at substantial risk of suffering physical or emotional harm from that exposure and the "parent fails or refuses to obtain services, treatment or healing processes to remedy or alleviate the harm"); NU CFSA, s 7(3)(p) ("child "is repeatedly exposed to family violence and the child's parent is unwi9lling or unable to stop such exposure") (all *supra* note 160).

[165] E.g. BC CFCSA, s 13; QB YPA, s 38 (both *supra* note 160).

[166] E.g. SK CFSA, "interpersonal violence" is defined in SK VIVA, *supra* note 8, s 2(e.1)to include intentionally or recklessly causing bodily harm or property damage or a reasonable fear thereof or forced confinement, sexual abuse, harassment and deprivation of necessities, *supra* note 160.

[167] AB CYFEA, *supra* note 160, s 2(1)(i).

[168] BC CFCSA, s 22; AB CYFEA, s 3.1; SK CFSA, s 15(1); ON CYFSA, s 17(1) (Society must consider whether ADR could help resolve the dispute or establish a care plan); NB FSA, s 31.1(2); but see QB YPA, s 76.0.5 (court can require a settlement conference); NS CFSA, s 21; PEI CPA, s 16 (Director may initiate "alternative approaches" to help develop plans of care); NL CYFA, s 13, 34 (may use ADR processes to develop a plan for a child; judge may adjourn for that purpose); YK CFSA s 7(4); NWT CFSA s 3; NU CFSA, ss 14-23.1 (all *supra* note 160).

[169] E.g. in Ontario all referrals are to be screened for domestic violence and a gender-based intersectional analysis applied to assessments of risk, Ontario Child Protection Standards (2016), at 22, 27.

[170] NWT CFSA, s 17(1) (re plan of care committees); YK CFSA s 7(2) (cooperative planning processes may be offered but may exclude a person who may "compromise the safety" of others or is subject to a no-contact order) (both *supra* note 160).

All statutes impose a duty to report where there are reasonable and probable grounds to believe a child is in need of protection or intervention unless solicitor-client privilege applies.[171] Several statutes make it an offence to fail to report.[172]

Access to a parent is generally available while children are in state care.[173] In Ontario, access is to be supervised if a parent has been charged with or convicted of a criminal offence involving violence against a child or other parent of a child.[174]

All statutes have provisions that mandate consideration of cultural and spiritual heritage or Indigenous traditions, customs and language in relation to a child's best interests[175] and most mandate notice to First Nations and other Indigenous representatives of protection proceedings.[176] In the Northwest Territories, conditions that define whether a child needs protection must be interpreted "with respect for different cultural values and practices and in accordance with community standards"[177] and in Nunavut, the legislation itself sets out Inuit societal values that are to guide its interpretation and application.[178]

These provisions are consistent with and furthered by *An Act respecting First Nations, Inuit and Metis children, youth and families*[179] (the Act). This federal statute affirms the inherent jurisdiction of Indigenous peoples to govern child welfare and establishes a process that will enable the exercise of such jurisdiction subject only to the best interests of the child principle and human rights laws.

The Act also establishes minimum national standards that govern the assessment of best interests in all child and family service matters involving First Nation, Metis and Inuit children across

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[171] BC CFCSA, s 14; AB CYFEA, s 14; SK CFSA, s 12 (includes Crown privilege as well); MB CFSA, s 18(2); ON CYFSA, s 125(10, (11); NB FSA, s 30; PEI CPA, s 10; NL CYFA, s 11; YK CFSA, s 22(1); NWT CFSA, s 8; NU CFSA, s 8 (all *supra* note 160).

[172] BC CFCSA, s 14; AB CYFEA, s 14(3), (6); ON CYFSA, s 125(9) (applies to particular professions); QUE YPA, s 39 (everyone except lawyers and notaries has a duty to report if reasonable grounds to believe child is in danger due to sexual or physical abuse; non-professionals have no duty to report a child endangered by psychological ill-treatment which includes exposure to conjugal and domestic violence); NS CFSA, ss 23(3)-25A (all *supra* note 160).

[173] E.g. NWT CFSA, *supra* note, s 28 (where temporary or permanent custody order).

[174] ON CYFSA, *supra* note 160, s 107.

[175] BC CFCSA, s 4(2), AB CYFEA, s 2(1); SK CFSA, s 4; MB CFSA, s 2(1) (services are to be culturally appropriate, s 7(1)); ON CYFSA, s 74(3)(b); QUE YPA, s 3; NS CFSA, s 3(2)(g), 47A (need to develop a "cultural connection plan" for children in permanent care); PEI CPA, s 2(2)(i)(j); NL CYFA, s 9(2)(f); NB FSA s 1(g) ; YK CFSA s 2(d), 4(2); NWT CFSA, s 3; NU CFSA, s 3 (all *supra* note 160).

[176] BC CFCSA, s 38; AB CYFEA ss 53, 67, 107 (application for private guardianship, adoption and planning for services); SK CFSA, s 37(1) (but only where a permanent or long-term order is sought); MB CFSA, s 30, 38(8), 77(2) (notice of hearing after apprehension, of order, of application for private guardianship); ON CYFSA, s 17(4), 79 (includes notice of ADR, party to proceedings); QB YPA, s 81.1; NS CFSA, s 36(3); PEI CPA, s 11(3.1), 18.1, 27, 32, 37 (notice of investigation and outcome, of temporary agreements, apprehensions, hearings). The YK CFSA stipulates that First Nations should be involved "as early as practicable in decision-making processes", s 2(j); NWT CFSA, s 12.3 (Aboriginal organizations to be served with notice of hearings, orders and can be party); NU CFSA, s 25 (notice of hearing on Inuit organizations) (all *supra* note 160).

[177] NWT CFSA, *supra* note 160, s 7(2).

[178] NU CFSA, *supra* note 160, s 2(2)(3).

[179] SC 2019, c 24.

Canada. The most noteworthy and promising practices include the following (with emphasis added):

- The physical, emotional and psychological security of the Indigenous child *as well as* the importance to that child of having an ongoing relationship with their family and Indigenous group, community or people are primary concerns (s 10(2)).
- In considering a child's best interests, the following factors are relevant and *are to be interpreted in accordance with Indigenous laws "to the extent that it is possible to do so*" (s 9(4)):
    - The child's "culture, language, religion and spiritual heritage" along with the importance "of preserving the child's cultural identity and connections to the language and territory of the Indigenous group, community or people to which the child belongs" must be considered in identifying a child's best interests (s 10(3)(a),(d));
    - Family violence and "its impact on the child, including whether the child is *directly or indirectly* exposed to the family violence as well as the physical, emotional and psychological harm or risk of harm to the child" (s 10(3)(g)); and
    - any "civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child" (s 10(3)(h)).
- Importantly, notice must now be given to a child's parent and care provider and to the relevant Indigenous governing body before *any significant measures* are taken in providing child and family services for an Indigenous child, s 12(1).
- Service providers *must prioritize preventive care and supports*, rather than removal of the child, if such care is consistent with the best interests of the child (s 14).
- "To the extent that it is consistent with" their best interests, a child should not be removed solely because of poverty, lack of adequate housing or infrastructure or because of the health of the parent or care provider (s 15).
- Before apprehending a child, the service provider must show that reasonable efforts were made to allow the child to continue residing with their parent or other family member unless immediate apprehension is in the best interests of the child (s 15.1).
- In terms of placements, priority to be given to an other parent, or family member, then an adult in same community or belonging to another Indigenous community or with any other adult as a last resort, s 16(1) and reviewed on an ongoing basis. Placement with siblings and traditional customs must be considered.

While some of the above measures have been implemented in some jurisdictions, the Act now mandates such practices whenever a child protection issue regarding an Indigenous child arises.

These measures should be considered in relation to all children and families involved in the child protection system.

E. Criminal Law and Policy and Domestic Violence Courts

Canada does not have a specific criminal offence for domestic violence, but the *Criminal Code* includes several offences that are applicable in this context, including sexual assault.[180] Worthy of note is section 278, which provides that a person may be charged with sexual assault against their spouse whether or not they were living together at the time. The *Code* also refers to intimate partner violence explicitly as an aggravating factor for interim release and sentencing purposes, and provides for no contact orders as a condition of interim release, probation, conditional sentences, and peace bonds.[181]

Bill C-247, *An Act to amend the Criminal Code (controlling or coercive conduct)*, proposed the addition of the offence of controlling or coercive conduct to the *Criminal Code.*[182] Although it was a Private Member's Bill, Bill C-247 was examined by the Standing Committee on Justice and Human Rights (JUST), resulting in a report with recommendations for further study of the issue by a taskforce of experts.[183] Bill C-247 is modelled on a similar provision in England and Wales,[184] and a contrasting model is provided by Scotland, which creates an offence for domestic abuse more broadly (including violence, threats, intimidation, and controlling behaviour).[185] In assessing what would be the best approach in this country, the federal, provincial and territorial ministers responsible should study these and other models and how they have been implemented in practice. Considerations should include (i) how the criminalization of domestic violence would impact other laws, policies, and legal systems in Canada, including family law, child protection, and immigration; and (ii) the consequences that criminalization will have for racialized, migrant, and Indigenous persons, including women who may be criminalized, and how best to avoid these consequences (e.g. through proper training, policies, and supports).[186]

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[180] *Criminal Code*, *supra* note 29, ss 229–239 (murder, manslaughter and attempts); ss 264 and 264.1 (criminal harassment, uttering threats); ss 265–269 (assault and bodily harm); ss 271–273 (sexual assault); s 430 (mischief to property); s 810 (peace bonds, which are often used in specialized domestic violence courts). Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018 (assented to 21 June 2019) added choking, suffocation and strangulation to ss 267 and 272 as equivalent to bodily harm.

[181] *Criminal Code*, *ibid*, ss 501(3)(d), (e), 515(3)(a), 515(2),(6)(b.1) (interim release); ss 718.2(a)(ii), 718.201, 718.3(8) (sentencing); s 732.1(3)(a.1) (probation orders); s 742.3(2)(a.3) (conditional sentence orders); s 810 to 810.2 (peace bonds). Common law peace bonds are also available where the specific circumstances in the Code are not met. See *R v Musoni*, 2009 CanLII 12118 (ON SC), aff'd 2009 ONCA 829; *R v Penunsi*, 2019 SCC 39 at paras 15 to 18.

[182] Bill C-247, *An Act to amend the Criminal Code (controlling or coercive conduct)*, 2nd Sess, 43rd Parl, 2020.

[183] JUST Report, *supra* note 14. See also JUST, online: <https://www.ourcommons.ca/Committees/en/JUST/StudyActivity?studyActivityId=11100758>. One of the authors of this report, Jennifer Koshan, was a witness at the JUST hearings.

[184] See e.g. *Serious Crime Act 2015* (England and Wales), 2015 c 9, s 76 (criminalizing controlling or coercive behaviour in intimate and family relationships).

[185] The *Domestic Abuse Scotland Act* (DASA), 2018, s 2.

[186] These issues are recognized in the JUST Report, *supra* note 14.

At the enforcement level, federal and provincial governments have pro-charging and pro-prosecution policies for offences in the domestic violence context.[187] Pro-charging policies require the police to lay charges in cases of domestic violence where they have "reasonable" or "reasonable and probable" grounds to do so, and pro-prosecution policies require prosecutions to proceed where there is a reasonable likelihood of conviction and it is in the public interest to do so. Some policies recognize that the use of reasonable defensive force is not criminal and include provisions requiring the police and Crown to ensure that only the primary or dominant aggressor is charged and prosecuted.[188] This is a best practice that should be followed in all jurisdictions.

Most Canadian provinces have Domestic Violence (DV) Courts that hear criminal domestic violence related offences, although the scope of these courts can differ greatly both within and between jurisdictions.[189] A common practice in some DV Courts is the use of peace bonds to resolve matters without criminal consequences, typically where the accused is prepared to accept responsibility for their actions and abide by conditions for no contact and counselling or treatment.[190] One issue that may arise where peace bonds are used is their interaction with other *Criminal Code* provisions that apply specifically to repeat offenders. For example, an accused who has been previously convicted of an intimate partner violence related offence bears a reverse onus in interim release proceedings and may face more than the maximum sentence.[191] A peace bond is not a conviction and may affect the applicability of these provisions. It is also unclear whether peace bonds are included in the assessment of risk under Clare's Law protocols.[192] At the same time, criminalization affects members of marginalized communities disproportionately and this may be a consideration in favour of peace bonds over criminal charges. Prosecutors and courts should consider the advisability of peace bonds carefully and should have adequate training on these issues to make a proper assessment.

F. Victim Compensation and Victims' Rights

All provinces and territories have legislation outlining various rights and entitlements of victims of crime, and most also have legislation regarding compensation for victims of crime. While none of these statutes are specific to crimes of gender-based violence, a few do have specific provisions

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[187] See *Final Report of the Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation* (Ottawa: Department of Justice Canada, 2003) at 100-101. Full analysis of these policies is beyond the scope of this report.

[188] See for example *The Domestic Violence Handbook for Police Services and Crown Prosecutors in Alberta* (2014), pp 104-105 (Dominant Aggressor / Dual Charging); online: Government of Alberta, <https://open.alberta.ca/publications/9780778541523>. A detailed review of these policies is beyond the scope of this report.

[189] Prince Edward Island and Québec do not have specialized domestic violence courts, although the latter does have a specialized court process operating in Montreal; the Northwest Territories and Nunavut have domestic violence treatment options only. Toronto also has an integrated domestic violence court that allows some family law cases and criminal charges to be heard by a single judge.

[190] For a discussion see Leslie Tutty and Jennifer Koshan, "Calgary's Specialized Domestic Violence Court: An Evaluation of a Unique Model" (2013) 50 Alberta Law Review 731 at 745, 751, 753.

[191] *Criminal Code*, *supra* note 29, ss 515(6)(b.1), 718.3(8).

[192] This may be especially true of common law peace bonds. See discussion at note 181 and accompanying text, above.

relating to sexual assault and/or intimate partner violence. Moreover, notwithstanding that these statutes do not generally speak directly to gender-based violence, they have important implications for survivors, including for their participation in criminal justice processes, their safety, and their ability to access the services and supports required for healing.

The statutes pertaining to victims' rights set out the range of information to which victims are entitled. While these statutes commonly provide for the disclosure of information relating to the criminal process, a close comparison between jurisdictions reveals the potential for improvements in relation to crimes of gender-based violence. The particulars regarding the information to which victims are entitled are important, especially because survivors have often voiced concerns about the limited information shared with them, the lack of meaningful participation offered to them, and the failure to take seriously their safety. Manitoba's legislation is more comprehensive than most and may serve as an example. Its *Victims' Bill of Rights*[193] creates an entitlement to information regarding the status of the prosecution, whether the accused has been detained and if not, the conditions attached to release, and the reasons for refusal to lay charges (it appears to be the only jurisdiction to create a right to information about the reasons not to lay charges). It also creates a right to a warning of a possible threat if a person has breached the terms of probation (breaches are very common in cases of intimate partner violence), has escaped from a provincial facility, or is about to be released from a provincial facility.[194]

Statutes regulating provincial correctional institutions govern the information to be provided to victims post-conviction and in relation to those sentenced to custodial facilities. With respect to correctional statutes, the entitlements vary. Saskatchewan's *Correctional Services Act* provides that victims have a right to be consulted and advised of temporary absences of inmates that have been authorized for humanitarian or rehabilitative purposes.[195] Québec's *Act Respecting the Québec Correctional System* creates not only a right to such information but requires state actors to take "every possible measure" to communicate information to a victim referred to in a government policy, including policies on domestic violence and sexual assault. This information includes, among other things, the date of the offender's eligibility for a temporary absence for reintegration purposes, and the date of the offender's release from prison.[196] In contrast, Alberta's *Corrections Act* provides for the release of similar information (release date and any days of temporary absence, any conditions attached to release including conditions attached to temporary absence that relate to the victim, the area the offender proposes to live during temporary absences or court-ordered community supervision and whether the offender will be near the victim while travelling in the areas) but only where the institution or probation officer concludes that the victim's interest in disclosure clearly outweighs the invasion of the offender's privacy.[197] In other words, in Québec, state actors must make every possible effort to communicate information to victims regarding release, in Saskatchewan victims have a right to consultation and information, while in Alberta decisions are made on a case-by-case basis after weighing the interests of victims

[193] *Victims' Bill of Rights*, CCSM, C V55, s 7 (MB VBR).
[194] *Ibid*, s 8.
[195] *Correctional Services Act, 2012*, SS 2012, c C-39.2, s 65.
[196] *Act Respecting the Québec Correctional System*, CQLR c S-40.1, s 175.
[197] *Corrections Act*, RSA 2000, c C-29, s 14.3.

and offenders. Québec's legislative approach is to be preferred as it reflects a deeper commitment to victims' safety.

Québec's *Act Respecting the Québec Correctional System* also contains unique provisions addressing domestic violence and "sexual deviance" and are suggestive of promising practice. The Minister of Public Security is required to provide offenders with access to specialized programs and services offered by community-based resources to help them reintegrate into the community and support their rehabilitation and that they be "designed to initiate the process of solving the problems associated with the delinquency of the offenders, in particular problems of domestic violence, sexual deviance, pedophilia, alcoholism and substance abuse." Additionally, "appropriate and specific indications" are to be placed on a person's record if they have "a history of behaviour targeted by government policies." This includes policies regarding domestic violence. These indications are to inform sentence management and to document rehabilitation.[198]

Several provinces have legislated the right to be protected from intimidation and retaliation,[199] but others have not. Particularly in the context of intimate partner violence, given the ongoing risks to survivors, this right—and how it is operationalized (that is, whether in practice meaningful measures are taken to protect)—is of importance.

The right of victims to have various needs—social, legal, medical, mental health—met is a statutory entitlement in several jurisdictions. However, Saskatchewan appears to be the only province where attention to diversity, including cultural diversity, in the development and delivery of programs and services, is explicitly identified.[200] It is now well-documented that many survivors do not access services and programs because they are not culturally appropriate or culturally safe; as such, a statutory recognition of cultural diversity is significant. But of course, here too, adequate resources are required to turn this recognition into reality on-the-ground.

Several provisions unique to particular provinces have an important bearing on matters of gender-based violence and could be considered good practices:

- Manitoba provides for a right to be interviewed by officers of the same gender upon request.[201]
- British Columbia mandates that victims must be treated with courtesy and respect and must not be discriminated against based on factors such as marital status, family status, gender, or sexual orientation.[202]
- Manitoba emphasizes the right to confidentiality of victim's information, particularly with respect to the address, phone number, and place of employment of the victim and family

[198] *Act Respecting the Québec Correctional System*, *supra* note 196, ss 22, 17.
[199] *The Victims of Crime Act, 1995*, SS 1995, c V-6.011 (SK VCA); *Crime Victims Compensation Act*, CQLR c I-6 (QB CVCA); *Victims of Crime Act*, RSPEI 1988, c V-3.1 (PEI VCA); *Victims of Crime Services Act*, RSNL 1990, c V-5.
[200] SK VCA, *ibid*, s 2.1
[201] MB VBR, *supra* note 193, s 5.
[202] *Crime Victim Assistance Act*, SBC 2001, c 38, s 2 (BC CVAA).

members.[203] This is especially important given the commonality of stalking post-separation in cases of intimate partner violence.

- Nova Scotia creates a right, while waiting to give evidence, to be kept apart from the accused in order to ensure safety.[204]

- Ontario's *Victims Bill of Rights* creates a presumption that a person convicted of a prescribed crime (including an assault and sexual assault) is liable in damages to every victim of the crime for emotional distress and bodily harm resulting from the distress, arising from the circumstances of the crime.[205] The Act creates a further presumption that victims of an assault by a spouse, sexual assault, or attempted sexual assault have suffered emotional distress. While not a guarantee of a successful outcome, these presumptions make it easier for a survivor to win a civil claim seeking "damages" (financial compensation) from the abuser.[206] These provisions could be modelled in other jurisdictions.

Victim Compensation

Several jurisdictions have statutory provisions creating an entitlement to compensation for victims of crime (in some jurisdictions these are contained in the same statute as provisions detailing victims' rights to information and participation, while in others there are two separate statutes). However, there is no criminal injuries compensation legislation in Newfoundland and Labrador, and in Ontario, Yukon, the Northwest Territories, and Nunavut victims of serious crimes have access only to a limited form of emergency assistance and not compensation.[207] Moreover, those jurisdictions that do provide compensation vary significantly in the range of compensable items, the total quantum of compensation available, and the conditions that are prerequisites to entitlement.

British Columbia provides for a wide range of compensable items, including medical and dental expenses, counselling, protective measures, moving expenses, childcare experiences, and expenses for repair of property.[208] In Manitoba compensation is available for both "bodily and psychological

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[203] MB VBR, *supra* note 193, s 6.
[204] *Victims' Rights and Services Act*, SNS 1989, c 14, s 3 (NS VRSA).
[205] *Victims' Bill of Rights,* SO 1995 c 6, s 3.
[206] See section I below for a discussion of civil claims.
[207] For Yukon's Victims of Crime Emergency Fund, see Victims Services Programs and Initiatives, online: <http://www.justice.gov.yk.ca/prog/cor/vs/vs_programs.html> and <https://yukon.ca/en/legal-and-social-supports/supports-victims-crime/get-emergency-financial-help-victim-crime>; and see *Corrections Act,* SY 2009 c 3, s 35.06 which provides that a victim may apply to the Director of Victim Services for payment of an "eligible victim expense" from the Corrections Revolving Fund. For the Northwest Territories, see the *Victims of Crime Act,* which establishes a Victims Assistance Committee to promote redress for, research on, and assistance to victims (s 2(1)). It also establishes a Victims' Assistance Fund which is maintained with revenue from victim fine surcharges (ss 11-12). The fund does not financially compensate individual victims but supports community-based projects and services for victims of crime generally (ss 14(1), 15). It funds emergency expenses such as home report, transportation, dependant care, counselling, medical expenses. In Nunavut, the *Victims of Crime Act* establishes a Victims Assistance Fund which is maintained with revenue from victim fine surcharges (s 11(1)). The fund does not financially compensate individual victims but supports community-based projects and services for victims of crime generally (s 11(2)).
[208] BC CVAA, *supra* note 202, s 4.

harm," as well as for counselling, loss of income, and permanent impairments.[209] Only British Columbia and Québec explicitly provide for the maintenance of a child born as a result of an offence.[210] Saskatchewan has a unique provision explicitly providing for the funding of counselling of child witnesses of domestic violence (up to $5,000, as well as up to $2,000 for persons accompanying a child, to cover their loss of earnings and related expenses).[211] A unique provision in Québec is that victims are able to recover the costs associated with the early termination of a lease, as well as rental costs of up to 3 months if a victim must pay rent for another dwelling as well and the victim's relocation is required for rehabilitation.[212] Québec also has a directive which took effect in November 2016 wherein a parent whose child has been murdered by the other parent is recognized as a victim if the actual intent of the act was to harm the other parent. This entitles that parent to benefits as a victim under the *Crime Victims Compensation Act*.[213]

In 2019, Ontario entirely eliminated compensation for pain and suffering and now funds through its Victim Quick Response Program only "essential expenses," such as short-term emergency counselling (to a maximum of $1,000) and crime scene clean-up (to a maximum of $1,500) and only for violent crimes, which include sexual assault and domestic assault. Ontario's *Compensation for Victims of Crime Act* is to be repealed on a date to be proclaimed and its Criminal Injuries Compensation Board is in the process of being wound down.[214] Prior to these reforms, victims of crime were eligible to receive up to $25,000 and all or significant portion of these funds could be awarded for pain and suffering. In the past the Criminal Injuries Compensation Board process and benefits have served as an important alternative to civil claims, and indeed in many instances, to the criminal justice process. Significant numbers of survivors of gender-based violence sought compensation in this manner each year. As such, the repeal of the *Compensation for Victims of Crime Act* and the winding down of the Board represent regressive measures in terms of the safety and well-being of survivors of gender-based violence.

As noted above, the total quantum of benefits or compensation available varies, from a few thousand dollars to assist with emergency services (as in Ontario and the territories), to Nova Scotia where the maximum of $2,000 is available for counselling in most cases, and $4,000 is available for counselling for an immediate family member of a homicide victim,[215] to Saskatchewan where the amount is capped at $100,000.[216] Alberta recently amended its victim compensation scheme to limit compensation: compensation is now only available for "severe neurological injuries."[217]

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[209] MB VBR, *supra* note 193, ss 46-47.
[210] BC CVAA, *supra* note 202, s 4; QB CVCA, *supra* note 199, s 5.
[211] *Victim of Crime Reg 1997*, RRS c V-6.011, Reg 1, ss 8.1, 8.3.
[212] QB CVCA, *supra* note 199, ss 6.2, 6.3.
[213] Indemnisation des victims d'actes criminels, online: <www.ivac.qc.ca/en/victims/Pages/application-may-be-rejected.aspx>.
[214] *Protecting What Matters Most Act (Budget Measures), 2019*, SO 2019, c 7, Schedule 11.
[215] *Criminal Injuries Compensation Regulations*, NS Reg 24/94.
[216] *Victim of Crime Reg 1997*, *supra* note 211, s 8(2).
[217] *Victims of Crime and Public Safety Act*, RSA 2000, c V-3, ss 12(2)(b), 12.2(1)(a) (AB VCPSA).

The time limits within which an application for benefits or compensation must be brought vary, and apart from Nova Scotia, are inexplicably out-of-step with revisions to limitation period legislation discussed further below. While there are some important differences between provinces, most have eliminated limitation periods for court-based legal proceedings based on sexual assault (or sexual misconduct) and many have also eliminated limitation periods for non-sexual assault where this occurs in an intimate relationship or in a relationship where there is physical, financial, emotional, or other forms of dependency.

Several jurisdictions require that the claim for compensation be brought within one year of the date of the offence, with discretion to extend this time in particular circumstance (British Columbia and Nova Scotia for example).[218] In Manitoba the one-year period runs from the injury or from when the victim "becomes aware of or knows or ought to know the nature of the injuries" and recognizes the effects.[219] In other provinces (Saskatchewan and Québec for example) the time period is two years, again with discretion to extend.[220] In Yukon, an application for victims of crime emergency benefits must be made within 60 days of the crime and in the Northwest Territories within two months of the crime.[221]

In some jurisdictions, eligibility is based on a report being made (most often to the police) and time runs from the date of the report. In Alberta, for example, a victim who fails to report the offence to a police service within a reasonable period of time is not eligible for financial benefits under the *Victims of Crime and Public Safety Act* [222] and in New Brunswick, victims are eligible for compensation if the offence was reported to police "without undue delay" (and they cooperated with the police investigation; see below).[223] Manitoba, as noted above, requires that applications for benefits usually be made within one year from knowledge of the injury, but compensation may be denied or reduced if the incident was not reported within a reasonable time.[224] Ontario requires that emergency assistance be sought within 45 days of reporting or disclosing for some benefits, 90 days for others. Unlike many other jurisdictions, the crime need not to have been reported to police in Ontario, however, the crime must have been reported—if not to the police, then to a child protection authority, a domestic violence shelter, a sexual assault centre, a hospital, a community agency, or an Indigenous organization that provides services to victims.[225]

Nova Scotia is the only province with a specific provision pertaining to sexual assault; the usual one-year time limit does NOT apply for applications pertaining to a sexual assault committed by

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[218] BC CVAA, *supra* note 202, s 3(2), NS VRSA, supra note 204, s 11B(1)).
[219] MB VBR, *supra* note 193, s 51(1).
[220] SK VCA, *supra* note 199, s 14; QB CVCA, *supra* note 202, s 11—time runs from when the victim becomes aware of damage suffered and of its probable connection with the criminal offence and may be extended if it was "impossible for the victim to act earlier."
[221] Yukon, "Get emergency financial help for a victim of crime," online: <https://yukon.ca/en/legal-and-social-supports/supports-victims-crime/get-emergency-financial-help-victim-crime> and Northwest Territories, "Victims of Crime Emergency Fund: online: <https://www.justice.gov.nt.ca/en/victims-of-crime-emergency-fund/>.
[222] AB VCPSA, *supra* note 217, ss 12(1)(b), 12.2(1)(b).
[223] *Compensation for Victims of Crime Regulation*, NB Reg 96-81 (NB CVCR).
[224] MB VBR, *supra* note 193, s 54.
[225] For a description of the VQRP see online: <http://victimservicespn.ca/our-services/victim-quick-response-program/>.

a person who was in a position of trust or authority, was a person upon whom the injured person was dependent (financially, emotionally, physically, or otherwise), or was a person who had charge of the injured person.[226] In Québec the time limit runs from an awareness of the damage suffered and its probable connection to the criminal office and may be extended if it was impossible for victim to act earlier, and these considerations will help to extend the time for some survivors.[227]

In addition to a requirement to report the offence, in many jurisdictions victims are also required to cooperate with the police and/or prosecution in order to be eligible for compensation. Manitoba's *Victims' Bill of Rights*, for example, provides that compensation may be denied or reduced if the victim did not assist in the apprehension or prosecution of the offender.[228] New Brunswick's *Compensation for Victims of Crime* regulation provides that a victim is eligible only when they reported the offence to the police without undue delay and cooperated with the police investigation.[229]

Most jurisdictions also include a provision wherein compensation and emergency can be denied where the victim contributed to the injury or was culpable in relation to the offence.[230]

A comparison of jurisdictions reveals both several issues of concern in relation to gender-based violence, as well as some promising practices. The requirement that victims report to police and/or cooperate in the police investigation or prosecution is deeply troubling. The vast majority of survivors of gender-based violence do not report to the police, for a multiplicity of reasons including: the risk of retaliation, distrust of police, concerns regarding racist responses, community ostracization, child welfare involvement, loss of income and support, and the re-traumatization of participating in the criminal justice process. Indigenous, racialized, and trans women and men are among those least likely to report to police. If police are involved, it is also commonly the case that survivors do not want the prosecution to go forward (for many of the same reasons that they are reluctant to engage the police in the first place), and resist participating in the prosecution. Conditioning entitlement to compensation on disclosure to police and/or cooperation with the police or the prosecution has the effect of denying access to benefits for the vast majority of survivors of gender-based violence and has the most pernicious effects on those who experience significant social marginalization. Ontario's current approach of expanding the range of actors who may be recipients of disclosures to include domestic violence shelters, sexual assault centres, hospitals, community agencies, or Indigenous organizations that provide services to victims is a positive measure.

Other issues of concern include the dramatic differences between jurisdictions regarding survivors' entitlement to information, supports, and compensation. With respect to compensation, the quantum and range of compensable matters (wages, counselling for a child witness of domestic

[226] NS VRSA, *supra* note 204, s 11B(2).
[227] QB CVCA, *supra* note 199, s 11.
[228] MB VBR, *supra* note 193, s 54.
[229] NB CVCR, *supra* note 223, s 4(1)(b); and see BC CVAA, *supra* note 202, s 9(3); AB VCPSA, *supra* note 217, s 13(3)(b) (requiring cooperation with any investigation for applications under the old version of the Act); QB CVCA, *supra* note 199, s 7.
[230] BC CVAA *ibid*, s 9(3); AB VCPSA, *ibid*, ss 13(4); SK VCA, *supra* note 199, s 5.1; MB VBR, *supra* note 193, s 54; QB CVCA, *ibid*, s 20; NB CVCR, *supra* note 223, ss 4(2), 12.2; PEI VCA, *supra* note 199, ss 16(2), 23.

violence, etc.) varies wildly between jurisdictions. As noted above, it is also concerning that the time limits for bringing a claim in most jurisdictions are out-of-step with the reforms to limitation periods for civil claims made over the last decade. A survivor's entitlement to support should not vary in these dramatic ways based on where she resides in Canada.

Federal Legislation

The *Canadian Victims Bill of Rights* sets out various rights of victims to information that mirror provincial and territorial legislation in many respects, but the right to information (for example, regarding the status and outcome of an investigation, the location of proceedings, their progress, and the outcome) arises only "on request."[231] This problematically assumes that survivors are aware of these rights and how to exercise them. Victims also have the right "to have their security considered by the appropriate authorities in the criminal justice system."[232] Also, similar to some of the provincial legislative schemes reviewed above, victims have "the right to have reasonable and necessary measures taken by the appropriate authorities in the criminal justice system to protect the victim from intimidation and retaliation."[233] These sections, even when combined, reflect a rather minimal commitment to the safety of survivors of gender-based violence. Moreover, on-the-ground steps to protect women from intimidation and retaliation by abusers are often non-existent, notwithstanding the rights set out here.

Other rights include: to have their privacy considered, to request that their identity be protected, to convey their views about decisions to be made by appropriate authorities in the criminal justice system that affect the victim's rights under the Act and to have those views considered, the right to present a victim impact statement and to have it considered, and the right to have the court consider making a restitution order against the offender.[234] As is clear from the statutory language, the corresponding duty attached to these various "rights" is merely to "consider" the victim's input; the fullness of that consideration and the weight to be given to the victim's input is entirely up to individual actors within the criminal justice system, who may change over time on any given case. Absent a thorough understanding of gender-based violence on the part of these decision-makers, these rights ring rather hollow.

Troublingly, the only victims entitled to exercise the rights under the Act are those who are present in Canada or are a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.[235] This means, for example, that a woman who is sexually assaulted while a visitor to Canada and is no longer in Canada, does not enjoy even these minimal rights.

Neither the *Canadian Victims Bill of Rights* nor any other federal legislation provide compensation to victims of crime. It is both desirable and possible to create a federal framework of victims' rights and victim compensation.

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[231] *Canadian Victims Bill of Rights,* SC 2015, ss 6-8.
[232] *Ibid,* s 9.
[233] *Ibid,* s 10.
[234] *Ibid, ss* 11, 12, 14-16.
[235] *Ibid, ss* 19(2).

G. Family Violence Death Review Committees

Several provinces—British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, and New Brunswick—have Domestic Violence Death Review Committees (DVDRCs), which review, report on, and make recommendations regarding deaths related to domestic violence.[236] In some provinces these committees are established and receive their mandates under legislation, while in others they have been created on a more ad hoc basis.[237] There are inconsistencies across jurisdictions that have DVDRCs in terms of their frequency of reporting, the variables they review (and whether data is disaggregated on the basis of factors such as racialization, Indigeneity, migrant status, and sexual / gender identity), whether they conduct in-depth review of all domestic violence related deaths or a more selective review of some cases, and whether the government is obligated to respond to the recommendations.[238] There is a role for the federal government to play here in ensuring that standardized information is available from DVDRCs across Canada and that funding is available for the establishment of DVDRCs and for the broadest and deepest level of review possible.

H. Legal Aid, Legal Assistance/Supports

In none of the provincial and territorial statutes governing legal aid is explicit reference made to any of the terms associated with gender-based violence. While not explicitly referencing gender-

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[236] In Nova Scotia, Bill No 180, *An Act to Amend the Fatality Investigations Act*, 2nd session, 63rd General Assembly, 68 Elizabeth II, 2019, will create a committee to review domestic violence deaths. There are no death review committees in Prince Edward Island; Newfoundland and Labrador; Yukon; Northwest Territories, or Nunavut.

[237] British Columbia: ad hoc under the *Coroner's Act*, SBC 2007, c 15; see British Columbia Coroners Service Death Review Panel, *A Review of Intimate Partner Violence Deaths 2010-2015*, online: <https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/deaths/coroners-service/death-review-panel/intimate-partner-violence2010-2015.pdf>). Alberta: Family Violence Death Review Committee established under the *Protection Against Family Violence Act*, *supra* note 8. For the most recent report see the 2019-2020 Annual Report, available online: <https://open.alberta.ca/publications/family-violence-death-review-committee-annual-report>). Saskatchewan: ad hoc under the *Coroner's Act, 1999*, SS 1999, c C-38.01. See *Saskatchewan Final Death Review Report*, 2018, online: <https://www.saskatchewan.ca/-/media/news-release-backgrounders/2018/may/sk-dv-death-review-report.pdf>. Manitoba: ad hoc; Bill 221, *The Domestic Violence Death Review Committee Act*, online: <https://web2.gov.mb.ca/bills/39-4/b221e.php>, does not appear to have been proclaimed though the committee is active. See Domestic Violence Death Review Committee publications, online: <https://www.gov.mb.ca/justice/publications/index.html> (most recent report is for 2018-19). ON: ad hoc under the *Coroners Act*, RSO 1990, c C.37. For the most recent report see *Domestic Violence Death Review Committee Annual Report 2018*, online: <www.mcscs.jus.gov.on.ca/english/Deathinvestigations/OfficeChiefCoroner/Publicationsandreports/DVDRC2018Report.html>. Québec: ad hoc; the Comité d'examen des décès survenus en contexte de violence conjugale was established by the Chief Coroner and issued its first annual report in December 2020. See online: <https://www.coroner.gouv.qc.ca/fileadmin/Media/Rapport_annuel_2018-2019_Version_amendee_20201207.pdf>. NB: ad hoc under the *Coroners Act*, RSNB 1973, c C-23. For the most recent report see *Recommendations from the Domestic Violence Death Review Committee, 2018*, online: <https://www2.gnb.ca/content/dam/gnb/Departments/ps-sp/pdf/Publications/DomesticViolence2018.pdf>. See also Canadian Femicide Observatory for Justice and Accountability, *#Call it Femicide: Understanding sex/gender-related killings of women and girls in Canada, 2020*; online: <https://femicideincanada.ca/callitfemicide2020.pdf> (documenting and analyzing all femicides across Canada in 2020).

[238] Compare for example Alberta (Committee provides statistical annual report and selective in-depth case reviews) and Ontario (Committee reviews all cases where a death has occurred as a result of domestic violence).

based violence, Yukon's *Legal Services Society Act*, in describing the circumstances in which legal aid may be provided, does potentially capture some number of the legal needs of survivors of gender-based violence:

- where there are "proceedings respecting domestic disputes that may affect their or their children's physical or mental safety or health"; or
- where legal issues "threaten their livelihood, the physical or mental safety or health of themselves or their families, or their ability to provide food, clothing, and shelter for themselves or their families."[239]

In a similar vein, Québec's *Act Respecting Legal Aid and the Provision of Certain Other Legal Services* does not mention domestic violence directly, nor do the regulations. However, the Act indicates that, if qualified financially, legal aid will be granted for applications:

- in family matters;
- in child abduction cases; and
- in any other case if "the matter threatens or will in all likelihood threaten a person's physical or mental safety, livelihood or ability to provide for his essential needs or those of his family."[240]

All legal aid programs are income-tested, and the income thresholds are very low (at or below commonly accepted poverty lines). Saskatchewan's regulations provide, for example, that anyone receiving social assistance or whose income would qualify for social assistance, or where the costs of obtaining legal services would cause the applicant's family to suffer hardship, is financially eligible.[241]

Ontario's website indicates slightly higher income thresholds are applied in cases involving domestic violence where the family unit is a single person: currently $18,795 versus $22,720 in cases of domestic violence.[242] We were able to find little information regarding the circumstances in which the income and assets of spouses or partners are assessed separately in order to determine eligibility, an important consideration in the context of intimate partner violence, given that financial abuse is often an element of control in such relationships with survivors having limited access to financial resources or even to information about the family's financial status. An important provision, and as far as we have been able to ascertain unique to Prince Edward Island, is the waiver or relaxation of financial eligibility rules to enable access to legal counsel in emergency situations where there is a risk to personal security.[243] On a temporary basis, during the COVID-19 pandemic, Legal Aid Ontario has waived all financial and legal eligibility criteria for

[239] *Legal Services Society Act*, RSY 2002, c 135, ss 16(1)(a)(iii), (iv).
[240] *Act Respecting Legal Aid and the Provision of Certain Other Legal* Services, CQLR c A-14, s.4.7.
[241] Regulation 2 under the *Legal Aid Act*, c L-9.1, s 3.
[242] Legal Aid Ontario, "Will Legal Aid pay for my lawyer?", online: <www.legalaid.on.ca/will-legal-aid-pay-for-my-lawyer/>. This is a change from recent past practice wherein the income levels differed for all family sizes.
[243] Prince Edward Island, Legal Aid, online: <https://www.princeedwardisland.ca/en/information/justice-and-public-safety/legal-aid>.

domestic violence survivors; its website indicates that "This accommodation will remain in effect until further notice."[244]

Beyond the statutory frameworks we have also consulted policies and program descriptions that are publicly available. Most provinces and territories provide funding in at least some areas survivors must frequently navigate, including family ("serious family law matters including protection orders" in British Columbia[245]); EPOs (Alberta Legal Aid, for example, currently has an Emergency Protection Order Program;[246] Nova Scotia legal aid covers matters under the *Domestic Violence Intervention Act*; [247] and New Brunswick provides "Family Advice Lawyer" services regarding emergency interventions orders (EIOs) under New Brunswick's *Intimate Partner Violence Intervention Act* and on applications to vary or set aside an EIO[248]); child protection (note that as a result of the Supreme Court of Canada's decision in *New Brunswick (Minister of Health and Community Services v G(J)* state funding is often constitutionally required in such matters[249]); and criminal law (a threshold of likely incarceration is applied in at least some jurisdictions). Some jurisdictions fund immigration and refugee matters, but whether and to what extent this includes representation in claims related to gender-related persecution, sponsorship breakdown due to abuse, family violence temporary resident permits, or other matters relating to gender-based violence is unclear.

Prince Edward Island's Legal Aid Policy provides that family applications involving domestic violence or threats to the personal security of the applicant or children in a family situation are given the highest priority for assistance. In less urgent family situations, priority is focused on the legal needs of dependent children. Prioritized needs in this category include custody, access, financial support, and housing.[250] Similarly, Nova Scotia Legal Aid's website indicates coverage for child custody, access, child and spousal maintenance/support, paternity, some divorces and division of property and that "applications for legal aid involving domestic violence are given priority" and matters under the *Domestic Violence Intervention Act* are also covered.[251]

Legal Aid Ontario appears to be unique in providing a two-hour free consultation for victims of domestic violence survivors for advice and assistance in relation to family law and immigration and refugee law matters, significantly with no financial eligibility requirement.[252] And while this is an important initiative that other jurisdictions would do well to replicate, ensuring access to

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[244] Legal Aid Ontario, "Domestic Violence," online: <www.legalaid.on.ca/services/domestic-abuse/>.
[245] *Legal Services Society Act*, SBC 2002, c 30. Legal Services Society, Legal Representation by a Lawyer: Serious Family Problems, online: <https://legalaid.bc.ca/legal_aid/familyIssues>.
[246] Legal Aid, "Emergency Protection Order Program," online: <www.legalaid.ab.ca/help/Pages/Emergency-Protection-Orders-Domestic-Violence.aspx>.
[247] Government of Prince Edward Island, Legal Aid (2017), online: <www.princeedwardisland.ca/en/information/justice-and-public-safety/prince-edward-island-legal-aid>.
[248] See New Brunswick Legal Aid Services Commission, "Family Advice Lawyer," online: <www.legalaid-aidejuridique-nb.ca/family-law-services/family-advice-lawyer/>.
[249] 1999 CanLII 653 (SCC).
[250] Government of Prince Edward Island, Legal Aid (2017), online: <www.princeedwardisland.ca/en/information/justice-and-public-safety/prince-edward-island-legal-aid>.
[251] Nova Scotia Legal Aid, "Legal Aid Services Provided," online: <www.nslegalaid.ca/what-we-do/what-legal-services-provided/>.
[252] Legal Aid Ontario, *supra* note 242.

funded representation for survivors is important. In many cases of domestic violence in particular, women must navigate multiple legal systems and processes (criminal, family, child welfare, immigration, and refugee law). The legal issues at the intersections of these various legal domains are exceptionally complex and access to knowledgeable, skilled counsel is important to the safety of women.[253] This complexity—as well as the reality that survivors are not infrequently charged criminally—was at least partially acknowledged in a policy of Legal Aid Ontario that provided legal aid for criminal counsel where a survivor of domestic violence was criminally charged and had a continuing family matter with LAO or an ongoing refugee status claim (even though incarceration was not a probability—the usual threshold for criminal coverage). This same policy also provided criminal representation where the survivor charged identifies as First Nation, Métis, or Inuit. In a search of LAO's website this policy no longer appeared but we have not been able to confirm whether it has been recently revoked.

The government of Nova Scotia runs a program that provides up to four hours of free legal advice for sexual assault survivors to help them understand their legal rights and options. There is no requirement to report to police or to take legal action if the service is used.[254] In British Columbia, the *Crime Victim Assistance Act* provides for independent legal advice and representation for victims who are subject to an application for disclosure of information relating to their personal history, and who lack financial resources.[255] Outside of Legal Aid Ontario and through the Ministry of the Attorney-General, all survivors of sexual assault aged 16 and over who are living in the City of Toronto, the City of Ottawa, or the District of Thunder Bay, are eligible to receive up to four hours of free legal advice (not representation) to help make informed decisions about next steps. This service is confidential and is available any time after the sexual assault has occurred.[256]

As alluded to earlier, access to knowledgeable and skilful counsel is critical to survivor's safety. Across several jurisdictions there is recognition at the policy level of the importance of providing legal advice and representation to survivors of gender-based violence. But given the importance of representation, entitlements to legal aid coverage should be statutorily embedded. Attention needs to be paid to the circumstances in which the financial situation of survivors will be assessed independently of their abusive partners. Moreover, models of legal representation should be developed that enable counsel across the country to acquire the expert knowledge needed to assist women in navigating the complex legal issues at the intersections of different areas of law. There are as well issues here regarding the federal government's financial contributions to provincial and territorial legal aid plans to cover areas of federal jurisdiction (most notably, representation in criminal, immigration, and divorce proceedings).

Supports for Survivors of Domestic Violence

Here we also note two specific programs designed to support victims of domestic violence in particular and that reflect promising practices. The Domestic Violence Support Service of the

[253] Costs of Justice, *supra* note 1.
[254] Nova Scotia, "Legal advice for sexual assault survivors," online: <https://novascotia.ca/sexualassaultlegaladvice/>.
[255] BC CVAA, *supra* note 202, s 3.
[256] Ontario, Ministry of the Attorney General, online: <www.attorneygeneral.jus.gov.on.ca/english/ovss/ila.php>.

Manitoba Justice department assists victims of domestic violence in situations where police are involved, regardless of whether criminal charges have been laid or arrests made. The program:

- provides information about domestic violence
- provides information about the criminal charges and court procedure
- helps prepare and accompany victims at court
- helps with safety planning
- provides information about protective relief orders
- offers short-term counselling; and
- connects families with community supports.[257]

In Ontario, the Family Court Support Worker Program provides a range of critical supports to survivors of intimate partner violence. Staff of the Program are located in buildings that house the family courts to support and assist victims of domestic violence in a variety of ways, including:

- preparation for proceedings
- referrals to other specialized services and supports
- the creation of safety plans
- documentation of the abuse
- accompaniment through court proceedings.

In Toronto these services are provided by the Barbra Schlifer Commemorative Clinic and Oasis Centre des Femmes for Francophone women. Other organizations are designated providers elsewhere in the province. Embedding these supports in the family courts is especially important to reach the very large numbers of unrepresented litigants.

I. Civil Law / Limitation Periods

Statutory limitation periods prescribe the length of time a person has to commence a legal proceeding in the courts; if the legal proceeding is commenced after this time period has passed, the claim is "statute barred" and cannot proceed.[258] A common approach to statutory limitation periods is to create a relatively short period of time from the date the facts giving rise to the proceeding are discovered (or ought reasonably to have been discovered) to the commencement of the proceeding (2 years is common), and then an ultimate limitation period after which no claim can be commenced, irrespective of the date of the discovery of the underlying facts (15 years is common for an ultimate limitation period).

[257] See "Domestic Violence Support Service," online: <https://www.gov.mb.ca/justice/crown/victims/dvss.html>.
[258] Technically the expiry of the limitation period is asserted as a defence should a claim be brought that is outside the limitation period.

The Supreme Court of Canada, in its 1992 decision in *M(K) v M(H)*, recognized how problematic limitation periods are when applied to childhood survivors of incest.[259] Importantly, in that case the court recognized that it was often years before survivors "discovered" the underlying facts; that is, years before they made the connection between the harms that they were experiencing and the assaults in childhood and that this was due to a range of factors: the repression or suppression of memories; self-blame (which is often actively encouraged by perpetrators); the continuing influence of the perpetrator, including fear of what the perpetrator would do if a disclosure is made; and social taboos and shame in disclosing. Since the SCC's judgment, there has been increasing recognition that limitation periods (which are intended to encourage diligence where one has knowledge of the facts giving rise to a legal claim and to protect defendants from stale claims) were a substantial impediment to access to justice for survivors. As such, over the past two decades significant reforms have been introduced in most, but not all, Canadian jurisdictions. While the statutory provisions across several jurisdictions are similar, there are important differences between them that we have highlighted below.

Significantly, all provinces and territories, with the exception of Prince Edward Island[260] have amended their limitations legislation to eliminate the limitation period for particular forms of gender-based violence. There are, however, several important differences between jurisdictions: some provide for no limitation period for sexual assault, others no limitation period for claims based on sexual misconduct, some remove the limitation period for sexual misconduct only in particular relationships (intimate relationships or relationships of dependency) and some eliminate the limitation period for non-sexual assault in these sorts of relationships.

There is no limitation period for a civil claim based on sexual assault in British Columbia, Alberta, Ontario, and Yukon.[261] The legislative framing is somewhat different in Saskatchewan, Manitoba, New Brunswick, and Nova Scotia: there is no limitation period where the claim is for damages for trespass to the person, assault, or battery if the act complained of (or the misconduct) is of a sexual nature. [262] While we have not examined the case law from these jurisdictions, this framing suggests a broader range of misconduct may be captured than sexual assault. In Québec there is no limitation period for claims for bodily injury arising from "sexual aggression."[263]

In the Northwest Territories, Nunavut,[264] and Newfoundland and Labrador there is no limitation period for claims based on conduct of a sexual nature, but only when this occurs in a context of particular kinds of relationships. In the Northwest Territories and Nunavut those relationships are intimate relationships, relationships of trust, and relationships of dependence. Additionally, the time limitation for sexual misconduct where the relationships are not intimate or ones of trust or

[259] 1992 CanLII 31 (SCC).
[260] *Statute of Limitations*, RSPEI 1988, c S-7. The time limit for actions to trespass to the person, assault, battery, wounding, or other injury to the person is two years from when the cause of action arose; s 2(1)(d).
[261] *Limitation Act*, SBC 2012, c 13, s 3(1)(j); *Limitations Act*, RSA 2000, c L-12, s 3.1(1) (a); *Limitations Act*, 2002, SO 2002 c 24, Sch B, s 16(1)(h); *Limitations of Actions Act*, RSY 2002, c 139 2(3)(b).
[262] *The Limitations Act*, SS 2004, c L-16.1, s 16(1)(a); *The Limitations of Action Act*, CCSM c L-150, s 2.1(2)(a); *Limitations of Actions Act*, SNB 2009, c L-8.5, s 14.1; *Limitations of Actions Act*, SNS 2014, c 25, s 11.
[263] *Civil Code*, article 2926.1.
[264] *Limitations of Actions Act*, RSNWT 1988, c L-8, ss 2.1(1), (2), and *Limitations of Actions Act*, RSNWT (Nu) 1988, c L-8, ss 2.1(1), (2).

dependency will not commence while the aggrieved person is incapable of starting an action due to their physical, mental, or psychological condition. Moreover, there is a statutory presumption (that is rebuttable) that the aggrieved person was incapable of commencing the proceeding earlier than when it was commenced.[265]

Similarly, Newfoundland and Labrador's *Limitations Act* provides that there is no limitation period where the claim is based on misconduct of a sexual nature committed against that person and that person was under the care or authority of; financially, emotionally, physically, or otherwise dependent upon; or a beneficiary of a fiduciary relationship with another person, organization, or agency.[266] There is also no limitation period for the enforcement of a restraining order.[267]

British Columbia, Alberta, Ontario, and Yukon—which as noted earlier all eliminate the limitation period for claims based on sexual assault—have further provisions relating to claims based on "misconduct of a sexual nature". In British Columbia and Yukon there is no limitation period for claims of misconduct of a sexual nature if the misconduct occurred while the aggrieved person was a minor.[268] In Alberta there is no limitation period for claims based on any misconduct of a sexual nature (other than a sexual assault or battery) if at the time, the person bringing the claim was a minor, was in an intimate relationship with the person who committed the misconduct, was dependent on that person, whether financially, emotionally, physically or otherwise, or was a person under disability.[269] Ontario's legislation is very similar to Alberta's, with the exception that it does not include a person under disability.[270]

As noted in section P, a number of jurisdictions have recently created a statutory tort for the non-consensual distribution of intimate images. A question arises as to what the appropriate limitation period—if any—should be. Currently, since the elimination of limitation periods in most jurisdictions is tied to the tort of battery, this new tort is likely to be governed by general limitation periods (in most jurisdictions, two years from discovery). In those jurisdictions that also eliminate the limitation period for "any misconduct of a sexual nature," the non-consensual distribution of intimate images would arguably be included. But recall that the limitation period is eliminated for misconduct of a sexual nature only where involving a minor or in some jurisdictions, an intimate relationship or relationship of dependency.

A domain of significant difference relates to whether there is a limitation period for non-sexual battery. Several provinces (British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, and Nova Scotia)[271] provide that there is no limitation period where the claim is based on assault or battery and where a particular form of relationship exists. While the language varies slightly

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[265] *Ibid*, ss 2(3), (4).
[266] *Limitations Act*, SNL 1995, c L-16.1.
[267] *Ibid*, s 8(1)(a).
[268] *Limitation Act (BC), supra* note 261, s 3(1)(i); *Limitations of Actions Act*, RSY 2002, c 139, s 2(3)(a).
[269] *Limitations Act*, RSA 2000, c L-12, s 3.1(1)(b).
[270] *Limitations Act (ON), supra* note 261 s 16 (h.1).
[271] *Limitation Act (BC), supra* note 261, s 3(1)(k)(ii); *Limitations Act (AB), supra* note 261, s 3.1(1)(c); *The Limitations Act (SK), supra* note 262, s 16(1)(b); *The Limitations of Action Act (MB), supra* note 262, s 2.1(2)(b); *Limitations Act (ON), supra* note 261, s 16 (h.2); QB CCQ, *supra* note 59, art 2926.1; *Limitations of Actions Act (NS), supra* note 261, s 11.

between provinces, the nature of such relationships is broadly defined as including intimate relationships and those where there is financial, emotional, physical, or other dependency. British Columbia, for example, provides that there is no limitation period for an assault or battery, where the claimant,

> was living in an intimate and personal relationship with, or was in a relationship of financial, emotional, physical or other dependency with, a person who performed, contributed to, consented to or acquiesced in the assault or battery.[272]

Québec's Civil Code eliminates the limitation period where the act causing bodily harm could constitute a criminal offence and the injury results from violent behaviour suffered during childhood or the injury results from the violent behaviour of a spouse or former spouse.[273]

While overall the amendments to limitations legislation across the country reflect a significant step forward in advancing access to justice for survivors, the inconsistencies and unevenness across jurisdictions is concerning. While all survivors of sexual assault have the benefit of no limitation period in some provinces, in others this benefit is available only to survivors in particular forms of relationships, and in Prince Edward Island, no survivors have this benefit. Moreover, only some jurisdictions eradicate the limitation period for a range of forms of sexual misconduct, and for those who do so, some only in the case of minors, while others include relationships of dependency. For non-sexual assault in intimate relationships and relationships of dependency, whether there is a limitation period will also depend on where the survivor is bringing the claim (usually it must be brought where the defendant lives or where the assault was committed). As with victim compensation schemes, whether a survivor's action will be statute-barred should not vary by jurisdiction. Moreover, given what is known about the trauma of gender-based violence, the often ongoing reality of stalking, intimidation, and harassment, and the prevalence of self-blame (as noted, actively instilled by perpetrators), the preferred statutory approach is one that eliminates limitation periods for sexual assault, for all forms of sexual misconduct (irrespective of the nature of the relationship—a recommendation that goes beyond existing statutes), and for any claim for harm inflicted in intimate relationships and other relationships of dependency.

J. Residential Tenancies Laws

All provinces and territories except Prince Edward Island, Yukon, and Nunavut have amended their residential tenancy legislation to allow tenants to terminate leases early without the usual liabilities where they must vacate the premises because of the risk to their (or their dependents') safety if the tenancy were to continue.[274] For the purposes of these early termination provisions, the risk of domestic (or family/interpersonal) violence is defined so as to include sexual violence

[272] *Limitation Act (BC)*, *supra* note 261, s 3(1)(k)(ii).
[273] QB CCQ, *supra* note 59, art 2926.1
[274] *Residential Tenancy Act*, SBC 2002, c 78, ss 45.1-45.3 (BC RTA); *Residential Tenancies Act*, SA 2004, c R-17.1, ss 47.1–47.7 (AB RTA); *Residential Tenancies Act, 2006*, SS 2006, c R-22.0001, ss 64.1–64.3 (SK RTA); *The Residential Tenancies Act*, CCSM c R119, ss 92.2–92.4 (MB RTA); *Residential Tenancies Act, 2006*, SO 2006, c 17, s 47.1–47.4 (ON RTA); QB CCQ, *supra* note 59, art 1974.1; *Residential Tenancies Act*, SNB 1975, c R-10.2, s 24.01 (NB RTA); *Residential Tenancies Act*, RSNS 1989, c 401, s 10F (NS RTA); *Residential Tenancies Act, 2018*, SNL 2018, c R-14.2, ss 25–26 (NL RTA); *Residential Tenancies Act*, RSNWT 1988, c R-5, s 54.1 (NWT RTA).

against one's partner or former partner, either in the residential tenancy provisions themselves (Alberta, Ontario, Québec), or by adopting the definition from the particular jurisdiction's protection order legislation (British Columbia, Saskatchewan, Manitoba, Nova Scotia, Newfoundland and Labrador, and Northwest Territories).[275] Alberta appears to be unique in adopting a broader definition of domestic violence for early termination than in its protection order legislation, expanding the definition in the *Protection Against Family Violence Act* to add emotional and psychological abuse in the *Residential Tenancies Act*.[276]

A few provinces also allow early termination in cases of sexual violence more broadly, without the need for an intimate partner or cohabitant context. This is the case in Manitoba, Ontario, Québec, and New Brunswick, which all permit early termination where the risk of either domestic or sexual violence makes it unsafe to continue the tenancy.[277] Several provinces include risk of violence from non-cohabitants in their early termination provisions: Alberta, Manitoba, Ontario, Québec (for sexual aggression but not domestic violence), and New Brunswick all include dating relationships.[278] Alberta is again unique here by extending early termination provisions to persons in dating relationships, whereas its civil protection order legislation only applies to cohabitants.[279] British Columbia is also unique in having recently added "household violence" to its early termination provisions, which extends their scope to allow applications in the case of "occupants" who are at risk of violence, in addition to intimate partners and their dependents who are at risk.[280]

The broadest definitions of violence and of relationships are best practices here in order to make early termination provisions available as widely as possible. Manitoba, Ontario, and New Brunswick currently take the broadest approach overall in defining violence and the kinds of relationships that give rise to eligibility for early termination.

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[275] British Columbia (adopting the definition of family violence in the BC FLA, *supra* note 8); Alberta (AB RTA, *ibid*, s 47.2); Saskatchewan (adopting the definition of interpersonal violence in the SK VIVA, *supra* note 8); Manitoba (adopting the definitions of domestic violence and stalking from the MB DVSA, *supra* note 8); Ontario (early termination for "violence and other forms of abuse", ON RTA, *ibid*, s 47.1); Nova Scotia (adopting the definition of domestic violence in the NS DVIA, *supra* note 8*);* Newfoundland and Labrador (adopting the definition of family violence in the NL FVPA, *supra* note 8); Northwest Territories (adopting the definition of family violence in the NWT PAFVA, *supra* note 8).

[276] AB RTA, *ibid*, s 47.2.

[277] MB RTA, s 92.2 (defining "sexual violence" to mean "any sexual act or act targeting a person's sexuality, gender identity or gender expression — whether the act is physical or psychological in nature — that is committed, threatened or attempted against a person without the person's consent, and includes sexual assault, sexual harassment, indecent exposure, voyeurism and sexual exploitation"); ON RTA, ss 47.3(1)(e), 47.3(2) (defining sexual violence the same as in Manitoba); QB CCQ, *supra* note 59, art 1974.1 (applying to "sexual aggression"); NB RTA, s 24.01(1) (applying to domestic violence, intimate partner violence, sexual violence, and criminal harassment, which are not defined).

[278] MB RTA, s 92.2; ON RTA, s 47.3(4); QB CCQ, *supra* note 59, art 1974.1; NB RTA, s 24.01 (all *supra* note 274, except otherwise noted).

[279] AB RTA, *supra* note 274, s 47.2.

[280] BC RTA, *supra* note 274, s 45.1. Household violence is defined as violence that is, or is likely to, adversely affect a tenant's or occupant's quiet enjoyment, security, safety, or physical well-being if they remain in the rental unit (s 45.1(1)).

Another difference amongst jurisdictions is the level of and process for verification of the abuse that is required for early termination. Ontario takes the most supportive approach by allowing termination to be based on proof of a peace bond, restraining order, or the survivor's statement of alleged violence.[281] Most other jurisdictions—British Columbia, Alberta, Saskatchewan, Manitoba, Québec, New Brunswick, and Newfoundland and Labrador—require proof that the survivor has obtained a protection order, no contact order, or peace bond, has made a police complaint, or has obtained a certificate from an authorized professional verifying the abuse.[282] The strictest approach is taken by Nova Scotia and the Northwest Territories, which require proof of a court order or police complaint without the option of a professional verifying the abuse.[283]

Where survivors are required to obtain court orders or interact with the police or other professionals, this may deter some from relying on the early termination provisions—particularly those from marginalized groups, who have a host of reasons for not wanting to engage with these actors. If they break their leases without giving notice of early termination, this may have adverse consequences in terms of their liability to pay rent and perhaps find other accommodation, given the likelihood of a poor reference from their landlord. In Alberta, failure to give notice of early termination may also affect eligibility for social assistance.[284] Burdensome verification requirements may delay the start of the notice period (typically 28 days to a month) and cause risks to the safety of survivors and children. In response to those who might argue that verification is important because notice of early termination ends the tenancy for all tenants and not just the survivor, it is important to note that landlords can re-enter a new lease with the other tenants.[285] Ontario's approach of permitting early termination based on the survivor's statement of alleged violence provides the best level of access to this important remedy, refutes the myth that women lie about violence, and is the most promising practice.

Protection order legislation also provides some protection for residential tenancies. It generally stipulates that landlords may not terminate a tenancy solely because a victim has obtained a protection order with exclusive possession rights and is not a party to the lease.[286] This same protection exists in some family legislation providing for exclusive possession orders for the family home, which deem the person with the order to be a tenant.[287] However, in spite of these provisions, most residential tenancy legislation still prohibits tenants from changing locks without

[281] ON RTA, *supra* note 274, ss 47.3(1), (5).
[282] BC RTA, s 45.2; AB RTA, ss 47.3, 47.4; SK RTA, s 64.2, SK VIVA, *supra* note 8, s 12.1; MB RTA, s 92.4; QB CCQ, *supra* note 59, art 1974.1; NB RTA, s 24.01(1); NL RTA, s 25(3) (all *supra* note 274, except otherwise noted).
[283] NS RTA, s 10H(2); NWT RTA, s 54.1(2) (both *supra* note 274).
[284] Alberta's *Social Housing Accommodation Regulation,* Alta Reg 244/1994, provides that applicants for social housing may lose priority for safety-based housing if they repudiated or breached a tenancy agreement, abandoned the premises, or their tenancy was otherwise terminated as a result of contravening the *Residential Tenancies Act*, *supra* note 274.
[285] See e.g. AB RTA, *ibid*, s 47.3(5).
[286] This is also the case in jurisdictions that do not have early termination provisions. See PEI VFVA, *supra* note 8, s 12; YK FVPA, *supra* note 8, s 10(2); NU FAIA, *supra* note 8, s 46(1)).
[287] See e.g. SK FPA, *supra* note 61, s 5(2)(j), where a spouse with exclusive possession of a family home subject to a lease can be deemed a tenant for purposes of the lease, but the other tenant is not removed from the lease.

permission, requires them to pay rent until the end of the tenancy, and allows landlords to terminate tenancies where a tenant has engaged in illegal activity, caused damage to the property, or adversely affected the security of another occupant—with no explicit exceptions in cases involving domestic or sexual violence.[288] Safe at home legislation, which allows survivors to remain in premises without these typical consequences of residential tenancy legislation, offers the next level of protection and should be explored for possible implementation in Canada.[289]

K. Immigration & Refugee Law

The right to enter and remain in Canada is addressed in federal legislation: the *Immigration and Refugee Protection Act* (IRPA) and its regulations (IRPR).[290] While neither the Act nor the Regulations make specific reference to gender-based violence, various operational guidelines do.

There are three main streams of immigration to Canada that provide routes to permanent resident status: the family class (in which women are over-represented), the economic class, and the Convention refugee or protected person class. It is also possible to enter Canada with various forms of temporary status, for example, as a visitor, student, or through various temporary worker programs. As a result, there are many different forms of status (for example, refugee claimant, visitor, permanent resident applicant, permanent resident, temporary resident permit holder). The form of status a person has is important because it affects whether they have the right to remain in and/or return to Canada and determines their entitlement to various forms of federal and provincial benefits, supports, and programs (we address some of these sections L & M).

For women entering Canada through the family class as a spouse or common law partner, the application for permanent resident status is usually made from outside of Canada and permanent resident status is granted to the spouse or partner before arrival.[291] In some circumstances it is also possible to apply from within Canada through the "Spouse or Common-Law Partner in Canada Class."[292] Both forms of application require a sponsorship and undertaking from the sponsor. The sponsor undertakes to provide for all of the basic needs of the sponsored person, and to reimburse the government should the sponsored person receive social assistance.[293] The financial undertaking, in the case of a sponsored spouse or common law partner, lasts for three years.[294] Any money paid to the sponsored person by the government through social assistance during those three years becomes a debt of the sponsor. For applications made in Canada, the sponsor can withdraw the sponsorship at any time prior to the granting of permanent residency (a process that may take two or more years). If the sponsorship is withdrawn, no decision will be made on the application for permanent residency, and the person who was to be sponsored is left without

[288] For a discussion, see Jonnette Watson Hamilton, "Reforming Residential Tenancy Law for Victims of Domestic Violence" (2019) 8 Annual Rev Interdisciplinary Justice Research 248.
[289] For a Canadian project examining a "safe at home" model, see Patricia O'Campo et al, Solutions Network: Safe at Home, online: <https://maphealth.ca/safe-at-home/>.
[290] *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), and *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR).
[291] IRPA, *ibid*, s 13(1).
[292] *Ibid*, s 124).
[293] *Ibid*, s 13.1, IRPR, *supra* note 290, ss 127, 130 - 133.
[294] *Ibid*, s 132(1) (b) (i).

status.[295] Troublingly, those without status have the least access to various social, income, and other supports.

For in-land applications, abusive partners wield both the promise of sponsorship and the threat to withdraw or cancel it in order to maintain control and to enforce women's silence about the abuse. Even for women with permanent resident status, abusers may manipulate or deny access to information about their status and/or may report (or threaten to report) that the marriage or relationship is not genuine. Making such a report will prompt an investigation and potentially the revocation of permanent resident status and possible removal on the grounds of misrepresentation.[296] In many instances, women endure ongoing and significant violence in order to preserve the possibility of securing permanent resident status through a spousal sponsorship.

For those who have lost status due to the withdrawal or failure of a promised sponsorship or in other ways, often the only route to potential permanent resident status is through a "humanitarian and compassionate" (H&C) application.[297] These decisions are entirely discretionary and guided by Operational Instructions and Guidelines.[298] The guidelines include "family violence considerations" and list several factors for officers to consider in these situations, including: "information indicating that there was abuse such as police incident reports, charges or convictions, reports from shelters for abused women, medical reports, etc."; and the applicant's degree of establishment in Canada. Regarding establishment, officers are directed to consider such matters as a history of stable employment; a pattern of sound financial management; integration into the community; and a good civil record (defined as no criminal charges or interventions by law enforcement officers or other authorities for domestic violence or child abuse).

Both the examples of documents to verify the abuse and the establishment considerations are profoundly out-of-step with the realities of intimate partner violence. The vast majority of women—but especially migrant and racialized women—do not access the police or shelters and may have no or limited access to medical professionals. Moreover women's "establishment" is often intentionally and severely undermined by perpetrators: tactics of coercion and control include isolation, denial of access to employment, limiting access to and knowledge of the family's finances, and making false reports to child welfare authorities. Problematically, the more successful the perpetrator's tactics, the less likely it is that a survivor will be able to show establishment.

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[295] *Ibid*, s 126.

[296] *Ibid*, ss 40(1)-(3). A particular form of misrepresentation—often referred to as "marriage fraud" or "marriages of convenience"—is addressed in s 4(1) of the Regulations, which specifies that, "for the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership (a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or (b) is not genuine."

[297] *Ibid*, s 25(1).

[298] See "Humanitarian and compassionate consideration," online: <www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing/assessment-dealing-family-relationships.html#violence>.

The Family Violence Temporary Resident Permit (TRP) introduced in July 2019 is an important, but limited, initiative.[299] On the positive side, the guidelines define family violence broadly as: physical abuse (including forcible confinement); sexual abuse; psychological abuse (including threats and intimidation); financial abuse (including fraud and extortion); and neglect (consisting of the failure to provide the necessities of life). The guidelines also indicate a much broader array of potential sources of verification than do the H&C guidelines: police records; criminal or family court documents; letters, statements, or reports from victim or witness assistance programs, a women's shelter, a domestic violence support organization, or a health care professional or counsellor; assessments by psychologists, psychiatrists, or therapists; photos of injuries; and emails or text messages.

However, the TRP is time-limited: for a minimum of 6 months with the potential for renewal. As such, it alone does not provide a route to permanency. Moreover, the TRP is available only in narrow circumstances: to a foreign national who is physically present in Canada and experiencing abuse by a spouse or common-law partner. The applicant must also be seeking permanent resident status that is dependent on them remaining in a genuine relationship. There is also a form of TRP available to survivors of trafficking and it too is time limited.

There are also concerns regarding how the criminality provisions of IRPA impact victims of gender-based violence, particularly when they are inappropriately charged.[300] In some instances, abusive men have been known to contact police to report that they are the victims—not the perpetrators—of abuse, with the intention of triggering the charging, conviction, and removal of their spouses/partners.[301] Without access to legal counsel who is knowledgeable about gender-based violence and the intersections of criminal and immigration law—and family law in instances where there are children—there is a real risk that survivors will (continue to be) convicted and removed from Canada (including, in some instances, without their children).

Refugee Law

A person making a claim to refugee status must establish a well-founded fear of persecution based on one or more of the five grounds: race, religion, nationality, membership in a particular social group, or political opinion.[302] If the persecution or fear of persecution is based on the conduct of someone other than a government authority, it is also necessary to show that government authorities in the home country are unable or unwilling to provide protection, and that there is no place within the home country where one could be safe from persecution (that is, that there is no internal flight alternative). The IRPA also recognizes the category of "protected person," defined as a person in Canada who is unable or unwilling to return to their home country safely because

[299] See "Temporary resident permit (TRP) for victims of family violence," online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/permits/family-violence.html>.
[300] IRPA, *supra* note 290, ss 36(1)-(3). Depending upon the maximum term of actual or potential imprisonment for the offence, even a permanent resident may be rendered inadmissible and subject to potential removal.
[301] See, for example, the Canadian Council of Refugees, "Gender Priorities: Key Issues Affecting Newcomer Women and Girls," online: <https://ccrweb.ca/en/issues/gender>.
[302] IRPA, *supra* note 290, s 96.

they may face a danger of torture, a risk to their life, or a risk of cruel and unusual treatment or punishment.[303]

Significantly, developments in refugee law have led to the recognition that persecution may be perpetrated by non-state agents—including by abusive spouses or intimate partners—and that, while gender is not an enumerated ground for a well-established fear of persecution, "women" or sub-groups of women, may constitute a "particular social group" within the definition of a Convention refugee. IRB guidelines, "Women Refugee Claimants Fearing Gender-Related Persecution," provide an analytic framework for a gender-sensitive interpretation of the definition of "Convention refugee."[304] The Guidelines explicitly recognize a sub-category of women refugees who "fear persecution resulting from certain circumstances of severe discrimination on grounds of gender or acts of violence either by public authorities or at the hands of private citizens from whose actions the state is unwilling or unable to adequately protect the concerned persons." The Guidelines also note that the "acts of violence which a woman may fear include violence inflicted in situations of domestic violence," and that "domestic violence" includes violence perpetrated against women by family members or other persons with whom the woman lives.

A review of decisions of the IRB suggests, however, that particular forms of gender-based claims related to, for example, female genital cutting or other practices perceived as "exotic" are much more likely to succeed than claims based on domestic violence. Consistent with earlier research, this review reveals a low acceptance rate in cases of domestic violence. [305] The more recent IRB Guideline on sexual orientation and gender identity and expression is also an important development, although as with Gender Guideline, many concerns have been identified regarding its operation.[306]

L. Social Housing Laws

In most jurisdictions legislation governing social housing makes no reference to gender-based violence.[307] However, various policies that we were able to access online indicate that women fleeing violence or at risk of violence are given priority access in some jurisdictions. For example, Newfoundland and Labrador's Housing Corporation has a Victims of Violence Policy that assists victims of violence when applying for housing, which they can do if they are in an "abusive home

[303] IRPA, *supra* note 290, s 97(1).
[304] Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution, online: <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir04.aspx>.
[305] Efrat Arbel, "The Culture of Rights Protection in Canadian Refugee Law: Examining the Domestic Violence Cases" (2013) 58:3 McGill LJ 729.
[306] Chairperson's Guideline 9: Proceedings before the IRB involving sexual orientation and gender identity and expression, online: <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir09.aspx>.
[307] See *Ministry of Lands, Parks and Housing Act*, RSBC 1996, c 307 and *Housing Management Commission Regulation*, BC Reg 490/79; *Saskatchewan Housing Corporation Act*, RSS 1978, c S-24; *New Brunswick Housing Act*, RSNB 1973, c N-6; *Housing Nova Scotia Act*, RSNS 1989, c 213; *Housing Corporation Act*, RSPEI 1988, c H-11.1; *Housing Corporation Act*, RSY 2002, c 114; *Northwest Territories Housing Corporation Act*, RSNWT 1988, c N-1; *Nunavut Housing Corporation Act*, RSNWT (Nu) 1988, c N-1.

situation." Victims are assigned a social worker to assist them with the process and who can refer them to any counselling they may require.[308]

Alberta, Québec, and Ontario appear to be the only jurisdictions with explicit references to gender-based violence in their statutes or regulations. Alberta's *Social Housing Accommodation Regulation* creates a point system for the allocation of social housing.[309] A household applying for social housing that requires accommodation as a result of an emergency situation, including family violence, is allocated the same number of points as a household that has been served notice to vacate or terminate a tenancy agreement. No points may be awarded if the household breached the tenancy agreement, abandoned the premises, or if the tenancy has been otherwise terminated as a result of a breach (s 2). If victims of domestic violence rely on the new early termination provisions in the *Residential Tenancies Act* (discussed in Section J), it appears they will avoid losing points under the *Social Housing Accommodation Regulation.*

Québec's legislation governing community housing does not mention domestic violence; however, the *By-law Respecting the Allocation of Dwellings in Low Rental Housing* does. The requirement that an individual must have resided in Québec for at least 12 months in the 24 months preceding the application in order to be eligible does not apply to victims of domestic violence. The fact that someone is a victim of domestic violence must be attested to by a shelter for such persons, a police force, or an institution of health and social services network. Additionally, the top ranked priority in applications for low-rental housing are persons who resiliated (terminated) their lease under article 1974.1 of the *Civil Code*, or who are victims of domestic violence, as attested to by a shelter for such persons, a police force, or an institution of health and social services network. As discussed more fully below, these requirements for verification of domestic violence create barriers for the many survivors who do not access police, shelters, or health and social services. [310]

Ontario has detailed provisions regarding access to social housing in situations of domestic abuse, as well as where a household member is being, or has been, trafficked. The *Housing Services Act, 2011* (HSA) sets out the guidelines for community service planning for housing and to address homelessness in Ontario.[311] The regulations to the HSA require that a housing plan take into account the needs for accessible housing for victims of domestic violence.[312] This was a key recommendation from the Hadley inquest into a domestic homicide a number of years ago.[313]

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[308] Newfoundland and Labrador Housing Corporation, *Victims of Violence Policy*, online: <https://www.nlhc.nl.ca/tenant-information/victims-of-violence-policy/>. See also, British Columbia Housing's Priority Placement Program, online: <www.bchousing.org/housing-assistance/women-fleeing-violence/priority-placement-program>; and Housing Nova Scotia, *Public Housing for Families*, 2018, online: <http://housing.novascotia.ca/programs/public-housing-and-other-affordable-renting-programs/public-housing-families>.

[309] *Social Housing Accommodation Regulation,* Alta Reg 244/1994; and see *Alberta Housing Act*, RSA 2000, c A-25.

[310] CQLR c S-8 r1, and see *Act respecting the Société d'habitation due Québec,* CQLR c S-8, ss 14, 23.

[311] *Housing Services Act*, SO 2011, c 6, Sch 1.

[312] General, O Reg 367/11.

[313] Hadley Inquest, Coroner's Jury Recommendations, online: <www.oaith.ca/assets/files/Publications/Hadley-Jury-Recommendations.pdf>.

The HSA regulations create categories for special priority housing. Under s 54(1) a household is eligible,

> … if a member of household has been abused by another individual, the abusing individual is or was living with the abused member or is sponsoring the abused member as an immigrant, and the abused member intends to live permanently apart from the abusing individual.

The regulations are unlike many other areas of law touching on gender-based violence in that they contain definitions of "abuse" and "trafficking" and detailed specifications regarding verification. Section 1(1) of the regulations defines "abuse" broadly as one or more incidents—done against the member of the household by a current or former intimate partner, a person on whom the household member is emotionally, physically, or financially dependent, or an immigration sponsor—of physical or sexual violence, controlling behaviour, intentional destruction of or intentional injury to property, or words, actions or gestures that threaten an individual or lead an individual to fear for their safety. Abuse is also defined to include trafficking of a member of the household and "trafficking" is defined as:

> one or more incidents of recruitment, transportation, transfer, harbouring or receipt of the member by improper means, including force, abduction, fraud, coercion, deception and repeated provision of a controlled substance, for an illegal purpose, including sexual exploitation or forced labour.[314]

Of concern is that a household is ineligible for rent-geared-to-income assistance if a member of the household owes, with respect to a previous tenancy in any housing project, arrears or an amount for damages (financial compensation).[315] While section 26(3) reduces the arrears or amount owing by one-half if a request has been made for priority access based on abuse and the amount owing relates to a unit the member of the household and the abusing individual were sharing as joint tenants, even with this reduction many survivors of abuse will not be in a position to pay and be precluded from accessing social housing. The one-half reduction seems to presuppose that there was equal responsibility for the outstanding arrears and/or the property damage. But given what is known about financial control within abusive relationships, and also the destruction of property by abusers, this assumption of equal responsibility is problematic.

Also of concern is the requirement that, if no longer living together, the abused household member must apply no later than 3 months after ceasing to live with the abusing person, that the abuse is ongoing at the time the request is made to be put on the priority list, or "the service manager determines it is appropriate to include the household on the priority list even though outside the three-month period."[316] Moreover, eligibility—as noted above—turns on the abused member's intention to live permanently apart from the abusing person.

In order to access priority housing, consent must be provided to allow the service manager to access information and documents to verify eligibility. Importantly section 57 imposes restrictions

[314] O Reg 367/11, *supra* note 312, s 1.
[315] *Ibid*, s 26(1).
[316] *Ibid*, s 26(2)

on what a service manage can require: information or documents cannot be requested if the household member believes they or any other member of the household will be at risk of abuse if they attempt to obtain the information or documents nor can information as to whether the member has commenced legal proceedings against the abusing individual or information or documents relating to such proceedings be required.

It is also possible to verify the abuse by providing a "record" that complies with section 58; such records are conclusive proof of abuse and no further or other verification is required. The record must include a statement by the person preparing it that he or she has reasonable grounds to believe that the member is being or has been abused by an intimate partner, or a person on whom they are dependent, as well as a description of the circumstances that indicate that the member is being or has been abused. It must be prepared by one of the professionals listed, in their professional capacity, among them a doctor, nurse, lawyer, law enforcement officer, early childhood educator, teacher, guidance counsellor, Indigenous Elder, Indigenous Traditional Person or Indigenous Knowledge Keeper, registered social worker, or registered social service worker. The record must be in writing unless the service manager is satisfied that the member of the household or the person preparing the record will be at risk of being abused. Almost identical provisions apply regarding trafficking.[317]

This approach to providing detailed directions regarding verification in the regulation to the statute is positive in several respects. If a survivor has access to one of the listed professionals it removes from frontline housing managers the determination of whether abuse or trafficking has occurred or is occurring; arguably then, the assessment is being shifted, as a general matter, to professionals with relevant training, education, and insight (although certainly not all professionals are well-educated in relation to abuse and trafficking). The "record" is also preferable to leaving it in the hands of housing managers to determine what documents or information they require and from whom, in order to verify abuse. However, this approach raises at least two significant concerns: the unevenness in access to the listed professionals, and the embedded skepticism regarding women's disclosures of abuse. A very substantial number of women—and especially those who experience the most profound forms of social marginalization—will never access the named professionals; the "record" approach will simply not be an option. Skepticism regarding women's disclosures of abuse is deeply embedded in law and other social structures, and this has obvious and severe consequences for their safety. A preferable approach would be, as with the early termination of a lease in Ontario, requiring only the survivor's statement regarding the abuse.

Eligibility for rent-geared-to-income housing in Ontario is also dependent upon immigration status. To be eligible, each member of the household must be either a Canadian citizen, have made an application for status as a permanent resident, or have made a claim for refugee protection. Moreover, a household is ineligible if an enforceable removal order has been made for any member of the household. These eligibility requirements are troubling in that they apply to all members of the household; as such, the status of one member will determine the outcome for all. Moreover, they create categories of deserving and undeserving survivors of gender-based violence: for example, a woman with permanent residence status who is abused by a Canadian citizen has

[317] *Ibid*, s 58.1 regarding trafficking.

access, while a woman who has overstayed a visitor's permit, lived in Canada for a decade, and is abused by a Canadian citizen does not have access.

It is troubling to see that so few provincial and territorial statutory housing schemes embed priority access for survivors of gender-based violence. But of course, the larger problem pertains to the limited supply of social housing: no matter how good the statutory scheme in prioritizing the safety of survivors and in taking survivors at their word, without an adequate supply of safe, affordable, and accessible social housing, the statutory schemes remain little more than window dressing. On this front, there is much that the federal, provincial/territorial, and municipal levels of government need do together to ensure emergency, transitional, and long-term housing for survivors of gender-based violence.

In addition to expanding housing stock, an interesting development that other jurisdictions might consider is Ontario's portable housing benefit. Victims of domestic violence approved for special priority status have the option of either rent-geared-to-income housing or a portable housing benefit (PHB). The PHB is a monthly subsidy provided to the household to secure rental accommodation in the private rental market. There are approximately 3,000 benefit allocations across the province.[318]

Beyond Social Housing

While we have not delved deeply in the funding of VAW shelters or the supply of housing, we note here a few developments that emerged in our research.

The New Brunswick Housing Strategy 2019–2029 includes an objective to provide flexible housing options for individuals and families who are the victims of intimate partner violence and family violence. Key actions to achieve this objective include identifying and implementing additional housing options for persons affected by intimate partner and family violence, including off-reserve Indigenous persons and families.[319] The Housing Action Plan for Prince Edward Island, 2018-2023, includes funding to create transitional housing for victims of family violence as they transition to safe living arrangements.[320]

Manitoba Housing, established under *The Housing and Renewal Corporation Act*,[321] provides some funding for women's shelters and a Rental Supplement program. As of 2019, these programs had not yet targeted housing for low-income women and children leaving family violence or shelters, but the construction or operation of such facilities in Winnipeg was being explored. [322]

[318] Portable Housing Benefit," online: <www.tdin.ca/res_documents/Portable%20Housing%20Benefit%20QAv3final-HHSN.pdf>.
[319] New Brunswick Housing Strategy 2019–2029, online: <https://www2.gnb.ca/content/dam/gnb/Departments/sd-ds/pdf/Housing/HousingStrategy2019-2029.pdf>.
[320] Housing Action Plan for Prince Edward Island, 2018-2023, online: <https://www.princeedwardisland.ca/sites/default/files/publications/pei-housing-action-plan_2018-2023.pdf>
[321] *Housing and Renewal Corporation Act*, CCSM c H160.
[322] See "Manitoba Housing," online: <https://www.gov.mb.ca/housing/progs/reoi-mhfvpp.html>.

M. Social Assistance Laws

The delivery of social assistance (or "welfare" as it is commonly known) is governed by a complex maze of statutory and regulatory provisions, as well as internal policy directives and guidelines. These raise a broad range of issues of concern for survivors of gender-based violence, for whom access to an adequate source of income outside of the paid labour market and independent of abusive partners is critical to their safety and well-being. Survivors often return to or remain in abusive relationships because of their inability to access adequate levels of social assistance and safe, affordable housing.[323]

We have not reviewed the quantum of benefits available in each jurisdiction, although it is widely acknowledged that benefit levels are below commonly accepted poverty lines. Nor have we examined the policies and practices in all jurisdictions regarding the circumstances in which income and assets of "spouses" (defined differently for social assistance purposes than for family law purposes) are assessed separately (that is, departing from the usual practice of treating spouses as a single benefit unit for the purposes of determining eligibility). In our survey, we did identify particular provisions bearing directly on the issue of the benefit unit that are relevant to gender-based violence. New Brunswick's *General Regulation* to the *Family Income Security Act*, for example, provides that "a victim of violence committed by a person living in the same home" may be considered to be a "separate unit,"—an extremely important measure—but limits this by requiring that the victim not live with the person who committed the violence and stipulating that they may only be considered as a separate unit for nine months.[324] Just what this means in practice is hard to discern. However, because financial control is so central to many abusive relationships, and because control also frequently extends to undermining women's employment and employability, access to social assistance without taking into account the abuser's income and assets is imperative.

Newfoundland and Labrador has a broad provision relevant to the benefit unit: its *Income and Employment Support Act* provides that in situations of emergency, the Minister may provide income support without the usual eligibility requirements to ensure the immediate health, safety, or well-being of an individual or family.[325] Presumably this enables consideration of the survivor's income and assets alone, even if in other circumstances the abuser's income and assets would also be considered. Notably, Newfoundland and Labrador is also the only province in which providing "support to victims of violence, including timely access to financial assistance and referrals to other services to ensure the safety of those individuals and their children" is identified as one of the purposes/objectives of its social assistance legislation.[326] This is significant, since the statement of a statute's purpose guides the interpretation of all other provisions in the statute.

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[323] See, for example, Janet Mosher & Pat Evans, "Welfare Policy: A Critical Site of Struggle for Women's Safety," in Angela Miles, ed, *Women in a Globalizing World: Transforming Equality, Development, Diversity and Peace* (Toronto: Inanna Publications, 2013), 138-146.

[324] *General Regulation - Family Income Security Act*, NB Reg 95-61, see ss 4(17.1), (17.4b).

[325] *Income and Employment Support Act*, SNL 2002, C I-0.1, s 16.

[326] *Ibid*, s 3(d).

Yukon has a similarly broad provision. Under the *Social Assistance Regulation* applicants may be eligible for discretionary aid in emergency situations in order "to prevent or alleviate immediate risk to the health or safety of a person or a member of a person's household," even if the person is not otherwise eligible for assistance.[327] For those receiving assistance, discretionary aid can include counselling, rehabilitative services, and moving expenses.[328]

The Income Assistance Policy Manual of Northwest Territories requires that applicants who have been in a legal or common law spousal relationship but claim to be separated—and so could qualify without consideration of the income and assets of their (former) partner—to provide evidence of separation. Importantly, this can include evidence of family violence, such as physical evidence or information provided by police, medical personnel, or social workers, accompanied by a change in residence.[329]

Benefits

Below we have attempted to capture the range and variability of benefits, rather than to document the full array of benefits available in each jurisdiction. As in other areas of our survey, our approach is limited in that we are mapping entitlements as they exist on paper; what these look like in practice may depart from the paper entitlements, in both positive and negative ways.

Again, Newfoundland and Labrador stands out among jurisdictions: consistent with the statutory purpose of its *Income and Employment Support Act*, the regulations confer a broad discretion for an officer to grant the income support necessary to ensure the safety of a victim of violence and their dependents.[330]

In several jurisdictions, particular benefits are available in emergency situations affecting health or safety (for example Ontario[331]), and some identify family violence as one such emergency (Prince Edward Island, for example, identifies family violence as a priority for emergency assistance[332]). Some jurisdictions also identify specific benefits for those fleeing abuse. These benefits vary quite widely: moving and transportation costs (British Columbia[333]); relocation

[327] *Social Assistance Regulations*, YOIC 2012/83, s 33.
[328] *Ibid*, ss 34-51.
[329] Income Assistance Policy Manual 2019, online: <https://www.ece.gov.nt.ca/sites/ece/files/resources/income_assistance_policy_manual_-_october_2019.pdf>.
[330] *Income and Employment Support Regulations*, NLR 144/04, s 28(3).
[331] O Reg 134/98 General, under *Ontario Works Act, 1997*, SO 1997, c 25, Sched A, s 56. The relevant Policy Directive notes that this assistance is available for up to sixteen days and limited to no more than once in any six-month period, except for "women entering an interval or transition home for abused women"; see Ontario Works Policy Directive 2.3, "Emergency Assistance," online: <www.mcss.gov.on.ca/documents/en/mcss/social/directives/ow/0203.pdf>.
[332] The protocols also require Social Assistance Program staff to participate in family violence training and to be aware of the signs of family violence. Social Assistance Family Violence Protocols, 2015, online: <http://www.cliapei.ca/sitefiles/File/publications/WomanAbuseProtocols/WAP9.pdf>.
[333] British Columbia's policy on *Case Administration: Persons Fleeing Abuse, 2015* provides that victims of abuse (including physical violence, psychological or emotional abuse, intimidation, and stalking) may be eligible for Supplements for Persons Fleeing Abuse; see Government of British Columbia, Case Administration: Persons Fleeing Abuse, 2015, online: <http://www2.gov.bc.ca/gov/content/governments/policies-for-government/bcea-policy-and-procedure-manual/case-administration/persons-fleeing-abuse>.

payments, household start-up costs, and telephone services (Alberta[334]); relocation benefits if moving due to interpersonal violence, and where there are health and safety concerns, emergency assistance to cover temporary accommodation and meals, as well a childcare allowance and funds to purchase or repair essential furnishings and supplies (Saskatchewan[335]); an enhanced benefit rate (Nova Scotia[336]); particular allowances for women living in VAW shelters to enable them to maintain accommodation in the community (Alberta,[337] Ontario,[338] and Québec[339]); and an exemption from income of victim compensation payments (for example Saskatchewan, Ontario, Nova Scotia, and Yukon[340]). Québec also has a provision dealing with situations where both spouses are liable to repay any overpayments (that is, amounts that should not have been paid). A spouse is not liable for the repayment if they prove that they were experiencing violent behaviour from the other spouse and therefore, could not declare their circumstances. In this case, only the violent spouse is liable for the debt.[341]

Beyond the particular benefits that may be available for those fleeing intimate partner abuse are two critical issues related to the application of particular prerequisites to entitlement: efforts to secure other compensation and financial support from other sources; and efforts to secure and maintain employment or become employment ready. Virtually all jurisdictions require applicants/recipients to make all reasonable efforts to secure other sources of financial support; the failure to do so can result in the denial, termination, or reduction of benefits.[342]

For women leaving abusive relationships, this obligation usually translates into an obligation to pursue child and/or spousal support. In the policy manuals and directives that we have been able

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[334] *Income Support, Training and Health Benefits Regulation*, Alta Reg 122/2011, schedule 4, ss 13, 14, 20.

[335] *Saskatchewan Income Support Regulations*, RRS c S-8, Reg 13, ss 4-8, 4-11, 4-12(7), 4-13 and Policy Manual ss 14.2, 15.1, 15.4, online: <https://pubsaskdev.blob.core.windows.net/pubsask-prod/112381/SIS-Policy-Manual-JAN2020.pdf>.

[336] *Employment Support and Income Assistance Regulations*, NS Reg 195/2019, s 49(c) available to a single recipient who rents or owns their home if fleeing an abusive situation.

[337] *Income and Employment Supports Act*, SA 2003, c I-0.5, s 6(a)(iii)(C).

[338] O Reg 134/98, *supra* note 331, s 44.1. Under the regulations, an applicant who is living in an interval or transition house for abused women is entitled to receive, for at least three months, the full amount of social assistance benefits—including for shelter—if these benefits are needed to maintain her accommodation in the community.

[339] Under section 53(9) of the *Individual and Family Assistance Act*, CQLR c A-14.1.1, an independent adult who does not have a severely limited capacity for employment and who is "a victim of violence who takes refuge in a shelter or other similar place for a maximum of three consecutive months from the date of admission" may be eligible for "a temporarily limited capacity allowance" on top of the basic benefit.

[340] *Saskatchewan Income Support Regulations*, *supra* note 335, s 2-7(2)(b); *Ontario Works General Regulation*, *supra* note 331, s 39(1); *Employment Support and Income Assistance Regulations* (NS), *supra* note 336, s 39(1)(d); *Social Assistance Regulations* (Yukon), *supra* note 327, s 52(1)).

[341] *Individual and Family Assistance Act* (QB), *supra* note 339, s 89.

[342] *Income and Employment Supports Act* (AB), *supra* note 337, s 15(1); *Saskatchewan Income Support Regulations*, *supra* note 335, s 3-10(d); *Employment and Income Assistance Regulation*, Man Reg 404/88, s 12.1(2); *Ontario General Regulation*, *supra* note 331, s 13(1); *Individual and Family Assistance Act* (QB), *supra* note 339, ss 63-66; *General Regulation - Family Income Security Act*, *supra* note 324, ss 4(1)(c), 6(b); Nova Scotia Employment Support and Income Assistance Policy Manual, ss 5.1.4(a)-(c) online: <https://novascotia.ca/coms/employment/documents/ESIA_Program_Policy_Manual.pdf>; *Social Assistance Act Regulations* made pursuant to *Social Assistance Act*, RSPEI 1988, C S-4.3, ss 8(7), (8); *Income and Employment Support Regulations*, NLR 144/04, s 9.

to access, very few make an exception to this obligation in instances involving gender-based violence. Saskatchewan, Ontario, and Nova Scotia appear to be the only jurisdictions where there are express exceptions related to gender-based violence, while Prince Edward Island waives the obligation where it would adversely affect an applicant or would be futile or unreasonable.[343]

In Saskatchewan the obligation can be waived where "potential abuse by the absent spouse or parent poses a serious threat to the individual and/or dependents."[344] Nova Scotia has a very similar provision: while applicants are required to pursue support through the courts, this can be temporarily suspended when "potential abuse by the absent spouse poses a serious threat to the applicant, recipient, and/or other family members."[345]

In Ontario, significantly, as of February 1, 2017 the obligation to pursue child support has been eliminated. In cases of spousal support, a temporary waiver of 3-12 months is available where the applicant or recipient provides evidence of domestic violence or a restraining order is in effect against the absent spouse. A permanent waiver is available where "the Administrator is satisfied, based on the evidence available, that there is an ongoing risk of domestic violence and it would not be in the best interests of the applicant or participant to pursue support."[346]

The above policies vary in whether the obligation can be waived only temporarily, and in terms of the threshold for the waiver: evidence of domestic violence versus a serious threat. None provide definitions of abuse or violence, nor details of verification requirements.

Some provinces create a right of the relevant Ministry to apply for and/or enforce court-ordered support on behalf of a woman and children (Alberta, Québec, and Ontario, for example).[347] Ontario's Policy Directives recommend only doing so where the applicant or recipient is unable to do so for various reasons, including where "violence, threats, or other forms of intimidation are likely to result as a consequence of the applicant or recipient taking action."[348] The Directive also provides, however, that a "delivery agent should not proceed with an application for an order of support if there is any possibility of putting the applicant or recipient in further danger of domestic violence." This caution in important as it is naïve to assume that simply having the Ministry apply for (or enforce) an order necessarily reduces the risks to survivors.

Another form of financial support that an applicant may be required to pursue is an immigration undertaking (discussed in Section K). To be eligible for social assistance, a sponsored immigrant normally must make reasonable efforts to secure financial support from their sponsor, as the

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[343] *Social Assistance Act Regulations* (PEI), *ibid*, s 8(8).
[344] Saskatchewan Income Support Program Policy Manual, *supra* note 335 at 12.
[345] Nova Scotia Employment Support and Income Assistance Policy Manual, *supra* note 342, s 5.1.4 (a)-(d).
[346] Ontario Works Policy Directive 5.5, "Family Support," online:
<www.mcss.gov.on.ca/en/mcss/programs/social/directives/ow/5_5_OW_Directives.aspx>.
[347] *Income and Employment Supports Act*, (AB), *supra* note 337, s 29; *Individual and Family Assistance Act* (QB), *supra* note 339, s 64; Ontario Works Policy Directive 5.5, *ibid*.
[348] Ontario Directive 5.5, *ibid*. Note that in Ontario a "family support worker" may be assigned to help recipients pursue support. Family support workers are not lawyers and are not authorized to provide legal advice; *Ontario Works Act, 1997*, SO 1997, c 25, Sch A, s 59. Family support workers are also distinct from the family court support workers discussed in Section II:H, who are embedded in the family law courts to provide assistance to survivors of family violence.

sponsor had promised to do in their undertaking.[349] However, various jurisdictions, in their regulations or policy directives, waive this obligation in situations of abuse. In Manitoba, for example, where the Program Manager determines that there is a "risk of harm" the sponsor will not be contacted.[350] In Alberta and Ontario the usual requirements with respect to the sponsor's assets and financial resources do not apply where the sponsored immigrant was abused or abandoned by their sponsor.[351] Québec treats domestic violence as an exceptional circumstance where recovery from the sponsor of amounts paid may be suspended.[352]

In Ontario, as with the obligation to pursue support, temporary (3-12 month) and permanent waivers of this obligation are possible. Policy Directive 3.11 provides that the requirement is temporarily waived where "the relationship has broken down as a result of "abuse and/or family violence."[353] A permanent waiver is possible where "there is evidence of abuse or family violence over a prolonged period of time and the Administrator is satisfied that it is not in the best interests of the sponsored immigrant to pursue support."[354]

Regarding proof of the abuse, Directive 3.11 provides that, "[i]f at application, there is no clear evidence to establish abuse, the person is expected to make reasonable efforts to verify the claim of abuse to the satisfaction of the Administrator (e.g., reasonable third-party verification from the police, a lawyer, or a community or health care professional)."[355]

Directive 3.11 also provides detailed guidance on communications with Immigration, Refugees, and Citizenship Canada (IRCC) to avoid having IRCC send a warning letter regarding monies owing to the sponsor in situations of abuse or family violence. The sponsor will be in default, and as such, barred from sponsoring anyone else, but will not be notified by letter and the government will not try to recover any debt. However, once the administrator concludes that there is no longer a risk of abuse, efforts to recover funds from the sponsor may be initiated.[356]

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[349] For example, Nova Scotia's approach is broader in providing that if the sponsoring spouse or other sponsor can no longer, or refuses, to provide support, the sponsored person "may be considered for ESIA." If the sponsor is able but refuses to provide support, the sponsored person must take "appropriate action to secure ongoing sponsorship," Nova Scotia Employment Support and Income Assistance Policy Manual, *supra* note 342, s 5.3.3.

[350] Manitoba, *Employment Income Assistance* (EIA) *Administrative Manual,* online: <https://www.gov.mb.ca/fs/eia_manual/index.html>.

[351] *Income Support, Training and Health Benefits Regulation* (Alta), *supra* note 337, ss 28(2), 54(2) (includes if abused or abandoned); *Ontario General Regulation, supra* note 331, s 51. Normally, when assessing the "income" of an applicant, if they have been sponsored and continue to reside in the same dwelling place as their sponsor, income from the sponsor will be attributed to the applicant. However, if the applicant satisfies Ontario Works that the relationship has broken down "by reason of domestic violence," the sponsor's income will not be attributed to the applicant.

[352] *Individual and Family Assistance Act* (QB), *supra* note 339, ss 91, 104. The policy manual, *Manuel D'interprétation normative des programmes d'aide financière*, provides that cases of domestic violence are an example of an exceptional circumstance.

[353] Ontario Works Policy Directive 3.11, "Sponsored Immigrants," online: <https://www.mcss.gov.on.ca/en/mcss/programs/social/directives/ow/3_11_OW_Directives.aspx>.

[354] *Ibid.*

[355] *Ibid.*

[356] *Ibid.*

As noted, entitlement to benefits also commonly require that all adult beneficiaries seek, maintain, and/or prepare for employment.[357] The failure to do so can result in a denial, termination, or reduction of benefits. Seeking employment poses particular risks to those in, or having recently left, an abusive relationship. Research shows that abusive partners or ex-partners will often sabotage women's employment/program participation as a way to further their control. Moreover, given the impacts of abuse, a survivor may require a considerable period of healing and various supports before being ready for employment. From the policy manuals and directives that we have been able to locate, Ontario, Manitoba, and British Columbia appear to be the only jurisdictions where this obligation is waived in some situations of abuse. In Ontario, unlike the Directive regarding the waiver of the obligation to seek spousal support, Directive 2.5 provides details regarding the sorts of documentation required to support the request for a waiver. "Appropriate documentation," depending on the reason for the deferral, may include a letter from a qualified health professional (including psychologist, social worker, physician, nurse, midwife and a "Traditional Aboriginal Midwife recognized and accredited by the Aboriginal community"). Survivors of family violence are deferred from participation requirements for a minimum of three months or, up to twelve months where a restraining order is in place. [358]

In Manitoba, those eligible for long-term income assistance include persons residing in a "crisis intervention facility"—defined as a crisis resource centre approved by the Minister for persons abused by other persons. Persons in a crisis facility are not subject to employment expectations and after they leave, employment may be deferred depending on their situation.[359] British Columbia's *Employment and Assistance Regulation* acknowledges that those currently experiencing domestic violence or having experienced domestic violence in the past 6 months, seriously impedes the ability to search for, accept, or continue in employment. As such, the usual consequences for failing to meet employment obligations do not apply to persons who have separated from an abusive spouse or relative within the previous 6 months, if, in the minister's opinion, the abuse or the separation interferes with their ability to search for, accept, or continue in employment.[360] This recognition of the impact of abuse is significant, but 6 months is a short window of time, and the appropriate exercise of discretion depends upon knowledgeable frontline workers.

Access to Social Assistance and Immigration Status

In addition to all of the other eligibility rules are those related to the beneficiary's immigration status. As noted in Section K there are a vast number of different forms of "status" that characterize one's relationship to the nation state. Our review of statutes and regulations revealed considerable variation in the forms of status that would render one eligible for assistance. Not surprisingly,

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[357] *Income and Employment Supports Act* (AB), *supra* note 337, ss 15(1)(a), (e); *Individual and Family Assistance Act* (QB), *supra* note 339; *Saskatchewan Income Support Regulation*, *supra* note 335, s 3-10d; *Manitoba Assistance Act*, CCSM, c A150, s 5.4; *Ontario General Regulations*, *supra* note 331, ss 3, 18, 28, 29.

[358] Ontario Works Policy Directive 2.5, "Participation Requirements," online: <www.mcss.gov.on.ca/en/mcss/programs/social/directives/ow/2_5_OW_Directives.aspx>.

[359] *Manitoba Assistance Act*, *supra* note 353, s 5(1)(a), (i) and Manitoba Employment and Income Assistance Manual, online: <https://www.gov.mb.ca/fs/eia_manual/index.html>, ss 6.3.5, 9.3.5.

[360] *Employment and Assistance Regulation*, BC Reg 263/2002, ss 2(3)(a)(ii), 4.1(4)(e), 29(4)(h)(iii).

citizens and permanent residents are eligible in all jurisdictions. At the more restrictive end of the spectrum are Newfoundland and Labrador (in addition to citizens and permanent residents, refugee claimants are also eligible[361]), the Northwest Territories (refugee claimants and a protected person who has applied for permanent residence if they have been issued a social insurance number are also eligible[362]) and Québec (a person to whom asylum has been granted is included, however one form of assistance—last resort financial assistance—is also available to refugee claimants, and to those who have applied for permanent residence on humanitarian and compassionate grounds and where other criteria are also satisfied[363]). More liberal approaches expand categories of eligibility to include temporary resident permit holders (see Nova Scotia for example[364]). Alberta includes temporary resident permit holders, refugee claimants, and "a victim of human trafficking as determined by the Department of Citizenship and Immigration (Canada)."[365] Saskatchewan and British Columbia include temporary permit holders, refugee claimants, and where a refugee claim is denied, a person subject to a removal order that cannot be executed.[366] Significantly, the British Columbia regulations provide that the normal citizenship requirements for assistance may be waived for applicants or recipients who have separated from an abusive spouse.[367]

New Brunswick simply provides that a person eligible to receive benefits must be "legally authorized to reside in Canada."[368] Ontario, by contrast, lists who is not eligible—tourists, visitors, and persons against whom a removal, exclusion, or deportation order has become effective or enforceable—unless for reasons wholly out of their control, the person is unable to leave Canada, or has made an application for permanent resident status on humanitarian and compassionate grounds.[369]

The already existing precarity of women without citizenship or permanent resident status is deepened when their immigration status disqualifies them from access to social assistance. As noted earlier, survivors of gender-based violence need considerable time and supports to restore their well-being and their safety and are often not ready to maintain employment. The denial of social assistance restricts options for survival, driving some survivors into—or back into—abusive intimate relationships or other forms of exploitative relationships.

Access to social assistance can be a key lifeline for survivors of gender-based violence. To ensure that this lifeline exists for survivors and their children, several best practices can be identified.

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[361] *Income and Employment Support Regulations* (NL), *supra* note 342, ss 5(1)(b), 6(1)(d), 35(1)(b).
[362] *Income Assistance Regulations,* RRNWT 1990, c S-16, s 1.11.
[363] *Individual and Family Assistance Act* (QB), *supra* note 339, ss 26; *Individual and Family Assistance Regulation*, c A-13.1.1, r 1, s 47. Additionally, the Minister of Employment and Social Solidarity may grant benefits to a person or family who is not eligible if without that benefit, they would be in "circumstances that could endanger their health or safety or lead to complete destitution," s 49.
[364] Employment Support and Income Assistance Program Policy, online: <https://novascotia.ca/coms/employment/documents/ESIA_Program_Policy_Manual.pdf>.
[365] *Income Support, Training and Health Benefits Regulation* (AB), *supra* note 337, s 10(2).
[366] *Saskatchewan Income Support Regulations, supra* note 335, s 1-2; *Employment and Assistance Regulation,* BC Reg 263/2002, s 7.
[367] *Employment and Assistance Regulation* (BC), *ibid,* s 7.1(1)(c).
[368] *Family Income Security Act,* SNB 1994, c F-2.01, s 4(2)(b)
[369] *Ontario General Regulation, supra* note 331, s 6(1), (2).

- providing timely access to financial assistance and referrals to other services (as in Newfoundland and Labrador) should be identified a statutory purpose/objective of all social assistance legislation;
- adopting a common and broad definition of gender-based violence;
- ensuring that woman experiencing abuse are able to apply separately from those who are deemed under social assistance legislation to be their "spouses"; this includes recognition of the reality that they may need to continue to live under the same roof for some period of time;
- eliminating verification requirements or significantly broadening the sources of verification (ideally any verification requirements would be consistent across, and could be used in, different domains—for example, social housing, social assistance, temporary resident permits, early termination of leases, etc.);
- creating clear waivers from the obligation to pursue financial resources;
- ensuring that no actions are taken (e.g. Ministry pursuit of child support or immigration undertaking) that could expose a woman to the risk of harm;
- ensuring consistency of benefit entitlements, including a broad range of benefits that women require in order to leave relationships and set up separate households;
- moving benefit entitlements and waivers into the governing statutes (or at a minimum, into the regulations to the statutes); and
- creating national social assistance standards through federal legislation and funding agreements with the provinces and territories (as previously existed under *Canada Assistance Plan Act*).

N. Employment & Occupational Health and Safety Laws

In the last few years the federal government, provinces, and territories have all introduced legislation providing for leave from employment related to violence.[370] This legislation typically provides employees with leave for purposes such as obtaining medical attention, counselling, or

[370] See *Canada Labour Code*, RSC 1985, c L-2, s 206.7 (federal); *Employment Standards Act*, RSBC 1996, c 113, s 52.5 (BC ESA); *Employment Standards Code*, RSA 2000, c E-9, s 53.981 (AB ESC); *The Saskatchewan Employment Act*, SS 2013, c S-15.1, s 2-56.1 (SK SEA); *The Employment Standards Code*, CCSM c E110, s 59.11 (MB ESC); *Employment Standards Act*, 2000, SO 2000, c 41, s 49.7 (ON ESA); *Act Respecting Labour Standards*, CQLR c N-1.1, ss 79.1–79.7 (QB ARLS); *Employment Standards Act*, SNB 1982, c E-7.2, s 44.027 (NB ESA); *Labour Standards Code*, RSNS 1989, c 246, ss 60Y, Z, ZA, ZB (NS LSC); *Employment Standards Act*, RSPEI 1988, c E-6.2, s 22.4 (PEI ESA); *Labour Standards Act*, RSNL 1990, c L-2, s 43.34 (NL LSA); *Employment Standards Act*, SNWT 2007, c 13, s 30.2 (NWT ESA). See also Bill 10, *Act to Amend the Employment Standards Act (2020)*, online: <https://yukonassembly.ca/sites/default/files/inline-files/34-3-Bill010-Act-to-Amend-the-Employment-Standards-Act2020.pdf> (YK, providing leave for domestic or sexual violence) and Bill 49, *An Act to Amend the Labour Standards Act (2020)*, online: <https://assembly.nu.ca/sites/default/files/Bill_49_AATA_Labour_Standards_Act_EF_FINAL.pdf> (NU, providing leave for family abuse).

victim services; seeking legal or law enforcement assistance; and/or relocation.[371] One difference across jurisdictions is whether the leave extends to sexual violence as well as domestic violence, with most jurisdictions now providing employment leave for sexual violence in addition to domestic or family violence.[372] This is not the case federally or in Alberta, Nova Scotia, Newfoundland and Labrador, or the Northwest Territories, however, where sexual violence is only included to the extent it qualifies as domestic or family violence—i.e. it requires an intimate partner or dating relationship (or former such relationship).[373] These jurisdictions should extend their employment leave provisions to include sexual violence leave regardless of the survivor's relationship with the perpetrator.

Another difference across legislation is whether any period of the leave is paid, which often depends on whether the employee has worked for a particular qualifying period for the same employer. Alberta is the only jurisdiction where leave is completely unpaid.[374] The broadest approach is in British Columbia, which provides for 5 days of paid domestic or sexual violence leave regardless of how long the employee has worked for the employer, in addition to up to 15 weeks of unpaid leave per calendar year.[375] The details are as follows:

- Jurisdictions with *no qualifying period*: **British Columbia**, though for the 5 days of paid leave, pay is calculated based on the employee's wages for the 30 calendar day period preceding the leave; BC also provides an additional 5 days and up to 15 weeks of additional unpaid leave per calendar year.

- Jurisdictions with *qualifying period connected to paid versus unpaid leave*: **Quebec** (qualifying period of 3 months of uninterrupted service to obtain 2 days of paid leave, no qualifying period for unpaid leave of up to 26 weeks per 12 months); **Yukon** (qualifying period of 3 continuous months for 5 days paid leave and up to 15 weeks of unpaid leave; no qualifying period for 5 days unpaid leave per calendar year; not yet in effect); **Northwest Territories** (qualifying period of 1 continuous month for 5 days and up to 15 weeks unpaid leave; qualifying period of 3 continuous months for 5 days paid leave per calendar year); **Nunavut** (qualifying period of 1 continuous month for unpaid leave, qualifying period of 3 continuous months for 5 days paid leave per calendar year; not yet in effect).

- Jurisdictions with *qualifying period not connected to paid versus unpaid leave*: **Alberta** (qualifying period of 90 days employment for 10 days unpaid leave per calendar year);

[371] These statutes generally define employer / employee so as to exclude some occupations and industries, but an examination of this issue is not included here.
[372] See BC ESA, SK SEA, MB ESC, ON ESA, QB ARLS, NB ESA, and PEI ESA, *supra* note 370. Yukon will also include sexual violence when Bill 10, *supra* note 370, takes effect.
[373] See also Nunavut, where Bill 49, *supra* note 370, provides for family abuse leave only. Federally, "family violence" is not defined in the *Canada Labour Code* or Regulations, *supra* note 370, but the Code uses the broader terms "violence and harassment" in relation to occupational health and safety, suggesting "family violence" has a more limited meaning.
[374] AB ESC, *supra* note 370, s 53.981(3).
[375] BC ESA, *supra* note 370, s 52.5(4).

> **Saskatchewan** (qualifying period of 13 consecutive weeks for 5 days paid leave, 5 days unpaid leave per 52 weeks); **Manitoba** (qualifying period of 90 days for 5 days paid leave (intermittent), additional 5 days unpaid (intermittent), and up to 17 consecutive weeks unpaid); **Ontario** (qualifying period of 13 consecutive weeks for 5 days paid leave, 5 days unpaid leave, up to 15 weeks additional unpaid leave per calendar year); **New Brunswick** (qualifying period of 90 days for 5 days paid leave (intermittent), additional 5 days unpaid leave (intermittent), and up to 16 consecutive weeks unpaid leave); **Nova Scotia** (qualifying period of at least 3 months for 3 days paid leave (intermittent), additional 7 days unpaid leave (intermittent), and up to 16 consecutive weeks unpaid leave); **Prince Edward Island** (qualifying period of 3 months continuous employment for 3 days paid leave, 7 days unpaid leave per year); **Newfoundland and Labrador** (qualifying period of 30 continuous days for 3 days paid leave, 7 days unpaid leave per year).[376]

BC's approach of having no strict qualifying period is a best practice if leave is to be as accessible as possible. All jurisdictions should consider more generous provision of paid leave, and certainly more than 2 or 3 paid days per calendar year. The COVID-19 pandemic has laid bare the importance of paid sick days and the same rationale can be applied to survivors who must legitimately be absent from work for reasons related to the effects of having sustained abuse.

Another potential barrier to seeking leave is a requirement to verify the violence that necessitates the leave. Manitoba—which was the first province to create employment leave for interpersonal violence—requires "reasonable verification" for paid leave, as does the Northwest Territories.[377] Most other jurisdictions require either no verification (Alberta, Québec, and New Brunswick),[378] or verification only upon employer request (federally and in British Columbia, Saskatchewan, Manitoba, Ontario, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador).[379] Here again, the best practice is not to require verification of violence if leave is to be as accessible as possible.

Also noteworthy are amendments to occupational health and safety (OHS) legislation in some jurisdictions that require employers to develop policies and procedures to protect workers from violence and harassment in the workplace.[380] Violence is defined with either explicit or implicit

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[376] BC ESA, ss 52.5(4), (5.1); AB ESC, s 53.981(3); SK SEA, s 2-43; MB ESC, s 59.11(2); ON ESA, s 49.7(2); QB ARLS, s 79.7; NB *Domestic Violence, Intimate Partner Violence or Sexual Violence Leave*, NB Reg 2018-81, s 3(1); NS LSC, s 60(Z)(1); PEI ESA, s 22.4(1); NL LSA, s 43.34(1); YK Bill 10, s 60.03.01(5)(b); NWT *Employment Standards Regulations*, NWT Reg 020-2008, s 12.1; NU Bill 49, s 39.19(2) (all *supra* note 370).

[377] MB ESC, s 59.11(11); NWT ESA, s 30.2(10). In both jurisdictions, an employer can also ask for reasonable verification for unpaid leave (see MB ESC, s 59.11(12), NWT ESA, s 30.2(11)) (all *supra* note 370).

[378] No verification is required in AB, QB, or NB. In YK, Bill 10 explicitly provides that employers shall not require verification from a third party (s 60.03.01(11)) (all *supra* note 370).

[379] Verification is only required upon employer request federally and in BC, SK, MB, ON, NS, PEI, NL, and NU (when Bill 49 comes into force) (all *supra* note 370).

[380] See *Canada Labour Code*, *supra* note 370, and the *Work Place Harassment and Violence Prevention Regulations*, SOR/2020-130 (federal, applies to harassment and violence, which are defined broadly enough to include domestic and sexual violence); *Occupational Health and Safety Act*, SA 2017, c O-2.1 (AB, applies to violence, including

inclusion of domestic violence federally and in Alberta, Ontario, New Brunswick, and Newfoundland and Labrador. Alberta and New Brunswick also include sexual violence explicitly. Other jurisdictions include violence in their OHS legislation but define it somewhat more narrowly, focused on physical force and injury or risk thereof.[381] Only Québec and Yukon do not have any protections against workplace violence or harassment (apart from human rights legislation, which will be discussed next).[382] The best practice here is inclusion of a broad definition of harassment and violence that obliges employers to protect their workers from domestic and sexual violence and harassment.[383]

O. Human Rights Laws

Human rights laws exist at the federal level and in each province and territory.[384] These laws include protections against sexual and other forms of harassment in the context of employment, tenancies, and services customarily available to the public (including education, for example).[385] They do not include free-standing prohibitions against harassment by individuals unconnected to these areas. While some human rights laws have explicit provisions regarding harassment,[386] others implicitly include such protection by virtue of their prohibitions against sex and other forms

domestic and sexual violence); *Occupational Health and Safety Act*, RSO 1990, c O.1, s 32.0.4 (ON, applies to violence and harassment, with explicit reference to domestic violence); *General Regulation - Occupational Health and Safety Act*, NB Reg 91-191, ss 2, 374.1-374.3 (NB, applies to intimate partner violence, domestic violence and sexual violence); *Occupational Health and Safety Regulations*, 2012, NLR 5/12, ss 22, 23 (NL, applies to family violence and harassment).

[381] See *Occupational Health and Safety Regulation*, BC Reg 296/97, ss 4.27-4.30 (BC); *Occupational Health and Safety Regulations*, 1996, RRS c O-1.1 Reg 1, s 37) (SK; also applying to harassment); *Workplace Safety and Health Regulation*, Man Reg 217/2006, Part 11 (MB; also applying to harassment); *Violence in the Workplace Regulations*, NS Reg 209/2007 (NS); *Occupational Health and Safety Act General Regulations*, PEI Reg EC180/87 (PEI; see also the *Workplace Harassment Regulations*, PEI Reg EC710/19); *Occupational Health and Safety Regulations*, NWT Reg 039-2015 (NWT, also applies to harassment); *Occupational Health and Safety Regulations*, Nu Reg 003-2016 (NU, also applies to harassment).

[382] *Act respecting occupational health and safety*, CQLR c S-2.1 (QB); *Occupational Health and Safety Act*, RSY 2002, c 159 (YK).

[383] For further discussion see Canadian Labour Congress, "How does domestic violence impact people at work?" (2015), online: <http://canadianlabour.ca/how-does-domestic-violence-impact-people-work>.

[384] Federally, the *Canadian Human Rights Act*, RSC 1985, c H-6, applies to employment, services and housing that fall within federally regulated sectors.

[385] For a recent discussion in the UK of the need to reform university violence policies to include domestic abuse, see Bella Soames and Isabelle Stanley, "Universities Are Accused Of Lack Of Support For Students Facing Domestic Abuse, Despite "High Prevalence" In Age Group" (14 April 2021), online: Politics Home, <https://www.politicshome.com/news/article/universities-lack-of-support-for-students-facing-domestic-abuse>. A review of university violence policies and procedures is beyond the scope of this report.

[386] *Canadian Human Rights Act*, RSC 1985, c H-6, s 14(1) and (2) (harassment and sexual harassment); *The Human Rights Code*, CCSM c.H175, s 19 (MB) (harassment, including sexual harassment); *Human Rights Code*, RSO 1990, c.H.19, ss 2(2), 5(2), 7 (ON) (harassment, sexual harassment); *Charter of Human Rights and Freedoms*, CQLR c.C-12, s 10.1 (QB) (harassment, including sexual harassment); *Human Rights Act*, RSNB 2011, c 171, s 10 (NB) (sexual harassment only); *Human Rights Act*, RSNS 1989, c.214, s 5(2) and (3) (NS) (harassment and sexual harassment); *Human Rights Act, 2010*, SNL 2010, c.H-13.1, ss 13, 17, 18 (NL) (harassment in commercial and dwelling units and establishments and sexual solicitation/advances); *Human Rights Act*, RSY 2002, c.116, s 14 (YK) (harassment, including sexual harassment); *Human Rights Act*, SNWT 2002, c.18, s 14 (NWT) (harassment, including sexual harassment); *Human Rights Act*, SNu 2003, c.12, s 7(6) (NU) (harassment, including sexual harassment).

of discrimination.[387] Harassment is defined in legislation and case law to include a range of conduct—from unwelcome comments and a poisoned work, educational, or tenancy environment, to physical violence that is connected to a protected ground such as sex, gender identity, or sexual orientation.[388] Human rights legislation also recognizes intersecting grounds of discrimination such as sex and race, either explicitly[389] or implicitly.[390]

Although domestic violence is not explicitly mentioned in human rights legislation, it could be seen to fall within the scope of harassment in certain circumstances, placing obligations on employers, service providers, and landlords to ensure environments that are free of this type of conduct.[391] Human rights case law is clear that liability for harassment attaches not just to the perpetrator but also to their employer if the harassment was committed in the course of employment.[392] This principle has also been extended to hold educational institutions liable for the harassment of one student by another.[393]

Manitoba takes the broadest approach in its explicit inclusion of "abusive" behaviour based on all protected grounds in its definition of harassment, and we recommend this as best practice.[394]

Other issues with human rights legislation are more procedural.[395] Many human rights statutes have very short time limits in which to bring complaints—commonly one year with a limited discretion to extend the time—which will often be unrealistic for survivors of harassment and abuse to comply with.[396] This has now been recognized, in varying ways, in legislation governing limitation periods for court proceedings related to gender-based violence in all jurisdictions except

[387] See *Janzen v Platy Enterprises*, [1989] 1 SCR 1252 (finding that sexual harassment constitutes sex discrimination). Jurisdictions that do not include harassment explicitly are British Columbia (*Human Rights Code*, RSBC 1996, c 210), Alberta (*Alberta Human Rights Act*, RSA 2000, c A-25.5), Saskatchewan (*The Saskatchewan Human Rights Code, 2018*, SS 2018, c S-24.2), and Prince Edward Island (*Human Rights Act*, RSPEI 1988, c.H-12).

[388] See e.g. *Janzen*, *ibid* (harassment in employment based on sex); *Friedmann v MacGarvie*, 2012 BCCA 445 (harassment in a residential tenancy based on sex); *School District No. 44 (North Vancouver) v Jubran*, 2005 BCCA 201 (harassment in a K-12 school based on perceived / attributed sexual orientation).

[389] See e.g. the *Canadian Human Rights Act*, *supra* note 386, s 3.1 (recognizing that discriminatory practices include those based on one or more prohibited grounds of discrimination, or on a combination of prohibited grounds).

[390] See e.g. *Radek v Henderson Development (Canada) Ltd*, 2005 BCHRT 302 (interpreting British Columbia's *Human Rights Code*, *supra* note 387, to include protection against harassment of an Indigenous woman based on the intersection of race, colour, ancestry, disability, and economic disadvantage).

[391] This is recognized in those jurisdictions that include harassment and stalking in their civil protection order legislation. See above at note 8.

[392] *Robichaud v Canada (Treasury Board)*, [1987] 2 SCR 84.

[393] See e.g. *Jubran*, *supra* note 388.

[394] *The Human Rights Code* (MB), *supra* note 386, s 19(2) (harassment includes a course of "abusive and unwelcome conduct or comment" made on the basis of protected grounds).

[395] A full review of procedural provisions is beyond the scope of this report. For example, we do not include review of different models for human rights complaints that involve commissions (including as possible complainants) versus direct-to-tribunal approaches.

[396] See, however, the *Alberta Human Rights Act*, *supra* note 387, s 20(2)(b), which has a strict limitation period of one year after the alleged contravention of the Act, with no discretion to extend this period.

Prince Edward Island, and human rights legislation should provide discretion to allow complaints for harassment and abuse to be filed after the normal limitation period.[397]

P. Privacy Laws

Access to information and privacy legislation typically restricts the collection, use, and disclosure of personal information by public bodies unless necessary in certain circumstances, such as to protect a person's mental or physical health or safety, or for law enforcement purposes. This legislation also typically restricts access to personal information where safety issues would arise from disclosure.[398]

British Columbia is currently the only jurisdiction that explicitly references domestic violence in its public sector privacy legislation. British Columbia's *Freedom of Information and Protection of Privacy Act* allows public bodies to collect and disclose personal information where it is "necessary for the purpose of reducing the risk that an individual will be a victim of domestic violence, if domestic violence is reasonably likely to occur."[399] The usual requirement to collect personal information directly from the individual concerned is subject to an exception where "the information is collected for the purpose of … reducing the risk that an individual will be a victim of domestic violence, if domestic violence is reasonably likely to occur."[400] While these provisions are similar to those in other jurisdictions in seeking to prevent harm and protect safety, it is useful that they explicitly reference public bodies' obligations in cases involving domestic violence, and other jurisdictions should be encouraged to consider amending their legislation to do so.

The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) applies to the federal private sector and provinces and territories that have not passed their own legislation that substantially complies with its requirements.[401] PIPEDA does not mention domestic violence

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[397] For an example of this approach see the *Canadian Human Rights Act, supra* note 386, s 41(1)(e) (limitation period of one year "or such longer period of time as the Commission considers appropriate in the circumstances." For a discussion of limitation periods for court proceedings related to gender-based violence, see section I. above.

[398] For legislation applying to public sector actors see *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss 19, 33.1(1)(m.1) (BC); *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25, ss 17, 18, 40 (AB); *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01, ss 21, 29(2) (SK); *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 (SK); *The Freedom of Information and Protection of Privacy Act*, CCSM c F175, ss 17, 24, 25, 44(1) (MB); *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, ss 14(1)(e), 20, 21(1)(b), 42(1)(h) (ON); *An Act Respecting Access to Documents Held by Public Bodies and the Protection of Personal Information*, CQLR c A-2.1, ss 28(4), 59, 59.1 (QB) (referencing "violence"); *Right to Information and Protection of Privacy Act*, SNB 2009, c R-10.6, ss 21, 28, 46 (NB); *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss 18, 27 (NS); *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01, ss 15(2), 16, 37 (PEI); *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c A-1.2, ss 17, 37, 40, 68 (NL); *Access to Information and Protection of Privacy Act*, RSY 2002, c 1, ss 19, 22, 25, 36 (YK); *Access to Information and Protection of Privacy Act*, SNWT 1994, c 20, ss 20, 21, 23(4), 48 (NWT); *Access to Information and Protection of Privacy Act*, SNWT (Nu) 1994, c 20, ss 20, 21, 23(4), 48 (NU). For legislation applying to private sector actors see *Personal Information Protection Act*, SBC 2003, c 63 (BC); *Personal Information Protection Act*, SA 2003, c P-6.5 (AB); *An Act respecting the Protection of Personal Information in the Private Sector*, CQLR c P-39.1 (QB).

[399] *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss 26(f), 33.1(m.1).

[400] *Ibid*, s 27(1)(c)(5).

[401] *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 (PIPEDA).

explicitly, but creates obligations for organizations around the collection, use and disclosure of personal information that could be relevant in the domestic violence context—for example, in the case of landlords and employers.[402] This is also the case in provinces that have their own private sector privacy legislation.[403] A detailed analysis of these provisions is beyond the scope of this report, but it is worth noting that no jurisdictions currently provide for domestic violence specifically in private sector privacy legislation.

Several provinces have also created legislative torts for the non-consensual distribution of intimate images.[404] This legislation complements the criminal prohibition against knowingly distributing intimate images by providing for the possibility of civil remedies to survivors (typically damages and injunctions).[405] The legislation is similar across the provinces with some notable differences. Manitoba's legislation is unique in providing supports and services for persons whose intimate images are shared without their consent, including referrals to police.[406] Newfoundland and Labrador has a reverse onus provision in their legislation that requires the respondent to prove consent and establish that they had reasonable grounds regarding their belief in consent.[407] Prince Edward Island includes remedies related to internet intermediaries and the destruction, removal, and de-indexing of intimate images from the internet and search engines, in addition to providing for damages and injunctions.[408] Other jurisdictions should consider implementing similar legislation with provisions that maximize access to remedies for survivors.[409]

Part III: Conclusion

In this report, we have provided a review of statutory regimes and entitlements across federal, provincial, and territorial jurisdictions in Canada and attempted to assess these regimes and entitlements from an access to justice perspective for survivors of gender-based violence. This perspective includes a survivor's right to fair procedures and their access to substantively equal,

[402] Most residential tenancy legislation also requires landlords and / or professional providing verification of abuse to maintain the confidentiality of information related to early termination. (See BC, AB, SK, MB, ON, NS, NL, and NWT, *supra* note 274.) This is also the case in some legislation providing employment leave for interpersonal violence. (See SK, MB, ON, NB, PEI, NWT, all *supra* note 370. Yukon and Nunavut also include confidentiality provisions in their Bills to add employment leave provisions.)

[403] *Personal Information Protection Act*, SBC 2003, c 63 (BC); *Personal Information Protection Act*, SA 2003, c P-6.5 (AB); *An Act respecting the Protection of Personal Information in the Private Sector*, CQLR c P-39.1 (QC).

[404] *Protecting Victims of Non-consensual Distribution of Intimate Images Act*, RSA 2017, c P-26.9 (AB); *The Privacy Act*, RSS 1978, c P-24 (SK); *The Intimate Image Protection Act*, CCSM c I87 (MB); *Intimate Images and Cyber-Protection Act*, SNS c 7 2017 (NS); *Intimate Images Protection Act*, RSPEI 1988, c I-9.1 (PEI); *Intimate Images Protection Act*, RSNL 2018, c I-22 (NL). SK and MB also have broader torts for breach of privacy (*The Privacy Act* (SK), *ibid*; *The Privacy Act*, CCSM c P125 (MB)).

[405] *Criminal Code*, *supra* note 29, s 162.1.

[406] *The Intimate Image Protection Act* (MB), *supra* note 404, ss 2-9.

[407] *Intimate Images Protection Act*, NL, *supra* note 404, s 7. Prince Edward Island also requires the respondent to prove consent if they rely on consent as a defence (*Intimate Images Protection Act* (PEI), *supra* note 404, s 7).

[408] *Intimate Images Protection Act* (PEI), *ibid*, s 5.1.

[409] Limitations periods for the tort of intimate non-consensual distribution of intimate images are addressed in Section I.

fair, and safe outcomes. Safety in this context has been conceptualized broadly in terms of physical, emotional, and psychological safety and security for survivors and their children.

While our review touches on multiple forms of gender-based violence, our primary focus has been on intimate partner violence, a form of gender-based violence that has been increasingly addressed in statutory and regulatory frameworks over the past two decades. Our review has revealed significant differences in definitions of intimate partner violence, in the forms of legal status that are preconditions to the right to make claims to relevant legal entitlements or material supports, and in the procedures required to verify domestic violence in making such claims. These differences have been shown to exist both within and across jurisdictions. Alberta, for example, provides an interesting case study when it comes to the challenges posed by a lack of both intra-provincial and inter-jurisdictional consistency across laws pertaining to gender-based violence. Intra-provincial inconsistencies in Alberta are likely a result of legislative initiatives during different time periods with different governments, but they can create issues for survivors when it comes to knowing and understanding their rights and responsibilities, and may also create gaps, inconsistencies, and conflicts between laws, potentially undermining safety. A review of Alberta's laws also reveals how survivors in one jurisdiction can lack equal access to remedies, support, and protection when compared to survivors in other provinces and territories.

For example, Alberta's *Protection Against Family Violence Act* (PAFVA) applies to "family violence" and defines it more narrowly than "domestic violence" in the *Residential Tenancies Act* and *Employment Standards Code*. Protection orders under PAFVA therefore cannot provide verification for some of the forms of abuse—such as emotional abuse and abuse in dating relationships—that allow survivors to terminate their tenancies early. As a result, survivors may need to engage with multiple legal and other professionals to obtain protective remedies. Furthermore, someone using force to protect themselves or their children is excluded from "family violence" under Alberta's *Family Law Act* but may fall within the definition of family violence in PAFVA, allowing an abuser to obtain an EPO against a survivor. The EPO may then have an inappropriate influence on other proceedings—perhaps affecting judicial perceptions of the survivor's likelihood of being a "friendly parent" or triggering child protection consequences. Alberta has also not yet aligned its *Family Law Act* with the *Divorce Act* amendments, which means that survivors in Alberta are subject to different definitions of family violence depending on whether they were married and are seeking a divorce or not. Alberta also appears to be the only province where survivors applying for social housing may lose their priority if they do not terminate their leases early under the *Residential Tenancies Act*, likely because the RTA amendments were not reviewed for their implications for all related legislation.

In terms of inter-jurisdictional differences, Alberta has not yet adopted the broad definition of family violence that includes coercive and controlling behavior as set out in the amended *Divorce Act* and in the family legislation of several other provinces. Neither has it designated judges to hear EPO applications under FHRMIRA, leaving First Nations women living on Alberta reserves without access to this remedy. Alberta has also declined to follow the lead of other provinces in extending remedies such as early termination and leave from employment to survivors of sexual violence, except in the intimate partner violence context. Other cross-jurisdictional comparisons

reveal that survivors of gender-based violence in Alberta are disadvantaged as a result of the lack of explicit recognition of intimate partner violence in the family dispute resolution context; availability of victim compensation for only severe neurological injuries; and domestic violence leave from employment that is unpaid, amongst other issues. As well, in dealing with verification procedures, a "designated authority" in Alberta must provide a certificate confirming grounds for terminating a residential tenancy whereas in Ontario, a tenant will be deemed to have experienced violence or abuse where a peace bond or restraining order has been issued or where the tenant simply provides a statement as to the commission of acts that cause them or a child to fear for their safety.

Statutory differences—in defining intimate partner violence, in prescribing the status required to pursue entitlements or benefits, and in verification procedures— may reflect a concern with other substantive or procedural values or interests, or reflect differences in regional and local cultures. Nonetheless, these variations are problematic to the extent that they fail to provide access to protective remedies for survivors and children at serious risk, and as such compromise their access to justice.[410] Differences in definitions, procedures, and supports both within and across jurisdictions should always be assessed from the perspective of their impact on the most marginalized women and children. From that perspective, inconsistencies should be reviewed, variability reduced, and the promising practices we have highlighted throughout this report considered for adoption more widely across the country.

[410] Janet Mosher, "Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by Their Intimate Partners" (2015) 32:2 Windsor YB Access to Justice 149 at 155.