BC Society of Transition Houses


# FLAIR for PEACE Toolkit

April 2024

# Acknowledgements

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We are also grateful to:

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*All the websites that are hyperlinked as text throughout the Toolkit are listed with their URLs in the Index of Resources.*

# FLAIR for PEACE Toolkit Introduction

The project was supported through funding from the gender-based violence stream of the Civil Forfeiture Office, Ministry of Public Safety and Solicitor General. The BC Society of Transition Houses (BCSTH) gratefully acknowledges the Ministry of Public Safety and Solicitor General for funding this Toolkit.

The purpose of the Toolkit is to equip PEACE Program Counsellors with sufficient knowledge and resources to support non-offending caregivers in navigating legal issues that arise in family court, in the absence of adequate legal aid. The Toolkit also aims to support PEACE Program Counsellors, as they manage an increase in their interactions with family courts.

These resources are specifically aimed at training PEACE Program Counsellors to be informed and capable of providing adequate support to address their clients' legal concerns, either by providing legal information or referring them to the appropriate regional agencies.

The Toolkit provides general information about legal issues and family court matters in BC. Legal advice must come from a lawyer who can advise on whether you should take certain actions in a court matter. Anyone else, such as court registry staff, non-lawyer advocates, and this Toolkit can only provide legal information and general guidance regarding legal issues.

If you have any questions about this Toolkit, please contact BCSTH at info@bcsth.ca.

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# The Role of PEACE Program Counsellors

It is important to remember that as PEACE Program Counsellors you are not expected to represent your clients in court or provide them with legal advice. Furthermore, there are different types of support workers available free of charge through community agencies who can support your clients in ways which extend beyond your role as a PEACE Program counsellor.

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# Victim Services

There are police based and community based victim support workers in BC to help anyone who has been a victim of crime.

To find out what services are available call VictimLink BC at 1-800-563-0808 or access information online at: https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/understanding-criminal-justice/key-parts/victim-services

## Family Justice Counsellors

Family Justice Counsellors work in Family Justice Centres and Justice Access Centres throughout British Columbia. They provide services to people going through separation and divorce and are specially trained to help families resolve their issues about guardianship, parenting arrangements, contact with a child and support. One of the services which PEACE Program Counsellors may be familiar with through their work with families are section 211 reports, which are discussed below on page 9. There is no charge for the services of family justice counsellors, and they do not provide legal advice, but can refer individuals to legal services. For more information about family justice counsellors, see: When should I see a family justice counsellor? - Province of British Columbia (gov.bc.ca)

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## Sexual Abuse Intervention Program (SAIP)

This is a service provided under the mandate of the BC Ministry of Child and Family Development. The goal of the program is to provide a range of assessment, treatment, and/or support services to children and youth who have been sexually abused, and to children under the age of 12 with sexual behaviour problems. For more information, contact a Child and Family Service Office: https://www2.gov.bc.ca/gov/search?id=3101EE72823047269017D08E55AF6441&tab=1&q=mental+health


Legal Information vs
Legal Advice

# Legal Information vs Legal Advice

Both legal information and advice are useful. Your client won't always need advice. Sometimes all they need is good, reliable information. Sometimes good information can help them to decide if they need to get advice or not. In the position of PEACE Program counsellor, you should never (nor are you expected to) provide legal advice. If your client asks for legal advice, always refer them to a lawyer. If they can't afford to hire a lawyer, there are resources available free of charge, below.

Examples of both legal advice and information are below, to illustrate the differences and help you determine whether your discussions with your client could be considered legal advice:

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## Legal Information:

- Can be provided by many different people, including lawyers, advocates, court clerks, librarians, etc.
- Showing people how to search for laws, case law, articles, court forms, etc.
- Guiding someone to a certain law, and explaining or summarizing what it says or what types of situations it deals with
- Outlining possible options for dealing with a legal problem or alternatives to court, as long as you don't suggest what they should or ought to do (ex: your options are a, b, c... you can reach out to x, y, z for support with resolving this)
- Explaining court processes and procedures (ex: usually, this is what happens in court in this type of a scenario ...)
- Explaining common legal words and phrases (ex: an adjournment is...)
- Referring people to resources (websites, brochures, organizations etc.)
- Telling a person they need to get more advice and help (you should talk to a lawyer about your specific situation)

## Legal Advice:

- Preparing legal documents and explaining how they impact someone (ex: drafting a consent order/settlement agreement)
- Recommending people to specific professionals or resources (ex: you need to hire an expert witness in order to prove x,y,z)
- Giving an opinion on any part of a person's legal problem, including whether their problem has merit and if their claim will be successful (ex: you should not seek a protection order because a, b, c)

If your client decides not to seek assistance from a lawyer, or is unable to access a lawyer for any reason, you may provide them with this memo from the BC Supreme Court with guidance for self-represented litigants: https://www.bccourts.ca/supreme_court/self-represented_litigants/Memorandum_to_SLRs_on_Trial_Procedure_and_Evidence.pdf

You may also refer them to the Family Law Handbook for Self-Represented Litigants, and refer to this resource while supporting clients who are dealing with family law proceedings.

For further BC specific information about family law, see:

Click Law BC: https://wiki.clicklaw.bc.ca/index.php/JP_Boyd_on_Family_Law

Family Legal Aid: https://family.legalaid.bc.ca

In the guidebook Family Law Handbook for Self-Represented Litigants at 141, the Canadian Judicial Council recognized litigation harassment as a form of abuse in family proceedings. This type of abuse occurs where one spouse uses the court's process to continue to control, intimidate, embarrass, or harass the other spouse after their relationship has ended. Unfortunately, litigation abuse can be difficult to detect, particularly at the outset of a family proceeding, because courts may not be able to determine whether the conduct is caused by malicious intent or a genuine inability to navigate the legal system without assistance. See: Why Can't Everyone Just Get Along: How BC's Family Law System Puts Survivors in Danger by Haley Hrymak and Kim Hawkins, Vancouver: Rise Women's Legal Centre, 2021.

## Where to access legal advice?

- Legal Aid BC https://legalaid.bc.ca/family
- Rise Women's Legal Centre https://womenslegalcentre.ca/
- Society for Children & Youth Legal Centre https://scyofbc.org/child-youth-legal-centre/
- BWSS in Vancouver – Justice Centre for women leaving abusive partners https://www.bwss.org/support/programs/justice-centre/
- Law Foundation funded Family Law Programs: Contact List - Law Foundation of BC (lawfoundationbc.org)
- ICLC – Student clinic for Indigenous People https://allard.ubc.ca/community-clinics/indigenous-community-legal-clinic
- Kettle – Child Protection Advocate https://www.thekettle.ca/advocacy
- Atira – Clinic lawyers: https://atira.bc.ca/what-we-do/program/legal-advocacy/

To find a lawyer for a child or youth through the Society for Children and Youth, email the Child and Youth Legal Centre by email at cycl@scyofbc.org or phone at 778-657-5544. Anyone can refer a young person, and when a young person self-refers, they will be prioritized.

# Legal Aid BC Update


Legal Aid BC has announced changes as of April 1, 2024 to improve access to family legal aid services and provide extra help to those who are experiencing family violence. The changes include matching the eligibility threshold with Statistic Canada's poverty benchmark for family law clients and updating how Legal Aid calculates financial eligibility, in order to exclude some assets for those clients who are experiencing family violence. Specifically, when calculating financial eligibility for applicants experiencing family violence, assets will be excluded if they are seeking family law services within six months of leaving their abusive partner. Furthermore, for Legal Aid contracts issued on or after April 1, 2024, Legal Aid BC will provide an additional 25 general preparation hours to clients upon certification that:

- The lawyer is not aware of the client having improved their financial situation since their most recent financial eligibility determination by LABC
- The client is experiencing family violence and one or more additional family law issues covered by LABC's standard representation services
- The client needs these additional hours to achieve stabilization of their family law matter

For more information about the 2024 family legal aid expansion at Legal Aid BC, see: https://legalaid.bc.ca/sites/default/files/2024-03/NTC-123-Family%20Legal%20Aid%20Expansion.pdf


Guidelines
for Witnesses
in Court

# Guidelines for Witnesses in Court

As a PEACE Program counsellor, you may be requested or required to attend court as a witness in relation to a court matter which your client is involved in. Alternatively, you may have to support a client who is going through a court proceeding. When an individual is required to attend court as a witness, they will be asked to give evidence under oath to help the judge make a decision about the case. This process is called testifying. In the process of testifying, witnesses will usually be asked questions by the lawyers for each party. The questions asked by one's own lawyer are referred to as "direct examination", and the questions asked by a lawyer for an opposing party are referred to as "cross examination".

The following guidelines can be referred to in your preparation for court attendance:

- Always direct answers to the judge. She or he will be evaluating the evidence in the case, and it is important to make oneself understood by the judge.
- Do not argue with the lawyers or the judge. Only correct the lawyer if they are incorrect about the facts.
- Similarly, do not get involved with the other lawyer personally or try to persuade them as to why a position is correct.
- If you do not understand a question that you are asked, do not answer. Ask for clarification, and request the lawyer rephrase their question.
- If you do not know the answer, just say I do not know. Never make up an answer.
- Answer only the question which has been posed. Do not ramble.
- Wait until the lawyer completes their question before answering. Do not interrupt, even if you think you know what the question is going be before it is completed.
- Try to stay calm, even if the question upsets you.
- Do not qualify or reduce your answers by using modifiers like "kind of", and "sort of".
- Do not exaggerate or use excessive repetitive language.

If you are supporting a client who has experienced family violence and is preparing to appear in court, in addition to the tips above, you may provide them with the following guidelines which relate to testifying in an adversarial litigation proceeding.

- Never use a soft word or description when you mean a hard word. Evidence must have an impact in order to be effective. Example: do not say "he pushed me around a bit" rather than "he punched me with his fist and kicked me in the ribs".
- Do not give the evidence of the opposing side. You don't know why they did what they did, and you don't have to provide excuses for them. Let them provide their own evidence if they choose to do so.
- Always tell the truth. You are required to, under oath. You will lose all credibility if you are caught in a lie, which can be extremely damaging for your case.
- Remember to save your energy to the end of the day. The last things you say will likely be remembered, and the opposing lawyer may ask important questions at this point, so stay strong and focused even if you are wanting it to be over.

If your client is not represented by a lawyer, it may be helpful to review the following guidelines with them in preparation for court, see: https://supremecourtbc.ca/civil-law/trial/preparing-your-witnesses

# Parenting Assessments

Parenting reports in BC are often ordered under section 211 of the Family Law Act when there are court proceedings about parenting issues. The purpose of these reports – commonly referred to as section 211 reports, is to provide evidence to the court about the views and needs of the children, and the ability and willingness of each parent to meet these needs. The evaluation process typically includes the following and results in a written report:

- Interviews with each parent and each of the children, depending on their age
- Observations of each parent with the children, often at that parent's home
- Review of documents
- Psychological testing of the parties, if the evaluator is qualified to administer such tests (e.g. is a registered psychologist)
- Interviews of collaterals (that is, people familiar with either party or with the children, such as extended family members and friends, or professionals such as school teachers and therapists)

Section 211 reports may be written by a family justice counsellor, a social worker, or another person approved by the court. Although psychologists are not specifically mentioned in section 211, registered psychologists routinely prepare reports, as do some registered clinical counsellors. Family justice counsellors are employed by the BC Ministry of the Attorney General and the reports they provide are free of charge to the parties.

There are also reports under section 202 of the Family Law Act, commonly known as "hear the child reports". These reports are written by trained, neutral professionals who are members of a Child Interviewer Roster. The purpose of the reports is to allow the views to be considered by the judge who is responsible for making decisions about the child's best interests.

For more information about hear the child reports, see: https://hearthechild.ca/

# Subpoenas & Document Requests

A subpoena is a court document that requires you to come to court to testify as a witness and a "subpoena duces tecum" is a document that summons you to court to bring records in your possession or under your control.

Any information which a PEACE Program counsellor is witness to, records or collects about a client may be the subject of an application for document production, or a subpoena to bring documents with you to court, as part of a legal proceeding. Although a PEACE Program counsellor will be considered a third party to the legal proceeding of your client, as a PEACE Program counsellor you can still be asked to appear as a witness or to produce records. These requests for document production are part of the discovery process allowed in court cases. As a part of the process, you can ask that the request be set aside, cancelled or limited, and it is important to understand your agency's legal rights in this regard. Accordingly, legal advice and representation is very important for you, your program, and your client in the circumstances of a subpoena. A lawyer can advise you or your agency on the legal process that is available to set aside or limit the subpoena. You should seek legal advice to determine next steps as soon as possible.

In addition to a subpoena, in a family court proceeding, a party may bring a notice of application, requesting that a third party produce documents. If they are successful, the court would issue an order which requires the third party to release those documents in accordance with a specific timeline, to whomever the court indicates in their order. This is set out in Rule 9-1(10) of the Supreme Court Family Rules, and Rule 62 of the BC Provincial Court Family Rules.

The court process varies according to the nature of the request and the underlying court case.

Disclosure of third-party records in family court cases are governed by court decisions, statutes and court rules. When and if you are served with a subpoena or an application for production of records, you should accept service but be careful not to reveal any confidential information in response to any questions asked. Next, the recipient should review the paperwork carefully to determine what is being asked and by whom and when.

If it is a family law proceeding, the paperwork will show the name of both the claimant (the party making the claim) and the respondent (the party responding to the claim) if it is a BC Supreme Court file, and the applicant (the party making the claim) and the respondent (the party responding to the claim) if it is a BC Provincial Court file.

In criminal cases, the Crown Counsel prosecutes on behalf of the government, and will be listed as Regina. The defense counsel represents the accused person, whose name will also be shown in most cases, except where there is a publication ban. In a criminal case, the Crown Counsel represents the government, not the client or the agency where you are working.

After reviewing the paperwork, advise your supervisor or the Executive Director, and consider sending a letter to the summoning party, advising them that you have received the subpoena or application and plan to consult with a lawyer. A sample letter can be found in the BCSTH Legal Toolkit at page 43. If your agency hasn't already established a working relationship with a lawyer, it is important to find one who can provide advice on the subpoena or document application. The BCSTH Legal Toolkit discusses free legal options at pages 11-13.

In addition to finding a lawyer to represent your agency, also encourage the client to get

independent legal advice. Your client has different legal interests than you, and cannot share a lawyer with the agency without the possibility of a conflict of interest. Once legal counsel has been confirmed, the lawyers will communicate with one another and will seek instructions from your agency as to whether you will comply with or set aside the subpoena or deny or comply with a request for documents. Your lawyer can answer your questions about the specific steps leading up to a court hearing, and how you should prepare.

If your lawyer files an application to set aside a subpoena, the matter will be scheduled for a hearing. Grounds to set aside the request could include:

- Procedural defects with the paperwork;
- The program does not have any material evidence to provide; and/or
- The requested information is privileged which means that it is protected from disclosure.

You do not have to release any records to the opposing party until and only if the judge orders you to. At a hearing, the judge may review the records and determine whether they need to be released. It is possible to challenge an application or a subpoena if the evidence is not relevant and/or is privileged. The court rules provide that any document capable of proving or disproving a material fact must be disclosed. A material fact is a fact that is relevant to the claim or a defence to the claim. The court cases allow for a case-by-case argument regarding privilege, and the judge will consider if:

- The communication was given in confidence;
- The confidentiality is essential to the relationship; and
- The confidential relationship fosters a public good.

If these criteria are met, the judge must consider whether the privacy interest in protecting the disclosure outweighs the interest in finding the truth and disposing the civil case correctly. If the judge determines that disclosure is warranted, you can still instruct your lawyer to request that conditions be attached to their release, such as the following:

- Only relevant portions of the records are released;
- A limited number of copies are made of the documents;
- Documents will only be viewed at court;
- The defendant may not disclose the information contained in the records without court approval; and
- Personal information (addresses, phone numbers, dates of birth, places of employment etc.) is blacked out or redacted.

**Best Practices for Record Keeping**

In order to guard against the potential unwanted disclosure of your clients' records, the following steps can be taken when taking notes:

- Ensure that you highlight the important of confidentiality on your public-facing information and your intake forms
- Take notes only of what you need to do your job
- Focus on support rather than the facts of what happened
- Be careful of including negative opinion or commentary in the records

**Request From a Client to Release Records**

If your client asks you to release records to a third party such as her lawyer for a court case, you need to obtain written consent from your client to share her records. A release form should:

- Set out the nature of the information to be shared, the recipients of that information, and the purpose for which it is being shared;
- Indicate whether it applies only to information that has been gathered or information that may be obtained in the future;
- Be signed by the client, witnessed, dated, and time-limited; and
- Include a statement that the client may withdraw her consent at any time.

The following webinar offers an introduction to the resources available through the Society for Children & Youth by Suzette Narbonne, and a discussion of family violence by Frances Rosner: https://youtu.be/aBdLSJi3GvQ

# Parenting Arrangements after Separation

When parents separate, they have to make decisions and come to agreement about various important issues, namely where the children will live, how parenting decisions will be made, how often each of them will see the children, and how the children will be financially provided for.

If the parents are unable to come to a consensus about these issues in the form of a parenting agreement, the federal Divorce Act and the provincial Family Law Act allow parents to apply for orders about where children will live, how much time they will spend with the children, and how the children will be financially supported. When making orders about parenting time and other arrangements, the court must only consider the best interests of the child or children. There are specific enumerated factors in both the Family Law Act and the Divorce Act which are used to determine the best interests of the children, but they are not exhaustive lists and other factors may be presented if they are relevant. For further information on the application of these laws, see the Family Law 101 presentation for PEACE Program Counsellors by Magal Huberman and Andrea Bryson, and the slide deck, specifically slides 23-27. The complete versions of these laws can also be found at the links below:

- The Divorce Act: https://laws-lois.justice.gc.ca/eng/acts/d-3.4/
- The Family Law Act: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/11025_00

As a result of these sections, when the court must make orders about decision-making responsibilities, parenting time and contact under the Divorce Act, or parental responsibilities, parenting time and contact under the Family Law Act, it must take into account a whole range of factors, including:

- the child's health and emotional well-being;
- the child's views, unless it would be inappropriate to consider them;
- the child's needs, given the child's age and stage of development;
- the nature and strength of the relationships between the child and significant persons in the child's life;
- the history of the child's care and plans for the child's care;
- the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
- the child's need for stability, given the child's age and stage of development;
- the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise the person's responsibilities;
- the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- whether the actions of a person responsible for family violence indicate that the person may be impaired in the person's ability to care for the child and meet the child's needs;
- the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
- any civil or criminal proceeding relevant to the child's safety, security or well-being.

# Parenting Time Challenges

Working with parents and children who are navigating shared parenting time and who are survivors of intimate partner violence can present complex safety challenges. On the one hand, if there is a court order in place which grants parenting time to both parents, the non-offending caregiver is not at liberty to simply disregard the other parent's legal entitlement to parenting time, without risking a court finding them in breach of the court order and related consequences. On the other hand, if there are safety concerns with entrusting a child in a caregiver, it is important to encourage clients to promptly seek legal support in order to protect the child.

Additionally, If you think a child or youth under 19 years of age is being abused or neglected, you have a legal duty under the Child, Family and Community Service Act to report your concern to a child protection worker. Contact 1 800 663 9122 to report a concern to the Provincial Centralized Screening centre, who are available 24/7, 365 days a year. For more information on what to report, see page 14 of this Toolkit.

There are different ways to deal with problematic court orders depending on the nature of the circumstances. If a court orders a parenting arrangement which, in your client's view, does not adequately address concerns of family violence, the client may pursue an appeal. An appeal is based on the belief that an order of the court is inherently wrong, and seeks relief from a higher level court to reach a different conclusion on the matter. There are strict timelines which must be adhered to in order to file an appeal. Without a successful appeal, unfortunately the non-offending caregiver may be in a position of breaching a court order if they do not follow the instructions set out in the order. There may also be situations in which a court ordered arrangement that was originally practical or appropriate starts to feel unsafe to a non-offending caregiver due to a change in behaviour by the other caregiver. If a child or their parent is reluctant about the child going to see the other parent due to concerns about violence, it is important to understand the signs of violence and to document and keep records of these, as they may serve as evidence to support a protection order, or application to vary an order about parenting time. A variation is based on the premise that the original court order was correct, but a material change in circumstances has occurred which warrants a change in the order.

In either situation, it is important that your client seek independent legal advice to determine whether it is appropriate to purse an appeal or a variation. If they do not pursue either option, they cannot disregard the terms of the parenting arrangement without risking that they are found in breach of the court order.

To see a presentation for FLAIR for PEACE Program Counsellors on the fundamentals of Family Law by Magal Huberman and Andrea Bryson, including how to help clients get effective legal services, the sources and structure of family law, resolving family law matters, central legal issues and concepts, see:

https://www.youtube.com/watch?v=3VDB0Dj-mTY

To review the slides of the presentation and the included resources, see below:

https://bcsth.ca/wp-content/uploads/2024/04/2024-01-15-Family-Law-101-Magal-and-Andrea-1.pdf

# What to Report to a Child Protection Worker?

# What to Report to a Child Protection Worker?

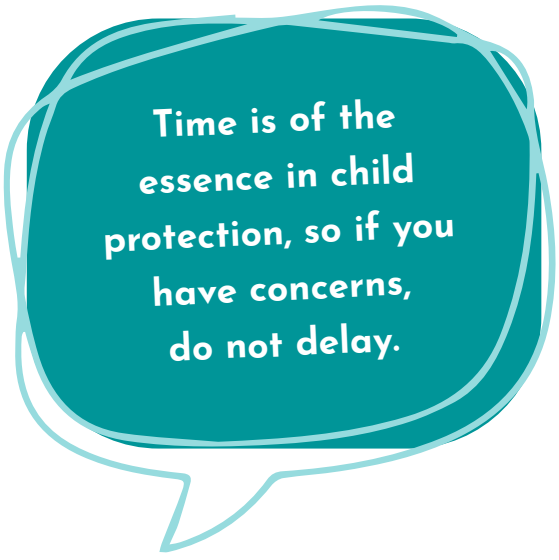
When making a report to a child protection worker, it is helpful to include your name, your phone number and your relationship to the child or youth. But you can make an anonymous call if you prefer. The child protection worker will ask:

- The child's or youth's name and location;
- Whether there are any immediate concerns about the child's or youth's safety;
- Why you believe the child or youth is at risk;
- Any statements or disclosures made by the child or youth;
- The child's or youth's age and vulnerability;
- Information about the family, parents and alleged offender;
- Information about siblings or other children or youth who may be at risk;
- Whether you know of any previous incidents involving, or concerns about the child or youth;
- Information about other persons or agencies closely involved with the child, youth and/or family;
- Information about other persons who may be witnesses or may have information about the child or youth;
- Information about the nature of the child's or youth's disabilities, his or her mode of communication, and the name of a key support person; and
- Any other relevant information concerning the child, youth and/or family, such as language or culture.

**You do not need all this information to make a report. Just tell the child protection worker what you do know.**

**Time is of the essence in child protection, so if you have concerns, do not delay.**

Reporting to child protection agencies allows for an independent investigation that is otherwise not available to judges hearing family cases, and may lead to the provision of services that can encourage the victim to testify in a criminal proceeding, and help the child and parents avoid future violence.




Guardianship

# Guardianship

The BC Family Law Act uses the term guardian to describe people who:

- Spend time with and care for the children, and
- Are responsible for making decisions that affect them.

Anyone can apply to become a child's guardian but the court will only consider what's best for the child. The Divorce Act uses these terms to describe the arrangements parents make for their children when they separate:

**Decision-making responsibility** means making important decisions about your child's well-being, including their healthcare, education, religion, culture and language.

**Parenting time** means the time a child spends in the care of a parent. It includes time when the parent is not present, such as when the child is at daycare or school.

The difference between sole guardianship and decision-making power relate to:

1. The rights that only guardians have, and
2. The different possible arrangements.

## Rights that only guardians have are:

- ✓ To become the sole guardian if the other guardian dies;
- ✓ To apply to the court for directions under s. 49 of the Family Law Act: A child's guardian may apply to a court for directions respecting an issue affecting the child, and the court may make an order giving the directions it considers appropriate. For example, if the other guardian makes a decision that the guardian disagrees with, that guardian can apply to the court to review the other guardian's decision and make a different order;
- ✓ To oppose relocation of the child (non-guardians who have contact with the child under an agreement or order are entitled to notice of the relocation, and may apply to vary the terms of contact, but they don't have standing to oppose the relocation);
- ✓ To apply for parenting time (only guardians are entitled to parenting time); and
- ✓ Subject to various limitations and conditions, appoint a person to become a guardian upon their death, or in the event that they become terminally ill or mentally incapacitated, or to temporarily authorize another person to exercise specified parental responsibilities (s. 43, 53, and 55 of the Family Law Act). The appointed person can only have the same or less rights as the appointing guardian, not more.

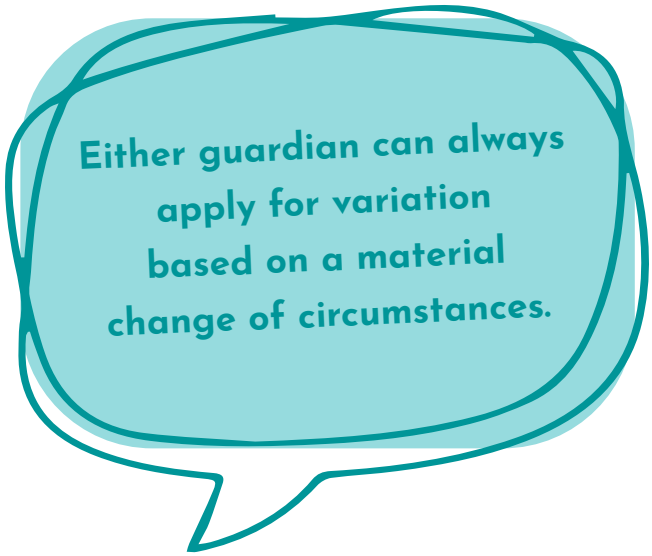
If there is only one guardian, then they are the only ones who can exercise parental responsibilities and have these rights. If another person wants to become a guardian, then they need to apply to the court and provide specified evidence (including criminal and child protection checks) about why it's in the child's best interests to appoint them as a guardian. The only exception is that if the other parent (rather than another family member or other non-parent) wants to become a guardian, then the appointment can be done by agreement, without an application to the court.

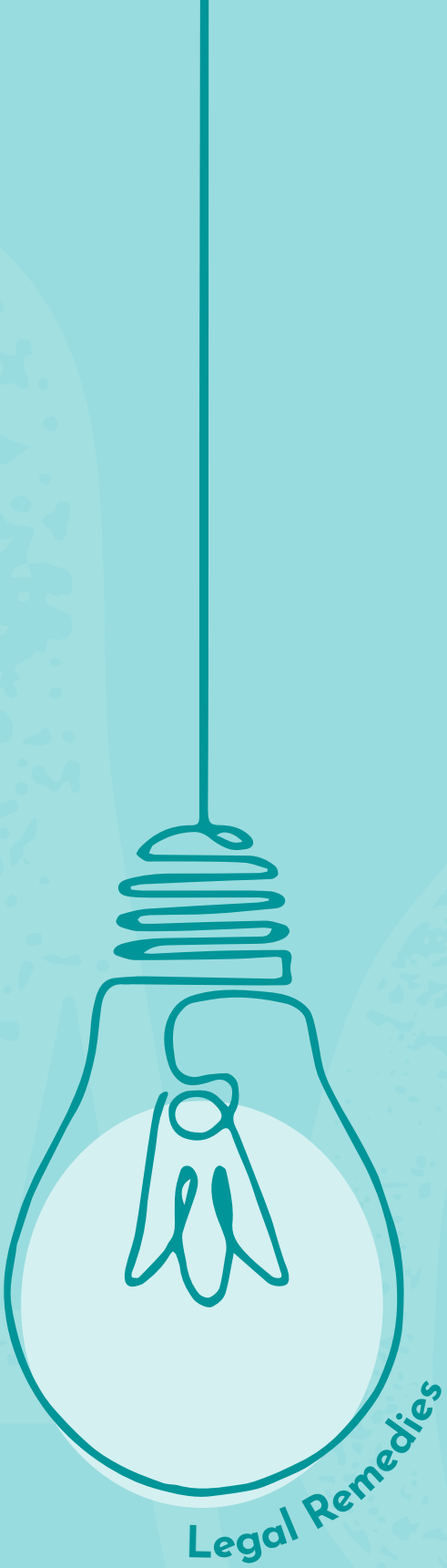
If there is more than one guardian, then the two typical arrangements for granting greater authority to one of them are:

1. The guardians have to consult with each other about major decisions affecting the child and try to reach an agreement, but if they disagree, then one guardian can make the decision, and the other one has the right to apply to the court for directions.

2. All or specified parental responsibilities (listed in s. 41 of the Family Law Act) are allocated to one guardian only (the order/agreement can also set out additional limitations or conditions). The other guardian can still apply to the court for directions, to make a different order.

Of course, either guardian can always apply for variation based on a material change of circumstances.




Legal Remedies

# Legal Remedies for Abuse & Family Violence: Protection Orders, No Contact Orders, Peace Bonds

These remedies can be sought in the form of an "interim application" – requests made to the court after a legal proceeding has started and before the court proceeding has ended, whether it ends with a trial or settlement. Some applications can be made either with or without notice, at the discretion of the applicant, and ideally with the benefit of legal advice from a qualified lawyer. You may wish to explain to your clients what these different legal remedies provide, if they are experiencing safety issues in the midst of family court proceedings, and wish to explore options for protection through the court system.

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## Protection Order under the Family Law Act

A protection order is a type of relief which can be ordered between family members, under the Family Law Act. A protection order is registered with the police, so if a call is made to the police and the caller states that there is a protection order in place, the police response is intended to be much quicker than otherwise. Section 183(1) allows:

- any family member to make an application or
- can be made by a person on behalf of an at-risk family member, or
- on the court's own initiative.

Under s. 183(2), an application for a protection order does not need to be made with any other proceeding or claim for relief under this Act.

The required documents at the BC Supreme Court are:

- Notice of Application - Form 31
- Affidavit - Form 30
- Application Record needs to be submitted 2 days before the hearing (BCSC Family Rules, Rule 10-6(14)

An application record is a collection of court documents, bound together, which includes the style of proceeding (the name of the case), the lawyers, and a copy of all the documents filed with the court. It can also include a draft of the proposed order, a written argument, a list of authorities (cases which will be relied upon) and a draft bill of costs. The application record must be provided to the registry no earlier than 9 a.m. on the business day that is three full business days before the date set for the hearing, and no later than 4pm on the business day that is one full business day before the date set for the hearing, unless a different date is set by a registrar.

If the client wants to bring the application without notice it needs to be brought pursuant to Rule 10-8, which requires a requisition in Form 29 with a draft of the proposed order in Form F34 and an affidavit in support in Form 30.

The required documents at the BC Provincial Court are:

- Application About a Protection Order – Form 12
- Affidavit for Protection Order – Schedule 1

S. 183(3) of the Family Law Act outlines what the court can order.

**No Contact & Children**:

Under s. 183(3)(a) of the Family Law Act, name 1 shall not have contact or communicate directly or indirectly with name 2 or the "child(ren), child(ren)'s name(s).

**No Contact Except**:

Under s. 183(3)(b) of the Family Law Act, name 1 shall not have contact or communicate directly or indirectly with name 2 except for the purposes of arranging parenting time and communication shall only be through email.

**No Go and Children:**

Under s. 183(3)(a) of the Family Law Act, name 1 shall not attend at, enter or be found within [distance] of the residence, place of employment or school of or any other place that is regularly attended by name 2 or the child(ren), child(ren)'s name(s), even if he or she is an owner or has a right to possess or enter such a place.

**No Stalking**

(not on picklist but can be ordered)
Under s. 183(3)(a) of the Family Law Act, name 1 shall not follow name 2 and/or children.

**Expiry of Protection Orders**:

Section 183(4) states that unless the court provides otherwise, an order under that section expires one year after the date it is made. The court can also provide that an order shall not expire and shall remain in place until further order of the court. Courts don't like to order protection orders without an expiry date when application is done without notice. They usually set a returnable date, usually within 2 weeks. Therefore, an order may include a term regarding the opposing party's liberty to vary or set aside the order, with notice to the at-risk party.

**What does the court consider?**

Under s. 184(1) of the Family Law Act, the court must consider at least the following risk factors:

a. any history of family violence by the family member against whom the order is to be made;
b. whether any family violence is repetitive or escalating;
c. whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at the at-risk family member;
d. the current status of the relationship between the family member against whom the order is to be made and the at-risk family member, including any recent separation or intention to separate;
e. any circumstance of the family member against whom the order is to be made that may increase the risk of family violence by that family member, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of violence;
f. the at-risk family member's perception of risks to his or her own safety and security;
g. any circumstance that may increase the at-risk family member's vulnerability, including pregnancy, age, family circumstances, health or economic dependence.

Under section 184(4) a protection order can be made even if:

- A protection order has been previously made
- The family member is temporarily absent from residence
- At risk-family member is temporarily residing in shelter or safe place
- Criminal charges have been or may be laid
- At-risk family member has a history of returning to residence and live with abuser
- Conduct order restricting communication has been made

The supporting affidavit (written evidence provided by the at risk party) should include:

- History of relationship, dates of marriage/ cohabitation, date of birth and ages of children (if any)
- History of violence in chronological order
- Use client's words to describe their sense of safety, fear, and concern:
- "I was frightened...."
- "I did not feel safe..."
- What is the client concerned/worried/fearful of?
- Don't use words such as "fighting" or "arguing" as it mutualizes the violence.

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## Service of Protection Order & Documents

- Clients can complete the Request for Service of Family Protection Order
- Blank template is available online: https://www2.gov.bc.ca/assets/download/ADDAC598F37D42D4A8007778E9B37EE7?forcedownload=true

# Peace Bonds

A peace bond is a type of court order that can protect an individual against anyone, and does not involve laying a criminal charge, nor does it generate a criminal record. It is a judicial tool which is focused on prevention, rather than punishment, which prohibits a person from committing or recommitting a crime. It is not a requirement that the other person has already committed a crime; to get a peace bond, you must show that you have a reasonable fear that the other person will hurt you, someone in your family or your pets; damage your property; or share an intimate image or video of you without your consent. It is based on the reasonable fear of the informant, rather than the guilt of the defendant. If a person is charged with a crime, in relation to family violence, such as assault, the Crown may offer them a Peace Bond under section 810 of the Criminal Code. Section 810 provides that an information may be laid before a justice by or on behalf of any person who fears on reasonable grounds that another person:

A. Will cause personal injury to them or to their intimate partner or child or will damage their property; or

B. Will commit an offence under section 162.1 (publication of intimate image without consent)

You can also call the police and tell them you want a peace bond against someone. If the police decide to pursue the matter, the other person may be arrested or given a promise to appear in court. If the police do not decide to pursue the matter, you can apply for a peace bond yourself. You can ask the criminal registry staff for the forms and ask duty counsel to help you fill them out. While they will not receive a criminal record from a peace bond, the other person will have to follow certain conditions such as not contacting you for up to one year. A peace bond can be enforced anywhere in Canada. If they breach these conditions, they could face new charges or have to face trial for the original crime. It may take weeks or even months to get a peace bond, and therefore if you have a client who is in immediate danger, encourage them to call 911.

Some concerns about section 810 peace bonds include:

- If the responding party wishes to contest the order or can't be found, delays are inevitable
- Peace bonds can't be obtained ex parte (without notice) and therefore the process can be intimidating for clients (although if the opposing party consents, an appearance in court may not be necessary)

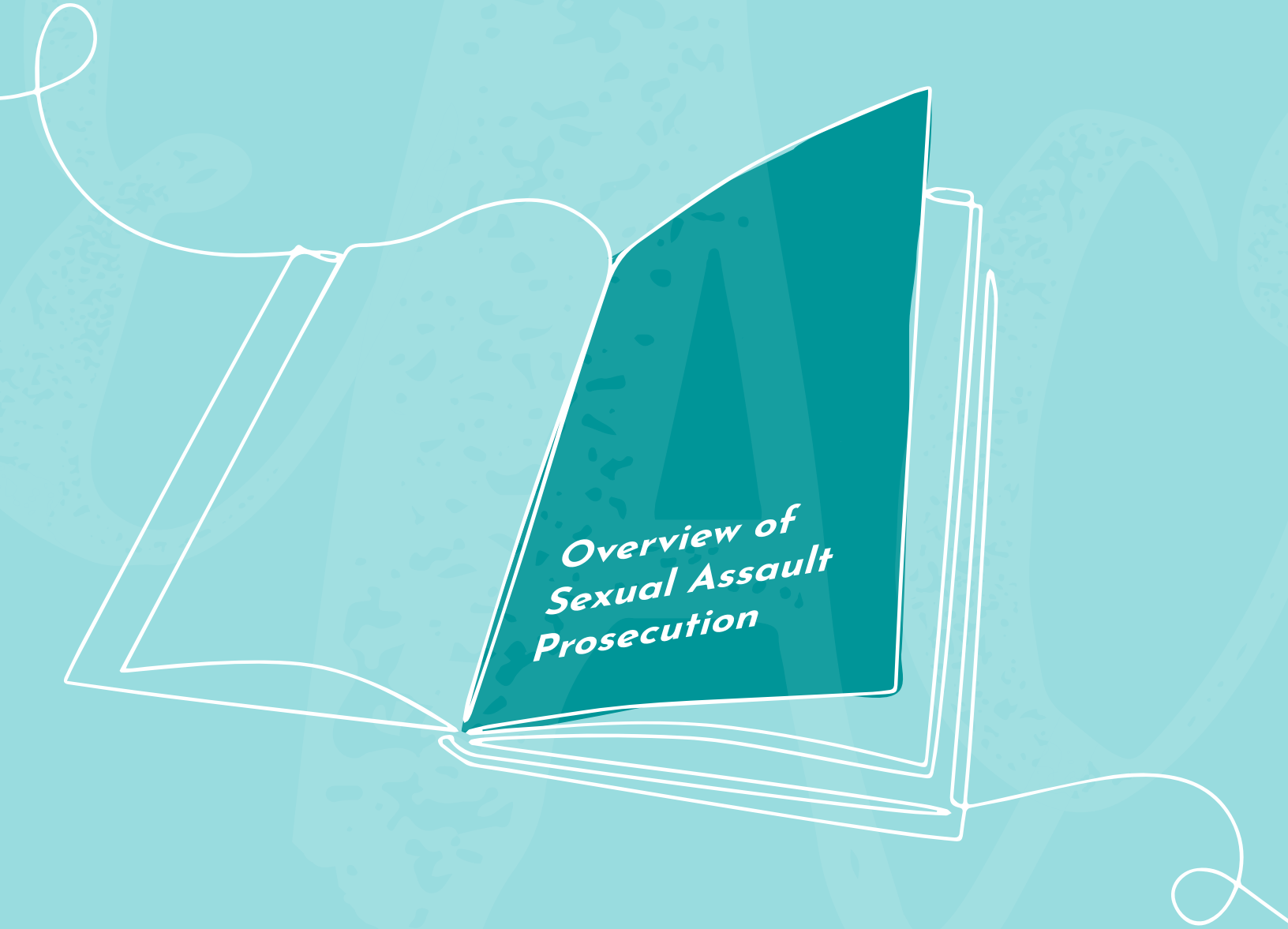
On the other hand, there are specific advantages with section 810 peace bonds:

- They are not limited to "family members", and therefore have a broader application
- There is no cost to obtaining a peace bond, and no need to use legal aid hours

For further information, see https://wiki.clicklaw.bc.ca/index.php?title=Peace_Bonds_and_Assault_Charges

# No Contact Order

A no contact order is an order which can be issued by a judge in criminal matters when a person is charged with a criminal offense and they are released on bail or have no contact conditions imposed on them as part of their sentence. For instance, a person may be sentenced to probation with a no contact condition and probation conditions can last up to 3 years.


Overview of
Sexual Assault
Prosecution

# Overview of Sexual Assault Prosecution

Although the primary focus of this Toolkit is family law, there may be cases where your client has experienced intimate partner violence, including sexualized violence. In BC, the prosecution of sexual assault is handled by Crown Counsel, who are government lawyers responsible for deciding whether a criminal charge will be laid against someone. In order to do this, they refer to the BC Prosecution Service Charge Assessment Guidelines. These guidelines are applicable to all criminal charges, and not just for allegations of sexual misconduct. Section 265 of the Criminal Code sets out the offence of assault, including sexual assault.

Based on these guidelines, Crown Counsel is required to independently, objectively, and fairly measure all the available evidence against a two-part test:

1. Whether there is a substantial likelihood of conviction; and
2. Whether a prosecution is required in the public interest

There are also specific guidelines for charge assessment in cases of sexual assault and sexual offences against children, for example: Child Victims and Witnesses. This policy sets out that where the evidentiary standard is met, which is typically that there is a substantial likelihood of conviction, it will generally be in the public interest to prosecute the offence.

Section 486.4 of the Criminal Code covers bans on publication for victims and witnesses in sexual offences. If the ban is imposed, it protects the name of the victim or witness and any information tending to identify them from reported case decisions. In sexual offences, upon application, a publication ban is mandatory for a victim of a sexual offence and mandatory for a witness under the age of 18.

If both the complainant and the suspect are under age (below 18) then the same guidelines apply for charge assessment, but the Crown Counsel may tend to use extrajudicial measures. Extrajudicial means outside of court, and these measures aim to hold a young person accountable without proceeding through the formal court process. For more information about extrajudicial measures, see: https://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/sheets-feuillets/pdf/measu-mesur.pdf

**Legal Concepts:**

- The accused is presumed **innocent until proven guilty**, and never has a legal onus to prove his or her innocence, in accordance with section 11(d) of the Charter
- The accused has **the right to remain silent**, and is not required to say anything or to testify during the criminal process (a component of the right to a fair trial, under Section 7 of the Charter)
- Consent is **the voluntary agreement of the complainant to engage in the sexual activity** in question according to section 273.1 of the Criminal Code and exists only when each participant voluntarily wants all aspects of the touching, including its sexual nature, to occur.
- Consent **must exist at the time of the touching and can be withdrawn or revoked at any time**. Canadian law does not recognize apparent, implied, or advance consent. Therefore, a sexual partner **cannot assume that silence, lack of resistance, or ambiguous conduct** means that the touching is consensual.

**Testimonial Accommodations:**

The Criminal Code sets out testimonial accommodations that may be available to facilitate the participation of child/youth or other vulnerable witnesses, such as:

- Having a support person of their choice nearby when testifying
- Testifying behind a screen or other device that prevents the witness from seeing the accused but allows the accused to see the witness
- Testifying from a room outside of the courtroom by way of video transmission
- If accused is self represented, a lawyer may be appointed to conduct the cross examination of the witness.

These accommodations are not automatically available, they require pretrial application, and a judge will decide whether to allow the accommodation, depending on the circumstances of the witness and the case. The Crown Counsel identify witnesses that may require and be eligible for testimonial accommodations, and if a victim services worker is assisting a witness, they may assist in identifying whether a witness may benefit from testimonial accommodation.

The court will consider a series of factors, including:

- The age of witness;
- Witness' mental or physical disabilities;
- The nature of the offence;
- The nature of any relationship between the witness and the accused;
- Whether the witness needs the order for their security or to protect them from intimidation or retaliation;
- Society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process.

**Pre-Trial Applications in Sexual Assault Proceedings:**

There are various pre-trial applications which can be brought, including:

- An application to lead evidence of the complainant's other sexual activity;
- An application seeking production of the complainant's private records;
- An application to adduce or use information in private records in possession of accused at trial, section 278.92-278.96 of the Criminal Code.

A complainant's other sexual activity cannot ever be used to claim that the complainant was more likely to have consented to the activity that is the subject matter of the charges, or that the complainant is less worthy of belief. An application to lead evidence about the complainant's other sexual activity is done "in camera", meaning it is done privately with only the judge and lawyers present, and the onus is on the accused who wants to include the evidence to establish that the evidence:

- Is not being adduced to support an inference that the complainant is more likely to have consented to the sexual activity in question, or is less worthy of belief,
- Is of specific incidents of sexual activity,
- Is relevant to an issue at trial, and
- Has specific probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Regarding the production of private records, such as counselling records of the complainant, the accused must serve the complainant, the record holder, the Crown and any other person to whom the record relates with the application. Both the complainant and the record holder can participate in the hearings about whether the records at

issue should be disclosed. The record holder has standing to appear and make submissions on the possible production. If any private records are ultimately produced, they cannot be used in any other proceedings. If the accused is in possession of a record in which the complainant has a reasonable expectation of privacy, they cannot use it in court without the court's permission.

**Victim Impact Statements:**

Section 722 of the Criminal Code sets out the requirements that must be met for a victim impact statement to be admissible. The requirements include that the VIS is limited to describing the physical or emotional harm, property damage or economic loss suffered by the victim as a result of the commission of the offence and the impact of it on the victim. There is a prescribed form which must be used for writing a victim impact statement, which can be accessed here:

https://www.justice.gc.ca/eng/cj-jp/victims-victimes/sentencing-peine/vis-dv.html

A victim impact statement is often presented to the court by the Crown who files it, but victims can also request to present their statement to the court by reading it themselves, in any manner that the court considers appropriate, either outside or inside of the courtroom.

For further information about the BC Prosecution Service, see: https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bc-prosecution-service

# Legal Information for Indigenous Children & Youth

There is a disproportionate representation of Indigenous children and youth in care in Canada. The Child, Family and Community Service Act ("CFCSA") empowers the government of BC to assist with the care of children and protect them from various forms of harm while with parents or caregivers, or, if necessary, through intervention. This includes apprehension of children. Under the CFCSA, the court is required to consider the child's best interests, including the child's views, before making a permanent order. There is also Federal legislation, an Act respecting First Nations, Inuit and Metis children, youth and families (the "Federal Act") which addresses the welfare of Indigenous children specifically. This law affirms that Indigenous people have an inherent right to self-government, including in relation to child and family services and it also recognizes that the best interests of an Indigenous child include consideration of the importance for a child to have an ongoing relationship with his or her family and with the Indigenous group, community or people to which they belong, and of preserving the child's connection to their culture. Notably, the Federal Act requires the best interests of the child to be considered at all stages of the process. Based on the Federal Act, Child and Family services provided in relation to an Indigenous child are to be provided in a manner that

A. Takes into account the child's needs,
B. Takes into account the child's culture;
C. Allows the child to know his or her family origins; and
D. Promotes substantive equality between the child and other children.

To learn more about tools available in the CFCSA to improve outcomes for Indigenous children in child welfare matters, see: Wrapping our Ways Around Them: Aboriginal Communities and the CFCSA Guidebook

When it's making decisions about parenting arrangements, what matters to the court are the actual practices or cultural experiences each parent makes available to the child. The court is expected to consider a child's Indigenous ancestry as part of the best interests of the child.

For further information, see: Aboriginal Legal Aid in BC: Your Family and the Law

For information pertaining to Indigenous women living on reserves, see: Your Rights on Reserve: A Legal Toolkit for Aboriginal Women in BC

For information about child protection in BC as it relates to Indigenous children, see: Keeping Aboriginal Kids Safe – Your Family's Rights

To access a webinar about supporting Indigenous families in BC with legal issues, presented by Frances Rosner for PEACE Program Counsellors, see: FLAIR for PEACE: Supporting Children and Indigenous Families in the BC Family Law System (Part 2)


## PovNet

PovNet is an online community of advocates and front-line workers that addresses poverty and promotes access to justice for vulnerable residents of British Columbia. To be eligible to join, you must live and work in BC, work or formally volunteer for a non-profit, non-government organization that offers information, advocacy, or pro-bono legal services to those requiring help or support with poverty law or family law issues, or be employed in a role that addresses systemic issues related to poverty law, family law and access to justice. See: https://www.PovNet.org/

PovNet has many resources which may be useful to PEACE Program Counsellors. The "Find an Advocate" tool helps connect individuals who need assistance with a legal advocate, and to find one that is near to them or that serves people across the province.

To explore the Find an Advocate tool, see: https://www.PovNet.org/find-an-advocate

The online community allows community workers and poverty law advocates to share information in a free, confidential manner which can improve their ability to assist clients with their legal problems.

To sign up, see: https://community.PovNet.org/login

# Index of Resources

**Online legal information resources**

Aboriginal Legal Aid in BC: Your Family and the Law: https://aboriginal.legalaid.bc.ca/child-family-rights/family-law

BC Prosecution Service Charge Assessment Guidelines: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/cha-1-charge-assessment-guidelines.pdf

BCSTH Legal Toolkit: https://bcsth.ca/publication/bcsth-legal-Toolkit/

Canadian Bar Association paper on Child Protection in British Columbia: https://www.cba.org/CBAMediaLibrary/cba_na/PDFs/Publications%20And%20Resources/Toolkits/ChildRights/Barrett-ChildProtectioninBC.pdf

Crown Counsel Policy Manual, Child Victims and Witnesses: https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/prosecution-service/crown-counsel-policy-manual/chi-1.pdf

Family Justice Centres: https://www2.gov.bc.ca/gov/content/life-events/divorce/family-justice/who-can-help/family-justice-centres

Families Change: https://bc.familieschange.ca/en

Family Justice Counsellors: https://www2.gov.bc.ca/gov/content/life-events/divorce/family-justice/who-can-help/family-justice-counsellors/when-should-i-see-them

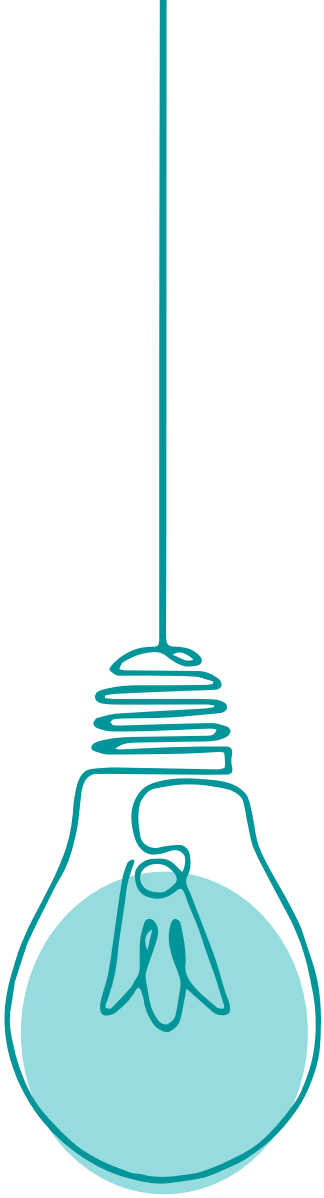
Family Law Handbook for Self Represented Litigants: https://cjc-ccm.ca/sites/default/files/documents/2021/Family%20Handbook%20-%20EN%20MASTER%202021-10-19_0.pdf

Family Law Legal Aid: https://family.legalaid.bc.ca/

JP Boyd on Family Law: https://wiki.clicklaw.bc.ca/index.php/JP_Boyd_on_Family_Law

Justice Access Centres: https://www2.gov.bc.ca/gov/content/life-events/divorce/family-justice/who-can-help/justice-access-centres

Keeping Aboriginal Kids Safe – Your Family's Rights chrome-extension: https://api2.legalaid.bc.ca/resources/pdfs/pubs/Keeping-Aboriginal-Kids-Safe-eng.pdf



Kids Are Only Kids Once, Video Documentary, West Coast Leaf: https://westcoastleaf.org/work/documentary-kids-are-only-kids-once/

Memorandum from the Court to Self-Represented Litigants Trial Procedure in Civil and Family Cases: https://www.bccourts.ca/supreme_court/self-represented_litigants/Memorandum_to_SLRs_on_Trial_Procedure_and_Evidence.pdf

PovNet: https://www.PovNet.org/

Wrapping Our Ways Around Them: Aboriginal Communities and the Child, Family and Community Service Act (CFCSA) Guidebook: https://cwrp.ca/sites/default/files/publications/en/wowat_bc_cfcsa_1.pdf

Sexual Abuse Intervention Program: https://www2.gov.bc.ca/gov/search?id=3101EE72823047269017D08E55AF6441&tab=1&q=mental+health

Supreme Court of BC Preparing your Witnesses: https://supremecourtbc.ca/civil-law/trial/preparing-your-witnesses

Trauma-Informed Legal Practice Toolkit, Golden Eagle Rising Society (Myrna MacCallum): https://www.goldeneaglerising.org/initiatives-and-actions/trauma-informed-Toolkit-for-legal-professionals/

Victim Services in British Columbia: https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/understanding-criminal-justice/key-parts/victim-services

Why Can't Everyone Just Get Along?: https://static1.squarespace.com/static/64220f300321233050a209ec/t/65de3b22be93725ee19fa396/1709062949128/Why+can%27t+everyone+just+get+along.pdf

Your Rights on Reserve: A Legal Toolkit for Aboriginal Women in BC: https://www.atira.bc.ca/sites/default/files/AWRS%20-%20Legal%20Advocacy%20-%20Your%20Rights%20on%20Reserve%20-%20A%20Legal%20Tool-kit%20for%20Aboriginal%20Women%20in%20BC.pdf

**Sources of Legal Advice:**

- Legal Aid BC https://legalaid.bc.ca/family
- Rise Women's Legal Centre https://womenslegalcentre.ca/
- Society for Children & Youth Legal Centre https://scyofbc.org/child-youth-legal-centre/
- BWSS in Vancouver – Justice Centre for women leaving abusive partners https://www.bwss.org/support/programs/justice-centre/
- Family Law Programs: Contact List - Law Foundation of BC (lawfoundationbc.org)
- ICLC – Student clinic for Indigenous People https://allard.ubc.ca/community-clinics/indigenous-community-legal-clinic
- Kettle – Child Protection Advocate https://www.thekettle.ca/advocacy
- Atira – Clinic lawyers: https://atira.bc.ca/what-we-do/program/legal-advocacy/

**Laws:**

- The Divorce Act: https://laws-lois.justice.gc.ca/eng/acts/d-3.4/
- The Family Law Act: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/11025_00
- The Provincial Court Family Rules: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/120_2020
- The Supreme Court Family Rules: https://www.bclaws.gov.bc.ca/civix/document/id/roc/roc/169_2009_00

**Cases related to Indigenous Children and Family Law:**

- J.W. v. British Columbia (Director of Child, Family and Community Service), 2023 BCSC 512
- Racine v. Woods, 1983 CanLII 27 (SCC), [1983] 2 SCR 173
- Dodginghorse v Limas, 2019 BCSC 1385
- L.P. and D.P. v. C.C., 2022 BCPC 34 (CanLII)

# Appendix A

**Protecting and Promoting the Rights of Children in the Family Justice System**

Child and Youth Legal Centre
Presentation for FLAIR for PEACE February 6, 2024

**Society for Children and Youth of BC**

The Society for Children and Youth of BC (SCY) is a provincial not for profit organization that works to protect and promote the rights and well-being of children and youth in BC. Since 1974 SCY has worked to empower children and educate adult decision makers. All of the work at SCY is based on the United Nations Convention on the Rights of the Child, because it reflects a well researched global consensus on what childhood should be.

The Society has three main program areas:

The **Child Rights Public awareness campaign** provides child rights materials to various audiences around the province and publishes a monthly Child Rights network newsletter. As part of the campaign, SCY hosts various child rights workshops and youth engagement projects. All the work SCY does is supported by a Youth Advisory Committee

The goals of **Child and Youth Friendly Communities (CYFC)** are to support youth in becoming active participants in the development of their communities and to ensure that local governance decision-making includes youth input. CYFC has helped municipalities in the development of child friendly planning strategies and worked in communities like New West, Richmond, Vernon and Kitimat. They also run a number of initiatives throughout the year such as Play Streets and the Walking School Bus program.

The **Child and Youth Legal Centre (CYLC)** provides free direct legal services to children in numerous areas of law including family, child protection, human rights and helps support them in schooling and housing issues. Currently, CYLC has several staff lawyers and in house advocates as well as a social worker—all of whom provide legal information and/or legal advice and advocacy to vulnerable young people.

**Why Should Children Participate in the Justice System**

Children are often the most impacted by decisions that are made in family law cases yet too often they continue to be excluded from the process for a variety of reasons. The evidence shows that there are better outcomes for young people and their families when the children's views are heard in family law decisions that will affect them. Sometimes, families are so caught up in the emotions of the family breakdown that they aren't able to hear their children.

The United Nations Convention on the Rights of the Child (UNCRC) (1989) is the "most universally accepted human rights instrument in history". It recognizes children as rights holders and focuses on their specific needs. Canada played a leading role in its development and ratified the Convention in 1991.

The UNCRC applies to *all children of any age without discrimination* (Article 2). Article 12 confirms that any child who is capable of forming their own views has the right to express those views freely in all matters affecting the child. The Convention doesn't require that a child have capacity or that they reach a certain age before they are permitted to exercise their rights. In fact, the UNCRC is explicit that a child need only to be "capable of forming a view" for them to be included in decisions about matters affecting them (Article 12).

Article 12 says:

1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or though a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Anyone who is making a decision about a child in a family law case—whether it's a judge or whether it's two parents sitting down and trying to reach an agreement—is required to consider the child's views as part of determining what is in the child's best interests.

Age shouldn't be a barrier to being heard. Children as young as three have had their views considered. Four-year-olds have had lawyers. As long as a child is able to form a view, they have the right for that view to be considered. They don't need to know why they think that way, they don't need to have thought through the outcomes of their views—all they need is the capacity to have a view.

Participation is a right and a child may choose not to participate.

Social science tells us that while there are common child development milestones that are somewhat predictable, at the same time, there is no universal measure for "capacity". While some of the legislation in BC includes an age that a child must attain before they are given notice of certain court matters (see for example the Child, Family and Community Service Act), there is no mandated age a child must attain, or special skill set or understanding a child must have in order to be able to participate. Instead, the United Nations Convention on the Rights of the Child should be interpreted as presuming that children have the capacity to express their views and preferences.

The weight that will be given to a child's views is dependent on a number of things. And a determination of a child's best interests includes an array of considerations such as: the child's relationships with other people, their psychological well-being, the ability of their caregivers to meet their needs, the child's views and preferences (see s.37 Family Law Act for a more comprehensive list of some of the factors that are relevant to a consideration of a child's best interests). As a child matures their views become more and more likely to be the deciding factor. Age or immaturity should not be an impediment to hearing the child. Research tells us that there is a direct link between determining what is in a child's best interests and hearing that child's views and taking them seriously. By hearing a child and taking them seriously, a decision-maker is better able to determine what outcome will be in that child's best interests.

**Why are children excluded?**

There are many common reasons why children may be excluded from the decision-making process. Too often, paternalistic assumptions about what is best for a child get in the way of what is actually best for the child.

One reason is a fear that the child will be asked to decide between caregivers or will be placed in an adversarial role against a parent. The notion of asking children to choose between their caregivers is sometimes referred to as the "loyalty trap".

In fact, children's lawyers, judges and other people who provide assessments for the family court are all trained to avoid asking children to choose between their parents. The young people are often told that they have "a voice but not a choice". In one study numerous young people were interviewed and asked to rank reasons for why they should be included in decision making. At the top of the list most children put "to be listened to" and at the bottom they put "To get what I want".

**Assumption 1: Capacity to Participate**

One common reason that children are excluded is because people assume they don't have the capacity to participate. Instead of assuming children don't have the capacity to participate, we need to ask, "capacity to do what?" To have a view? To share an opinion? Because children aren't being asked to decide anything.

Firstly, it's our job to help young people understand what they're being asked to express their views about. They need to be taught. Counsellors are taught how to work with even very young children and have many different communication tools that they use. Sometimes, because of a child's level of maturity or neurodiversity, the interviewer may need to adapt their approach. Often the problem is less the capacity of the child and more the ability of the interviewer to modify their interview style.

A real risk in assuming that children must first prove capacity is that there isn't a universal test for "capacity". So the same child may be deemed capable by one person and incapable by another. Too often, it may come down to whether the parent likes what they're hearing.

**Assumption 2: "Parents Know Best"**

The reality is that judges actually only decide a very small fraction of parental disputes. The majority of cases are settled without going to court. Most parents are in court precisely because they cannot agree as to what is in their child's best interests. Deferring to parents in these circumstances can in fact be harmful to children. It's hard for parents who each often have strongly held views, to objectively assess whether or not the child should participate, if so how, and even what is in fact in the child's overall best interests. Research shows that a surprisingly large number of parents did not include their children in discussions about future parenting plans at all and just assumed that the kids would fall in with whatever the parents decided.

Parents who are in the court process may forget to provide even the most basic information about their child to the judge and instead focus their evidence on the conflict between the parents rather than the needs of the child. A child's best interests may not necessarily be the same as those of their parents and

adults may disagree with a child about what is in their best interests.

In *Young v. Young*, the Supreme Court of Canada said:

> It's all the more important to have a rights based approach in the discussion of a child's participation because of children's vulnerability and the frequent competition between a child's rights and those of an adult. Too often what a parent wants takes precedence over the child's rights. Courts must also be mindful that not only the benefit but also the real cost and burden of all custody and access arrangements ultimately falls on the children themselves. (emphasis added)
>
> [1993] 4 SCR 3 paragraph 82

**Assumption 3: "We need to shelter children from the turmoil of the family breakdown by excluding them"**

There is a common, but mistaken, belief that including children's voices in family law decisions may be harmful to them. The truth is that high conflict separations are often very stressful for young people but seeking their participation in the decision making helps to empower them during this time of disruption. They know that decisions are being made and excluding them from expressing their views only increases their distress. Children know when their parents are going to court. They see their parents organizing their paperwork, dressing differently that morning, making special arrangements for pickups from school. They overhear conversations in the home. It is naïve to assume that children don't know what's happening.

Hearing from the children helps to shift the conversation away from the parents' needs and to the needs of the children.

**Assumption 4: "Alienated" children should not be heard because their views are not their own**

Everyone who works in family law will hear the term "parental alienation". Essentially, one parent alleges that a child is resisting or refusing contact with them because of the actions of the other parent in not supporting the relationship between the child and the rejected parent and intentionally poisoning the child's mind towards that parent. There is a risk of serious harm caused by marginalizing or even silencing a child's views in cases where one parent claims that the child is being manipulated by the other parent.

The fact is, sometimes children will often resist or refuse contact with a parent based on that child's own negative experiences of that parent. It is important to understand the reasons for the rejection of the parent—because there can be and often are very good reasons for not wanting to see one parent.

And ultimately, a judge needs to understand the child's perspective—not just to determine what is causing the child to reject a parent but also to decide what types of orders are going to best support that child's psychological well-being and not do further harm.
In a 2010 decision, Justice Martinson spoke about the importance in hearing children in family law:

> [21] Obtaining information of all sorts from children, including younger children, on a wide range of topics relevant to the dispute, can lead to better decisions for children that have a greater chance of working successfully. They have important information to offer about such things as schedules, including time spent with each parent, that work for them, extra-curricular activities and lessons, vacations, schools, and exchanges between their two homes and how these work best. They can also speak about what their life is like from their point of view, including the impact of the separation on them as well as the impact of the conduct of their parents.
>
> [22] Receiving children's input early in the process, and throughout as appropriate, can reduce conflict by focusing or refocusing matters on the children and what is important to them. It can reduce the intensity and duration of the conflict and enhance conciliation between parents so that they can communicate more effectively for the benefit of their child. When children are actively involved in problem solving and given
> recognition that their ideas are important and are being heard, they are empowered and their confidence and self esteem grow. They feel that they have been treated with dignity. In addition, children's participation in the decision making process correlates positively with their ability to adapt to a newly reconfigured family.
>
> BJG v DLG 2010 YKSC 44 at paragraphs 21 and 22

She noted that there are risks to excluding children from the process:

> [23] Excluding children and adolescents may have immediate adverse effects such as: feeling ignored, isolated and lonely; experiencing anxiety and fear; being sad, depressed, and withdrawn; being confused; being angry at being left out; and having difficulty coping with stress.
>
> [24] Further, longer-term adverse effects of not consulting children and adolescents may include: loss of closeness in parent-child relationships; continuing resentment if living arrangements don't meet their needs in time or structure; less satisfaction with parenting plans, less compliance, more "voting with their feet"; and longing for more or less time with the non-resident parent.
>
> BJG v DLG 2010 YKSC 44 at paragraphs 23 and 24

**Legislative Landscape**

In British Columbia, the Divorce Act and the Family Law Act provide the statutory framework under which family law decisions are made. Both Acts require that decisions about children should only be made in their best interests. And both Acts require the court to consider a child's views in determining what is in their best interests unless there are very good reasons not to do so. While a child's capacity is not a good reason to exclude them from participating, it may be a factor when deciding how much weight to give to the child's views.

Children can participate in a variety of ways: mediations, meetings with the judge, appointment of a children's lawyer, views of the child reports, expert reports. They can be heard through video recordings, letters to the judge, and through the hearsay evidence of an adult. Each of these has pros and cons. Most experts believe that where a child is able to instruct a lawyer and wants to participate that way, it is the best way of ensuring that their rights are protected throughout the process. But not every child will want or be able to obtain a lawyer.

Parents and children need to know what mechanisms to be heard are available for children. A child needs enough information to decide whether or not they want to participate and what their options are. And sometimes multiple methods can be used. Children have been heard through a hear the child report, the appointment of counsel and a judicial interview all in the same case, for example. There are no guidelines respecting how a child must be included or the number of times. Best practice dictates that a child should be heard throughout the proceedings in a way that best supports their ability to communicate their wishes and for the justice system participants to properly "hear" that child.

## Counselling Records and Confidentiality

In law, the courts must often balance a person's privacy rights against the need to have as much relevant evidence as will help the judge to determine the facts. Certain types of evidence will not be allowed in a trial, even when they are relevant, because of a person's privacy rights. The test to decide whether or not to admit this kind of evidences has been referred to as the "Wigmore test" for admissibility.

It is a four-part test. When deciding whether counselling records should be disclosed, the court must balance all of these factors.

Firstly there is generally a high expectation of privacy in a person's counselling records. In order to support the therapeutic nature of children's counselling sessions and to promote the child's willingness to participate in counselling, the children need to know that their private conversations will stay private. Courts have found that this privacy right should be "sedulously fostered"- that is, that the benefit of this therapeutic relationship transcends the "need to know". When the court considers what evidence might be gleaned from the records the court isn't allowed to speculate about what might be in those records. Counsellors are not engaged in a fact-finding exercise. Their notes aren't designed to be evidence. They are used as a therapeutic tool for the counsellor. By their nature they are "hearsay": the counsellor has been told these things but wasn't there when the things they have been told about happened. There is a very high bar that protects those records. Courts have often refused to allow a child's counselling records into evidence, even where they were relevant to an issue in the case, because of the risk to the therapeutic relationship if those records were disclosed.

## Best Practices for Counsellors

- Explain confidentiality at your first meeting and record that you've done so.
- Record keeping should be limited to what the counsellor needs in order to effectively support the child in the therapeutic process.
- If you receive a subpoena, you can apply to have it "quashed" (cancelled).
- Do not share your records with anyone unless the court specifically orders you to do so or your child client consents to the disclosure.

By demonstrating that the records are confidential through your conduct, you will be in a much better position to argue confidentiality if it comes up in court. If you do receive a subpoena, your client should be advised that the records are being requested as they may have a position on that.

**How can you promote meaningful access to justice for children?**

- Listen to the child. They have important information to share.
- Learn about and direct them to resources that can help support them.
- Share what you have learned here today.

# Appendix B

**Notebook on Ethics, Standards, and Legal Issues for Counsellors and Psychotherapists**

Confidentiality and the Wigmore Criteria
Dr. Glenn Sheppard

As counsellors and psychotherapists we are committed to maintaining the confidentiality of our clients communication with us. We are stewards of their confidentiality and cradlers of their secrets. It is usual practice to refer to protection of those confidential communications as a well established ethical concept and to describe privileged communication such as that between a lawyer and a client receiving legal advice and support with litigation as a legal one. This solicitor-client communication is called privileged because it is protected from the reach of the courts and therefore inadmissible as evidence in any court case.

Since every citizen in our Canadian society accused of a crime has the right to make a full answer and defense as a principle of fundamental justice the categories of privileged communication are very limited. For example, although English and Canadian courts have rarely compelled members of the clergy to disclose to the courts confidential religious communication it is not protected as privileged either in common law or statutory law except in Quebec and Newfoundland where it has statutory status as privileged. In the United States, all states have similar statutory protection of clergy-communication which is also referred to as priest-penitent privilege. Even without such protection in Canada, courts one likely to continue the practice of treating it as if it were privileged and to deal with matters for disclosure on a case by case basis. In the United States by 2011, all but one state had enacted counsellor-client privilege statutes. Some of these protect privilege to the fullest extent while others are quite weak with the many exceptions making it not much more secure than counsellor-client confidentiality.

Readers know that our commitment to the maintenance of client confidentiality can not be absolute. It can be breached when; a child is at risk of harm, a client is at risk of significant self-harm, or when there is an imminent risk of the client inflicting serious bodily harm or death to a person or group of persons. Also, since confidentiality always belongs to clients rather than to therapists they can provide their informed consent to have their confidential communication disclosed to others including to a court proceeding. Of course, without client consent and through a subpoena or court order we can be compelled to surrender to a court a counselling record and/or be required to testify.

Despite these potential exceptions to our maintenance of client confidentiality the courts and judges are far from reckless in requiring us to breach confidentiality and they typically demand a compelling reason to require a counsellor or psychotherapist to breach it. Fortunately, they have available to them a general framework for adjudicating any such consideration. It is called the **Wigmore Criteria**. John Henry Wigmore (1863-1943) was an American jurist and an expert on the law of evidence. He presented the following four requirements for jurists when determining if a particular communication is confidential and the factors to be considered when deciding to protect it or compel its disclosure;

1. The communications must originate in a ***confidence*** that they will not be disclosed.
2. This element of ***confidentiality*** must be ***essential*** to the full and satisfactory maintenance of the relation between the parties.
3. The ***relationship*** must be one that, in the opinion of the community, ought to be ***sedulously fostered***.
4. The ***injury*** to the relationship that disclosure of the communications would cause must be ***greater than the benefit*** gained for the correct disposal of the litigation.
   (Emphasis in original)

In the case of professional counselling relationships it is usually not difficult to meet the first two criteria. In fact, none other than the former Supreme Court Justice Claire L'Heureux-Dube' has expressed on behalf of the court, its commitment to the right to privacy and its deep understanding of the importance of confidentiality within the therapeutic relationship (R.v. Mills SCC, 1999). She wrote:

*That privacy is essential to maintaining relationships of trust was stressed to this court by the eloquent submissions of many interventions in this case regarding counselling records. The therapeutic relationship is one that is characterized by trust, an element of which is confidentiality. Therefore, the protection of the complainant's reasonable expectation of privacy in her therapeutic records protects the therapeutic relationship.*

*Many interveners in this case pointed out that the therapeutic relationship has important implications for the complainant's psychological integrity. Counselling helps an individual to recover from his or her trauma. Even the possibility that this confidentiality may be breached affects the therapeutic relationship.*

Also, in a court decision by the British Columbia Supreme Court (RCL v. SCF 2011) judge Joyce said:
I find there is great public interest in encouraging victims of abuse to seek counselling and to be assured of the confidentiality of that communication. The public interest is served if that confidentiality is fostered to the greatest possible degree.

Counsellors and psychotherapists and their advocates can also persuasively muster arguments to fulfill criterion 4. Such as, in order for individuals to disclose private information that maybe embarrassing, sensitive, and sometimes thoughts that maybe considered irrational or unusual, or a personal history of abuse or other trauma, they require confidence that such disclosures will not be revealed without their permission. Under such confidential conditions citizens can obtain the help they need to live healthier and more productive and satisfying lives. This is, of course, is a significant benefit to society. So for such significant benefit to accrue this type of confidential relationship needs and appears to be "sedulously fostered" by our communities.

If the conditions for criteria 1 to 3 are met it is the remaining criterion 4 that maybe the most challenging. This is where the court has to decide on what side the greater benefit will accrue when it is deciding whether or not to require the disclosure of confidential information to the court. If it is determined that such a disclosure is essential to the courts mission to seek the truth and to fully administer justice in a particular case then disclosure must be granted in whole or in part. A judgement in favour of not compelling a disclosure may be more likely to occur in a civil suit then a criminal one because as Supreme Court Justice Beverly McLaughlin has said *"...the defendant in a civil suit stands to lose money and repute; the accused in a criminal proceeding stands to lose his or her very liberty."*

The court must always balance the importance of disclosure to the administration of justice against the public interest in maintaining the confidentiality even when the conditions required in criteria one to three are met. Here are a number of court cases in which the Wigmore criteria was used to render a court decision regarding disclosure:

1. In RCL v. SCF (2011) before the Supreme Court of British Columbia, the judge had to decide whether or not to require the disclosure of the plaintiff's counselling records from the Elizabeth Fry Society where he had gone for counselling. He decided that the counselling met the Wigmore Criteria 1 to 3. With respect to Criterion 4 he denied access to the counselling records for the following reasons:

   *"the defendant already knows that the plaintiff was abused as a child; that this caused him emotional pain; that he attempted suicide; that he sought help from the Elizabeth Fry Society..." He concluded "I am not satisfied that these records will assist in proving any material fact."*

2. In R.v. Gruenke (1991, 3 SCR 263) Gruenke and Fosty were convicted of first degree murder. They were appealing based on an argument that Gruenke's disclosure of the murder to a church spiritual counsellor and to the pastor were privileged communications. The court decided that it was not privileged. Applying the Wigmore criteria, it concluded that there was not an expectation of confidentiality at the time of the disclosure and there were compelling reasons to allow it as evidence. The appeal was dismissed.

3. In the Supreme Court of Canada (SCC) decision in the Globe and Mail v. Canada journalist Daniel LaBlanc was asking for journalistic–source privilege to protect his sources with respect to information about what became known as the sponsorship scandal. The court dismissed all arguments in support of such a privilege. However, it did apply the Wigmore criteria and concluded that maintaining the confidentiality of the source in this case was in the public interest but it directed Mr LaBlanc to answer questions about the matter before the court provided it did not reveal identity of his source.

4. In R. v. M (1992) the New Brunswick provincial court dealt with a matter involving school counselling records. In this case a voir dire was held to decide whether or not a trial for a young offender should be heard in an adult court. The court applied the Wigmore criteria in deciding whether or not to permit disclosure of his school counselling record. It decided that criteria 1 to 3 were met and with respect to criterion 4 it denied access to the record because such information was not essential to its decision. I am familiar with a very similar matter dealt with by a court in Newfoundland in which the judge made a similar decision, however, he did require disclosure of the offender's student cumulative record. A reminder that such a record should never contain counselling notes.

5. In the Children's and Society of Ottawa v. S(N) involving a child protection matter the Ontario Supreme Court denied the mother access to her child's school counselling record. It concluded that the child's counselling relationship with the guidance counsellor met all the Wigmore criteria. It concluded that the mother had sufficient information and that it was "in the child's best interest" not to permit the mother to question the guidance counsellor about the counselling notes.

6. On a personal note: Several years ago I was in a provincial court in Newfoundland as a witness regarding a teenager who was charged with a significant criminal offense. I had visited the teenager, who was my counselling client, while he was being held at a secure facility prior to his court appearance. I was asked by the crown attorney about this visit and more particularly about what my client might have disclosed to me about the alleged offense. I was caught off guard but recovered and said to the judge something like "You Honor I need some direction from you before I answer this question because when I spoke with Stephen I am sure that both of us believed that we were speaking in confidence and I like to keep his hard-won trust." I was surprised when he called both lawyers to his bench and after a lengthy and somewhat animated discussion amongst the three of them he informed me that I did not have to answer the question. Of course, I do not know whether or not he applied the Wigmore criteria but I am confident the communication would have met Wigmore criteria 1 to 3. Of course, criterion 4 will always be the challenge for careful judicial decision making and will no doubt continue to be made on a case by case basis.

The Wigmore Criteria can be found in the **CCPA Standards of Practice** on Page 13.

Reference:
Wigmore, J. N. (1961). **Guidance in Trials at Common Law** (Vol. 8. McNaughten Rev)
Boston: Little Brown

# Appendix C

**Tips for Counsellors***

February 13, 2024
Suzeie Narbonne, Managing Lawyer
Child and Youth Legal Centre

**When Family Law and Criminal Law intersect:**

It isn't unusual to see police records in a family law case, particularly in cases of family violence. But often even when the police are involved, charges aren't laid. Why is that?

There a couple of important things that you should know. The first is that there is a different standard of proof between criminal law and family law. In criminal law, before a charge is even laid, the prosecutor has to be satisfied that there is a substantial likelihood of conviction. If theyare satisfied of that, they must next decide if it is in the public interest to prosecute the offence.

Only then will charges be laid against someone. I'll give you an example. Say that a person calls the police and says, "I was trying to get out of the house and my ex blocked me and kept pushing me back into the house". At law, you cannot intentionally lay hands on someone without their consent. Blocking someone could amount to an assault. But next the prosecutor has to look at the circumstances. Maybe the person leaving was intoxicated, had their car keys in their hands, and were heading out to drive somewhere. The person blocking was trying to stop that. Is there a public interest in prosecuting in that circumstance? Maybe not.

Even when a charge is laid, the prosecutor must prove that the event happened and that it was criminal conduct all beyond a reasonable doubt. That is a very high standard and frankly, it's an important part of making sure we don't convict innocent people. In family law, though, the standard is "proof on a balance of probabilities". In other words, it must be more likely that it is true than that it isn't—it's really a balancing act where you see which way the balance tips.

Why is this important for you to know? Because you may see cases where you have been concerned and have reported your concerns to the authorities. They have investigated and have chosen not to lay charges or they have laid charges and the person has been acquitied. The person who was assaulted is devastated. Why didn't anyone believe them? You need to help them understand that just because charge weren't laid or the person was found not guilty, that doesn't mean that it didn't happen—it just means that the criminal justice system is not able to solve this situation. The man or woman or child who tells you about the abuse they've experienced is not less credible just because the criminal law outcome was not to lay charges. You need to remember that when you're working with people.

**Staying out of the Conflict**

I've talked about you reporting and I'd like to touch on how to stay out of the conflict. Staying out of the conflict doesn't mean hiding your head in the sand. But it does mean that you need to remind yourself of

what your role is and how you can best support your client in that role. As I already discussed last week, providing therapeutic services is such a valuable gift that you can give people.

I've seen more than one case where a very well-meaning therapist got too entrenched with one of the parents and started to advocate for the child and against one parent. I have never seen it go well. Judges expect professionals to stay in their lane. Send the child to an advocate—refer the parents to lawyers or other supports. But don't take sides against one parent. It won't assist the child. If you are in court and a judge asks you about the impact of the conduct on the child, be honest. But avoid stating opinions and stick with the facts and your observations. That is the best way to support the child.

**Parental Consent**

Finally, I'd like to touch briefly on parental consent. Many therapists take the position that they won't assist a child unless the legal guardians consent to the therapy. And I've seen too many children falling through the cracks where they desperately need and want counselling but one parent says their child doesn't need it. Those same children, several years later, have been so stuck in their parents' bad behaviour and the conflict that they refuse therapy when it is available. One client said to me "I've just lived this crap for so long, no one can do anything about it".

Those therapists who want parental consent first aren't terrible people. They just want to make sure that they're complying with the law, and they want the services to be useful and not to be suddenly ripped away from a child when a parent finds out.

In BC the Infants Act allows children to consent to medical treatment without the need for parental consent in certain circumstances.

The Foundry is one organization that will provide free, confidential counselling services to children without parental consent. The children accessing these services at the Foundry must be 12 or older. They take the position that under the Infants Act, a child who is sufficiently mature can consent to medical treatment without their parents' consent. As long as the young person understands the treatment, why it is being recommended, and what will happen if they accept or refuse treatment, the young person's decision must be respected.

Child and Youth Mental Health takes the position that if the clinician determines that the child has the capacity to understand the risks and benefits of services and the limits on confidentiality then they don't require the parents' consent to treatment. This is rare however, as often part of the treatment necessarily involves the family as a whole. When parents are separated and there are court orders regarding guardianship, they generally require consent that is consistent with the court order. It's the job of lawyers to help the court understand that this can be a barrier and to get a court order that specifically references the Infants Act and allows a child to consent to their own treatment in those cases. Too often, the children who would most benefit from counselling are the ones who are blocked from receiving it.

Your organization will have its own policies in this respect. But remember that therapy is a valuable service for children and if you see something blocking your ability to provide those services, reach out to someone who can help to remove those barriers, such as the children's lawyer.

***These tips are the opinions of the author and should not be interpreted as providing legal advice. As always, if you have a question about a specific issue, you should seek your own legal advice.***

BC Society of
Transition Houses