



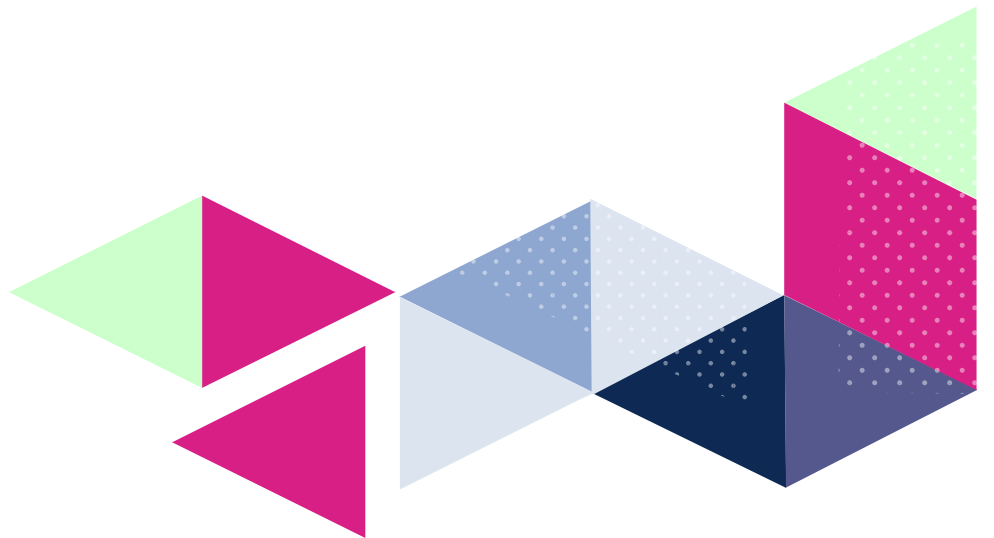
SECTION 211 REPORTS



# Improving Access to Justice through Safeguards in Parenting Assessments

GINA ADDARIO-BERRY  
& MAGAL HUBERMAN

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*Rise*   
WOMEN'S LEGAL CENTRE

WITH GENEROUS SUPPORT FROM  
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Gina Addario-Berry & Magal Huberman

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604-451-7447 | [info@womenslegalcentre.ca](mailto:info@womenslegalcentre.ca)

[womenslegalcentre.ca](http://womenslegalcentre.ca)

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# Executive Summary

Parenting reports in BC are often ordered under section 211 of the *Family Law Act* when there are court proceedings about parenting issues. The purpose of these reports—commonly referred to as 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.

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

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

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

Section 211 reports are profoundly influential in the lives of children and families, because of their potential impact on both court decisions and out-of-court settlement of parenting arrangements.

## Key Issues Identified in Our Research

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

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

# Summary of Recommendations

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

## Assessors' Training and Experience

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

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

## Practice Standards for Both the Evaluation Process and Report Content

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

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

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

Further, we recommend consideration of two additional issues:

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

## Financial Barriers

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

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

## Judicial Gatekeeping and Court Oversight

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

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

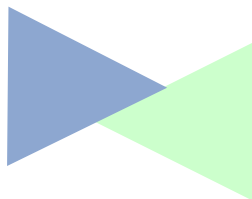


- **Avenues to challenge the report:** the ability to challenge a section 211 report is an important safeguard but also among the most difficult to structure in a way that is timely, accessible (financially and to self-represented parties), and fair to everyone involved. Although no jurisdiction we are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

## Additional Recommendations (Not Intended for Legislation)

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

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





# Background

Parenting reports in BC are often ordered under section 211 of the *Family Law Act (FLA)* when there are court proceedings about parenting arrangements.<sup>1</sup> The purpose of these reports — commonly referred to as “section 211 reports” — is to assess and provide information to the court about any or all of the views and needs of the children, and the ability and willingness of each parent to meet these needs.<sup>2</sup> These reports aim to assist the court to determine the appropriate parenting arrangements by providing evidence that the court would otherwise not have, and they may also lead to settlement by providing parties and counsel with the perspective of a neutral professional. 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 schoolteachers and therapists).<sup>3</sup>

Section 211 of the *FLA* is the primary legislation on these reports, and it provides that:

**211 (1)** *A court may appoint a person to assess, for the purposes of a proceeding under Part 4 [Care of and Time with Children], one or more of the following:*

- (a) the needs of a child in relation to a family law dispute;*
- (b) the views of a child in relation to a family law dispute;*
- (c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child.*

Section 211(2) provides that the person writing a section 211 report “must be a family justice counsellor, a social worker or another person approved by the court” and must not have had prior connection with the parties or children (unless otherwise agreed by the parties).<sup>4</sup> Although

psychologists are not specifically mentioned in section 211, registered psychologists routinely prepare reports, as do some registered clinical counsellors.<sup>5</sup> 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.<sup>6</sup> They are accredited family mediators, certified by Family Mediation Canada.<sup>7</sup> In addition to section 211 itself, section 211 reports are also governed by the BC Supreme Court Family Rules or the Provincial Court Family Rules, as applicable.<sup>8</sup>

We refer to section 211 reports and to similar reports in other jurisdictions as “reports,” “evaluations,” or “assessments,” and to their authors as “evaluators,” “assessors,” or “authors,” interchangeably.

Assessments are profoundly influential in the lives of children and families, whether parenting arrangements are resolved by court decisions or by agreement. Some studies indicate that judges follow the report’s recommendations in over 90% of cases and that parties reach settlement in 70% to 90% of cases after receiving the report.<sup>9</sup> However, conducting assessments is “an extremely complex area”<sup>10</sup> with only limited empirical research about fundamental issues such as case outcomes, report quality, and evaluation practices.<sup>11</sup> There are ongoing debates and disagreements among scholars and family justice system professionals, resulting in a field that operates “a bit like the ‘wild west’ ” and requires “clear guidance ... to bring a higher level of consistency and quality.”<sup>12</sup>

Given the profound influence of these assessments, alongside the diversity of opinions and limited empirical research about them, robust safeguards are essential to ensure that assessments are of consistently high quality in order to protect the children and parties whose lives may be deeply affected by them.<sup>13</sup> The need for safeguards is augmented by the prevalence of reports in complex matters, such as contested claims of family violence, child abuse, parental mental illness, or substance abuse.<sup>14</sup> As the Honourable Donna Martinson, retired Justice of the BC Supreme Court, explains, “Cases in which reports are ordered are complex and are often ones which deal with allegations of family violence and/or child resist/refuse contact cases (often called parental alienation allegations),” and “the outcome can have profound and adverse effects on families and in particular on the safety, security and well-being of children.”<sup>15</sup>

In BC, there have been many critiques of the section 211 report regime in various studies and reports, and over a long period of time; despite concerns being repeatedly raised about the reports, little has changed.<sup>16</sup> This was recently illustrated by interviews Rise conducted with BC women who have undergone parenting assessments in family violence cases and in an analysis of a sample of reports.<sup>17</sup> Concerns include the lack of mandatory training and practice standards, lack of specialized expertise in family violence (including screening for family violence and assessing parenting in the context of family violence), gendered and cultural biases, costs and delays, and the lack of accessible avenues to challenge the recommendations and conclusions of the reports.<sup>18</sup> These problems result in safety risks, undermine gender equality and children’s rights, and place survivors who report violence at risk of being disbelieved, labelled with mental health disorders, or accused of alienation.<sup>19</sup> A related serious concern has been the overuse and misuse of psychological testing with inadequate reliability and validity for parenting assessments, which tends to pathologize survivors who have experienced family violence and make diagnoses of mental health

disorders that are then exploited by the perpetrator.<sup>20</sup> The overarching concern is that family violence is silenced and the safety of survivors and their children is undermined.

The literature and studies we reviewed illustrate that the quality of training for assessors (both initial and ongoing), their experience, the evaluation process, and the contents of reports are all essential safeguards for parenting assessments, requiring that evaluators' responsibilities correspond to the significant weight that expert evidence receives. Some jurisdictions have introduced legislation or guidelines to address these issues, and the Association of Family and Conciliation Courts has also recently published its revised Guidelines for Parenting Plan Evaluations in Family Law Cases.<sup>21</sup>

In BC, however, these aspects of reports are up to the governing bodies of the applicable professions and the discretion of the evaluator. The BC College of Social Workers requires evaluators to have “skills and knowledge” in enumerated areas, including theories of childhood development, attachment and family systems theories, power and control, family violence and its impact, the impact of “cultural, spiritual, and religious background” and basic knowledge of the applicable law and court system.<sup>22</sup> Registered psychologists, who commonly conduct the assessments in BC, are subject to the College of Psychologists of British Columbia (CPBC) “CPBC *Code of Conduct*” (CPBC Code), and in August 2021, the CPBC also published practice support checklists on conducting psychological assessments and on family law parenting assessments.<sup>23</sup> However, based on our review of reported BC court decisions, the courts do not appear to use these standards, the CPBC Code, or the practice support checklists as tools for oversight or gatekeeping.

The next section summarizes this project's methodology, and the subsequent sections cover the main topics that emerged from our literature review and interviews, supplemented by BC case law, legislation, and professional standards of regulatory bodies. We begin by highlighting gaps in the literature on reports. That topic is followed by a discussion of the four broad, interrelated themes that emerged from the literature and our interviews: assessors' experience and training; practice standards; financial barriers; and judicial keeping and oversight. For clarity, we largely focus on “full” reports – that is, reports that assess the parties and the children comprehensively – rather than limited-scope reports.<sup>24</sup> Further, we do not address reports under section 202 of the *FLA* (sometimes referred to as “hear the child reports” or “non-evaluative” reports).<sup>25</sup>



There are ongoing debates and disagreements among scholars and family justice system professionals, resulting in a field that operates “a bit like the ‘wild west’” and requires “clear guidance ... to bring a higher level of consistency and quality.”



# Methodology

The methodology for this project consisted of a review of legislation, case law, and academic literature and other secondary sources about assessments in British Columbia and other jurisdictions. The results of this review, in conjunction with consultations with an advisory committee comprised of family law practitioners and the executive directors of Rise Women’s Legal Centre and the BC Society of Transition Houses, informed the preparation of questions for interview respondents. Three separate series of questions were created: one for family law practitioners in BC, one for non-BC respondents, and one for individuals with experience undergoing assessments under section 211 in family court proceedings in BC.

Respondents for this research were recruited by initially contacting legal practitioners and scholars through Rise’s professional network, the parental alienation international listserv, and the network of the project’s advisory committee. We connected with other participants through introductions offered by interview respondents. We conducted 24 semi-structured interviews through a secure licensed Zoom account with participants in BC, Ontario, the United States, the United Kingdom, Australia, and New Zealand. These interviews ranged from 60 to 90 minutes. The respondents had various backgrounds; they included family law practitioners, clinical counsellors, registered psychologists, and legal scholars whose expertise and practices intersect with the evaluations in their jurisdiction.

Focus groups with women with lived experience of intimate partner violence were facilitated by members of the BC Society of Transition Houses. We conducted three focus groups, each approximately 90 minutes, in person at confidential meeting spaces in the Lower Mainland and Victoria. An additional focus group was conducted virtually for women in other parts of BC.

Interviews were recorded and converted into transcripts with software that employs artificial intelligence and machine learning to perform speech-to-text transcription. Transcripts were reviewed for accuracy by the first author (Gina Addario-Berry) and a legally trained volunteer. Data analysis was completed by reviewing transcripts for overarching themes, especially recommendations for standards, guidelines, and oversight. Each respondent elected whether to be quoted anonymously or by name.

In addition to case law cited throughout this report, the Appendix contains a summary of court decisions that have identified problematic aspects of section 211 reports which were in evidence in those cases. The summary is organized by the themes that have emerged from these decisions: procedures; advocacy; analysis and evaluation; and report content.



# Gaps in the Literature

**G**iven the complexity of this field, the high stakes for children and families, and the limited empirical evidence, identifying the *gaps* in the literature is as important as reviewing the available research. Here we highlight two important gaps.<sup>26</sup>

First, our literature review found no studies that evaluated how children and families fared when the recommendations of the report were implemented. Further, we found no studies that compared how children and families fared when the recommendations were implemented, not implemented, or when there was no report at all and parenting arrangements were determined based on other evidence.<sup>27</sup> This gap may be explained by the challenges of conducting empirical research, which is constrained by confidentiality, recruitment, and funding challenges. Nonetheless, researching these questions is critical because such research “would provide a better understanding of what works and what does not work [when doing evaluations], which would afford a greater theoretical foundation to child custody work.”<sup>28</sup> This is a fundamental gap in the literature, given that the purpose of the section 211 report is to help determine and advance the best interests of the child.<sup>29</sup>

Our literature review also found that research on report quality is limited.<sup>30</sup> First, the absence of a “reliable and valid measure of quality”<sup>31</sup> makes defining a “high quality” report elusive.<sup>32</sup> Second, studies that evaluate the quality of reports through reviews of *actual* reports are scarce, and most studies about the quality of reports are based on surveys, which are less reliable.<sup>33</sup> Moreover, while existing studies have explored the quality of reports generally, they have not evaluated their quality with respect to risk assessment, such as when claims are made of family violence or sexual abuse.<sup>34</sup>

In summary, “The reliability, validity, efficacy, and efficiency of [reports] has never yet been adequately demonstrated. Science has yet to define and measure the variables that constitute a healthy family, much less how one is to measure and recommend changes for conflicted systems in the midst of tectonic transitions.”<sup>35</sup>

# Assessors' Training and Experience

**A**lthough the need for “high quality and comprehensive education [for evaluators] cannot be overstated,”<sup>36</sup> there are no uniform training requirements.<sup>37</sup> Concerns about evaluators’ training, especially at the graduate and internship levels, include inadequate evaluation-specific training and competence, and the need for specialized training in family violence, child sexual abuse, children with special needs, or parents suffering from mental health or substance abuse issues.<sup>38</sup> Judicial oversight may be essential for ensuring that evaluators meet training and experience requirements.<sup>39</sup>

International surveys of evaluators indicate that “graduate courses and internships infrequently focused on forensic or child custody issues.”<sup>40</sup> Rather, most evaluators received their training after completing graduate school, mostly through workshops, seminars, books, and articles. Only about one-third reported taking graduate-level courses on forensic or child custody evaluations, and slightly fewer received training on these issues during an internship. These findings are “troubling, particularly considering the distinction between forensic and clinical roles and the risk when clinicians venture into forensic roles.”<sup>41</sup>

Importantly, intimate partner violence (IPV) frequently comes up in assessments. Therefore, “a comprehensive knowledge of screening and assessment of IPV is a core competency and should be part of [evaluators’] qualifying education” along with knowledge about the “overlap between IPV and child maltreatment, such that children exposed to IPV are also more likely to be exposed to harsh psychological parenting ... and/or neglectful parenting ... [and] physical abuse in general.”<sup>42</sup>

Another key area for training is biases, which “may be the greatest threat to the integrity and probative utility” of reports.<sup>43</sup> Biases include cognitive biases, professional and personal biases, and cultural biases (whether implicit or explicit).<sup>44</sup> In brief, cognitive biases (such as confirmation bias, among others) are “errors in logical reasoning that derive from the architecture and physiology of

the human brain” and occur without the individual’s awareness and control.<sup>45</sup> Professional biases may relate, for example, to data-gathering and use or misuse of research, while examples of additional biases relate to culture, ethnicity, gender, sexual orientation, and health and disability.<sup>46</sup> Importantly, awareness of biases may not be enough; rather, training should cover strategies to mitigate and manage biases.<sup>47</sup>

Further areas that require education and training are “child maltreatment, substance abuse assessment and treatment, relocation, parent-child contact problems, forensic interviewing of children, children with special needs, relevant psychological evaluations (including testing), gender diversity, and culture diversity.”<sup>48</sup> With respect to psychological testing, evaluators should have up-to-date training about the reliability, validity, relevance, use, and limitations of tests, as well as about the controversies and debates about their appropriateness for assessments.<sup>49</sup>

With respect to diversity, evaluators have an “ethical responsibility to better understand and address the unique needs, values, and differences of the families with which we work.”<sup>50</sup> Fulfilling this responsibility entails not only ongoing training, but also supervision and consultation. Evaluators should reflect on questions such as the following:

*What are some gaps in my knowledge base for particular cultural groups? What are my personal biases and how might they impact decision-making in family law matters? What stereotypes or implicit biases exist within the system in which I work? What are the individual or organizational barriers that might impact my ability to provide more culturally responsive practices? How do I manage my known biases or values? What supports do I have for supervision or consultation on these topics?*<sup>51</sup>

Of note, gaps in training opportunities may partly account for the relatively small number of assessors, including the lack of training at the graduate level, the need for specialized training, and scarce opportunities for mentoring and supervision.<sup>52</sup> Furthermore, some of the measures that have been proposed in the literature to reduce the risk of complaints — which has been identified as another reason for the small number of evaluators — are to have evaluators receive appropriate training, adhere to practice standards, and consult with peers, which together suggest that introducing clear requirements can benefit not only children and families but also evaluators.<sup>53</sup> Lastly, uniform and comprehensive training requirements may also reduce the hesitancy of lawyers and judges to appoint “newcomer” evaluators, which is another potential explanation for their small pool.<sup>54</sup>

To summarize, training for assessors should be a “broad and dynamic process” that includes not only initial education but also ongoing training throughout the evaluator’s career.<sup>55</sup> In addition, evaluators should be aware of the limitations of their skills and refer some matters to appropriate specialists.<sup>56</sup>



## What Our Respondents Said

The need for consistent training requirements was a prevalent theme in our respondents' comments. Respondents identified the need for assessment-specific training in general, and they also commented that training has to be specific to the issues the assessor is providing an opinion about. Respondents also said that there should be ongoing training and professional development requirements. For example, Suzette Narbonne, managing lawyer of the Society for Children and Youth, commented that the assessors "should have some current training, specific to what it is they are opining on."<sup>57</sup>

### Core Competencies and Training Requirements for Report Writers

This section distills the areas of competency and training for assessors that our respondents identified as vital to an assessor's report being helpful, reliable, and appropriate for use in court:

- An understanding of the family law system and usage of a section 211 report in a litigation context
- Specialized training in family violence and risk management
- Cultural humility when serving clients who approach caregiving from diverse and racialized backgrounds
- An Indigenous lens to interpret and identify the best interests of Indigenous children and families
- Interview skills for working with children and understanding the impact of the evaluation process and the report on the child
- Knowledge and ability to screen for brain injury and other forms of trauma among individuals undergoing evaluation
- Limiting the use and frequency of psychological testing in favour of trauma-informed and culturally appropriate interview methodology
- Being required to demonstrate practical knowledge and proficiency in assessing child development and child capacity
- A mentorship/shadowing system and enhanced recruitment initiatives to increase the pool of qualified assessors

Various respondents identified the need for assessor training about interviewing children and, more generally, the impact of the evaluation on children. Vancouver-based family lawyer Katherine

B. Lawrence, for example, noted the importance of this training given that those involved are sometimes young children and are “very vulnerable, and impressionable... Typically, they love both their parents, and they don’t want to be put in the middle.” More broadly, she noted the need for “generally just safeguarding the children and their well-being and minimizing the impact on them through the assessment process.”<sup>58</sup> Suzette Narbonne advised: “Don’t ask kids leading questions. Don’t force a setting on them. Why not ask the kid where they’re comfortable? Let’s get some fidget toys. Would you like a snack? These kids didn’t walk into this lawsuit because they wanted to, right?”<sup>59</sup>

Respondents repeatedly noted the need for training on family violence and experience working with families in which family violence has taken place. Family therapist Allan Wade noted that “the problem of violence requires specialized training and perspective and practice.” He also observed that understanding family violence includes not only understanding its harms, but “We also need to understand: How do people respond to and resist family violence? How do people who perpetrate family violence work to overcome and suppress the resistance of people who are violated?”<sup>60</sup>

When considering specialized training in family violence, a multicultural community liaison worker said, “Women that we work with [have] experienced family violence and then report back to us that assessors sometimes do not have any special training in family violence, and that aspect sometimes is ignored or misinterpreted.”<sup>61</sup> Echoing these experiences, a BC family lawyer said, “I am never confident that family violence will be addressed appropriately” in section 211 reports, “I have seen reports that do not appear to take allegations of family violence seriously or do not appear to properly assess whether family violence was present, and assessors who, from their assessments and reports, do not seem to have the experience that I would like to see, particularly with coercive controlling violence.” This family lawyer further noted, “I’ve seen a lack of investigation and what seems to be an overemphasis on conflicting statements by the person alleging family violence and failure to question both parties equally on it.”<sup>62</sup>

Registered clinical counsellor Shelly Dean recommended that report writers

*have a demonstrated background in assessing violence and using a clear framework to guide their assessment, particularly when working for children who have experienced violence. There is a risk of misunderstanding a child’s behaviour when they are spending time with either parent, when violence is at issue. For example, a child may be well behaved, cautious, and eager to please an offending parent while at the same time they are terrified and blaming the protective parent for the circumstances of their lives, such as living in poverty and having less time together. It isn’t uncommon to see a child behave “well and cautiously” with an offending parent and defiantly with a protective parent.<sup>63</sup>*

These dynamics of coercive control echo the words of Suzette Narbonne, who shared that “family violence doesn’t always have blood, or bruises or broken bones. Family violence can be consistently phoning the school to complain about what the other parent is doing. Family violence

can be second-guessing all the medical decisions, excessive applications, endless litigation. Family violence takes on many shapes and forms and understanding that can really help you understand how a parent dealt with a situation.”<sup>64</sup> BC family lawyer Agnes Huang noted that section 211 reports lack discussion of financial abuse and its impact, even though “that could be [a] huge site of violence that triggers all kinds of other things.”<sup>65</sup>

With respect to the need to address cultural bias and be well versed in the needs of diverse and marginalized clients, one BC family lawyer acknowledged that “for the private [section 211 report] people, most of them [the assessors] are not of colour, they’re not of another language. It would be nice to have a roster that identifies the specialties that these people have.”<sup>66</sup> For Indigenous families, BC-based family lawyer Frances Rosner pointed out “the need to preserve the child’s cultural identity, and that the assessor be very well versed on those priorities that are set out in the *Federal Act* [An Act respecting First Nations, Inuit and Metis children, youth and families] that are intended to be remedial in nature. So, culturally competent, essentially, and knowledgeable about different Indigenous views of family and ... how it is, the views of children should be brought to the table, like an Indigenous way of bringing the child’s views to the table.” This knowledge, she said, “would accomplish the need to respect distinct Indigenous cultural ways of being as well avoid undermining the significance of cultural identity for Indigenous children, which is a systemic issue in the family law system and section 211 reports.”<sup>67</sup>

Suzette Narbonne said, “I’m learning that I have to approach each child from where they are, who they are, not from my preconceived notions of childhood. So similarly, absolutely, there should be meaningful cultural understanding and training.”<sup>68</sup> Further, as Allan Wade noted, “if you’re doing this work in relation to Indigenous people, you need to have on-board supervision from Indigenous people, and not just an Indigenous person from First Nations Coast Salish on Vancouver Island, because the different First Nations function differently ... so you would need to have a diversity of people who could provide resources and information and training and supervision to people who are doing family law work in relation to Indigenous communities. That’s the only ethical way to proceed.”

Respondents repeatedly noted the need for training on family violence and experience working with families in which family violence has taken place.



A further concern raised by Allan Wade illustrates the intersection of family violence and considerations for Indigenous clients, namely that “many Indigenous women will not report domestic violence, because they know that if they do their kids will be removed from them because Indigenous kids are removed at much higher rates than non-Indigenous kids.”<sup>69</sup>

When intimate partner violence has resulted in traumatic brain injury, survivors are at risk of serious negative consequences in family court proceedings generally, and in section 211 assessments specifically. Traumatic brain injuries are an insidious, invisible injury that can be difficult to diagnose or address, and which can have prejudicial repercussions in the context of psychological assessment processes. As described by Karen Mason, co-founder and executive director of SOAR (Supporting Survivors of Abuse and Brain Injury through Research), “It’s really an invisible injury, but the implications can be pretty devastating.”<sup>70</sup> Further discussion with Hannah Varto, a forensic nurse practitioner with Embrace Clinic and legal nurse consultant specializing in care of victims of violence, elucidated the multidimensional challenges for survivors suffering from brain injuries.

*It’s easy to say “I was in a hockey game last night and I got a concussion, I need the day off.” It’s a lot harder to say “My partner beat the crap out of me last night, and I need the day off because I have a concussion.” We ended up navigating [with patients] a lot of the social issues that come with this, on top of them managing the symptoms of concussion, while trying to parent, while trying to navigate the legal system. Try to imagine having the worst migraine of [your] life while also feeling like you have a hangover and trying to parent a two-year-old, a six-year-old, and a 16-year-old while living in a shelter. The expectation for them to perform and to remember things clearly and to have a linear thought is really unrealistic.”<sup>71</sup>*

Navigating family court proceedings, including the section 211 assessment — which often results in judgments by the report writer of a parent’s capacity — can be significantly challenging when a parent has an undiagnosed brain injury to contend with simultaneously.

More generally, when an individual has experienced trauma from prolonged exposure to family violence, this can lead to negative evaluations in a parenting assessment, which may not fairly reflect that individual’s ability and willingness to raise their child. Hannah Varto noted, “Sleep is one of the biggest things that’s interrupted for people who’ve experienced any form of trauma. And it’s one of the things that is often missed in medical follow-up and assessment. Due to sleep disturbance, memory issues can be a part of that, and just the inability to stay focused and concentrate on things.”<sup>72</sup> A survivor of family violence with lingering trauma may not be able to present the best version of themselves in the evaluation process, even though they may have the long-term ability to provide a safe and stable home if treatment and safety measures against further family violence are in place.

Various respondents noted the need for training in and implementation of trauma-informed practice, including understanding of the potential traumatic impact of the evaluation process itself,

and how it affects the way that parents present and act. Agnes Huang said, for example, “I don’t think [the assessors] recognize how traumatic these kinds of processes are... There’s nothing that acknowledges that, as to why somebody would react in a way that they do during a process, which isn’t how they actually treat their children, or they interact with their children.”<sup>73</sup> Within the topic of mandatory training, child capacity and development came up as an important area of consideration. Suzette Narbonne said, “They should have a better understanding of child capacity. Children evolve differently and [they need to] ensure that a child’s views are provided in a meaningful way.”<sup>74</sup>

With respect to ensuring thorough screening for brain injury in victims of violence, Karen Mason of SOAR explained: “If we don’t [screen, and] if the psychologists aren’t trained to look for this, and we don’t have structures in our systems that then can kind of activate supports to help women, then [the condition] will be weaponized. And there will be this notion [that] often happens now with some psychological conditions, ‘Oh, she’s unfit to parent’ ... and yet, if you consider, if there’s a way to prove that, in fact, these injuries are because of what he did to her...”<sup>75</sup>

Another area of training and experience for section 211 report writers is front-line work supporting survivors of family violence. Senior lecturer at Griffith Law School in Australia Zoe Rathus pointed out: “Experience is really important, people who’ve got a lot of experience of working with families affected by domestic violence. I’d like someone who might have worked at a women’s refuge for a period of time, or in some other kind of domestic violence support service, or family support service. And if we don’t include that, then we’re missing out on a group.”<sup>76</sup>

Overall, the training and experience required to qualify as a registered psychologist or registered clinical counsellor may not give assessors a full appreciation of the issues faced by families undergoing assessments, such as the nuances and impacts of family violence, that can be learned through specific work experience. More broadly, our respondents’ comments echo the concern in the literature about the need for apprenticeships and supervision. As noted by one family lawyer in BC, “I think a shadowing or mentoring process is definitely something that they [report writers] should have. Because it’s one thing to have the textbook knowledge, and ... the ability to do the psychological testing and interviewing skills and all of that, but to actually understand the process and to know what to look for, that comes with actual experience.”<sup>77</sup>

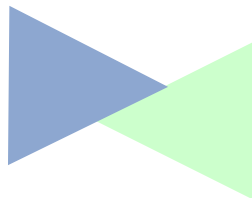
Several legal practitioners pointed out the need to increase evaluators’ understanding of the family law system, and how section 211 reports are used. For example, Agnes Huang said that assessors “should understand the family law context, dynamics, and family law. So it [the report] shouldn’t just be taken from a psychological perspective in terms of assessing people but understanding how family law works, because sometimes they come up with recommendations that just are not practical. They’re not trained to go through the best interest [of the child] factors... They should be more cognizant of some of that.”<sup>78</sup> To address these concerns, training for section 211 report writers could include a foundational course in family law.

## Collaboration, Mentorship, and Apprenticeship

Australian clinical psychologist Jennifer Neoh noted that in Australia, the Pacific Congress, which is an organization of family law professionals from various Pacific region jurisdictions has addressed the shortage of qualified assessors by providing “online training, events, things like that, to encourage people to see it as an appropriate career path, and with support and networking and training.”<sup>79</sup> She shared, “We’ve had a good success there getting more people doing the work, and more people with good qualifications to do the work so that the pressures of a supply-demand situation aren’t so pressing.”<sup>80</sup> New Zealand clinical psychologist Sarah Calvert noted the need for collaboration to implement an apprenticeship program: “If we were going to set up an apprenticeship scheme, we’d need among ourselves to agree on some robust structure for doing it that made it not too onerous ... and we’d probably need [the New Zealand Ministry of Justice] to do some work, making sure courts had a structure for the people who were coming in at that level.”<sup>81</sup>

It is perhaps an unfeasible challenge for an assessor to single-handedly undertake a section 211 report evaluation and ensure a fair and balanced outcome without some support and feedback from other experts. Australian clinical psychologist Robyn Goodwin noted, “I do think professionally it would help to have a centralized professional body or association where all family report writers get to know each other, connect, and talk about issues as a sort of hive brain.”<sup>82</sup>

Finally, collaboration with other professionals is indicated as well. Allan Wade stated: “You need to be connected to a community of people who are conversant and knowledgeable and practise in addressing interpersonal violence. What’s needed is a kind of a community development approach. The practice of having individual assessors or experts who are operating individually and in isolation is not a good practice. Wherever there is violence, there needs to be a collective response.”<sup>83</sup> One BC family lawyer also noted the need for knowledge and information sharing between lawyers and assessors, including “readily available information about standards for psychologists, and testing and methods being used by assessors in section 211 reports.”<sup>84</sup>



# Practice standards

Overall, the literature indicates general agreement about the necessity of practice standards for evaluators.<sup>85</sup> BC, however, has no mandatory uniform provisions for these matters (other than relatively brief requirements for all expert reports in the court rules) and therefore no clear standards for court oversight. Court decisions do provide some guidance. In *Dowell v Hamper*, for example, the court stated:

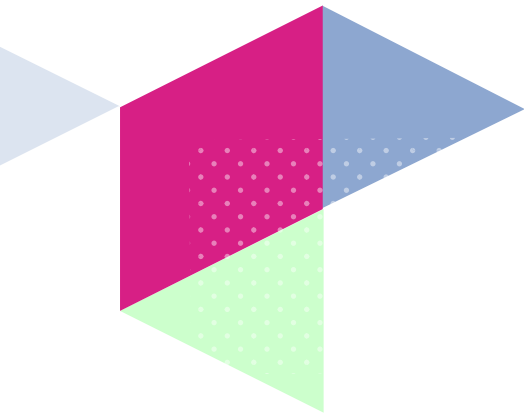
*The court rightly expects that, in addition to complying with the assessment/reporting standards prescribed by the [College of Psychologists of BC], any registered psychologist will also:*

- *read the background material provided by the court or counsel, including affidavits, prior assessments, medical or other expert reports respecting the parties or the children;*
- *be thoroughly conversant with current assessment standards and procedures, as well as up-to-date social science respecting parenting practices following separation and divorce that best promote and protect the child's long-term psychological and emotional well-being;*
- *produce a well-written, well-organized report with appropriate headings and subheadings supported by a detailed table of contents;*
- *in that report set out discrete, separate assessments for each assigned inquiry, i.e., the views of the child, the needs of the child in the context of parenting disruption arising from the family law dispute, and the ability/willingness of each parent to meet those needs; and*
- *make recommendations respecting the future parenting of the child supported by a detailed explanation why/how they promote/protect the best interests of the child, with reference to any appropriate current social science.<sup>86</sup>*

The BC *Supreme Court Family Rules* provide that the expert “has a duty to assist the court and is not to be an advocate for any party” and must certify in the report their awareness of and compliance with this duty.<sup>87</sup> The report must contain specified information about the expert, the instructions to and “nature of the opinion” sought from the expert, and the expert’s opinion and reasons for the opinion (including descriptions of factual assumptions and research that led to the opinion, and any document relied on).<sup>88</sup> In addition, the governing bodies of professionals preparing reports have some set practice standards.<sup>89</sup> But while these standards are important and laudable, there exist no readily available mechanisms to ensure adherence, and these standards are not routinely used by the courts, as part of their oversight and gatekeeping.<sup>90</sup> Further, standards vary among professions, which undermines consistency.<sup>91</sup>

Studies of the views of evaluators and legal professionals (judges and/or lawyers) about the importance of expert reports and the quality of the reports reveal marked differences between the overall highly positive views of evaluators about the quality of the reports and the more attenuated or reserved views of judges and especially of lawyers.<sup>92</sup> All groups agreed that the reports were very *important*; however, while legal professionals expressed positive views about reports in general, they were critical when asked to assess the quality of individual components of reports, and one study found that risk assessment in cases involving claims of family violence or sexual abuse were the most “problematic area.”<sup>93</sup> These findings indicate a troubling gap between the importance of the reports and their quality.<sup>94</sup>

A recent qualitative study—based on interviews with judges, lawyers, and evaluators—identified four key characteristics of high-quality reports.<sup>95</sup> These reports are thorough, transparent, provide a “path forward,” and assist the parties, their lawyers, and/or the court. *Thoroughness* related to investigation, analysis, observations, and explanations of family dynamics, testing (if used), and how all the different components of the report were linked to parenting capacity. *Transparency* related to explaining the evaluator’s methodology, reasoning, and opinion, as well as to considering alternate hypotheses and acknowledging limitations. A “*path forward*” related to addressing the referral questions, “considering possible outcomes and risks, providing clear and specific recommendations,” and helping to move the case forward in the proceedings.<sup>96</sup> These



A recent qualitative study identified four key characteristics of high-quality reports. These reports are thorough, transparent, provide a “path forward,” and assist the parties, their lawyers, and/or the court.



three characteristics—thoroughness, transparency, and a “path forward”—impacted the degree to which the report was of assistance.

The remainder of this section explores the topics of mitigating biases, psychological testing, and other gaps in practice standards which have emerged from our review.

## Mitigating Biases

As noted above regarding training, biases threaten the quality and integrity of reports, but they “are not easily altered.”<sup>97</sup> Training is important but insufficient if the evaluator does not use strategies to mitigate biases.<sup>98</sup> These strategies include using “a multi-method, semi-formal, structured process”; evaluating both “confirmatory and contradictory evidence” related to the evaluator’s hypotheses; considering not only data that support that evaluator’s conclusions but also data that does not support them; “develop[ing], maintain[ing], and test[ing] multiple hypotheses throughout the course of the evaluation”; considering both the risks and the benefits of various parenting plans; addressing stereotypes by collecting information about each individual party, to ensure that the evaluator differentiates actual information about the individual from potential stereotypes about the group that the individual is associated with; being vigilant about bias in information from collaterals (e.g., a health care or education provider may have their own biases about the parties and the children, based on ethnicity, gender, etc.); and acknowledging limitations.<sup>99</sup>

Further regarding bias, evaluators (as well as the court, counsel, and the parties) should guard against pre-appointment bias, which can arise, for example, when the prospective evaluator discusses the case with counsel (particularly with just one counsel).<sup>100</sup>

## Psychological Testing

One of the areas of contention in the literature is the use of psychological testing, which has been described as “almost as intense as the conflict between the parents we are tasked to assess.”<sup>101</sup> Some concerns about testing relate to indiscriminate use that unnecessarily increases the costs of reports.<sup>102</sup> Other key concerns relate to their utility and risks. Proponents stress their value for comprehensive assessments, while detractors emphasize deficiencies and risks, such as concerns about their validity and reliability, and improper use and interpretations.<sup>103</sup> Examples include failure to take into account linguistic and cultural influences on test results, overreliance on testing as a source of information, and the risk that administering tests during the particularly stressful time of separation and litigation may generate uncharacteristic results that do not accurately reflect the individual’s typical functioning.<sup>104</sup>

Similarly, there are significant limitations on the utility of psychological testing in parenting assessments in relation to survivors of trauma and violence. The standardized testing can penalize individuals who have experienced intimate partner violence; it can also misrepresent the after-effects of abuse as indicative of mental disorders. These findings and the court orders that flow from them can have devastating consequences for victims of abuse who are seeking parenting time in family court proceedings.<sup>105</sup> The “Use and Misuse of Psychological Tests” section of the *Section 211 Toolkit* published by Rise in March 2021 outlines further serious issues with psychological testing in parenting assessments. These issues include evaluators failing to indicate limitations on the use of tests, or to link the test questions directly to the issues at trial. Additionally, no psychological tests have been validated for predictive reliability for outcomes in child-related disputes.<sup>106</sup>

## Additional Measures

Several New Zealand studies identified further areas to address in the evaluation process, namely:

- Implementing routine safety and risk assessments.<sup>107</sup>
- Improving procedures for obtaining children’s views and giving them more weight.<sup>108</sup>
- Prior to beginning the evaluation, providing to the parties (and their counsel) a clear explanation of the evaluation process and procedures, including what testing (if any) will be used.<sup>109</sup>
- Improving quality control measures, such as having a review of the report by another professional and reducing the threshold for critique reports or allowing them as of right”.<sup>110</sup>
- Addressing the adverse emotional impact of going through the evaluation process, as illustrated by the suggestion to “make sure people are okay. The psychiatric and psychological report were very triggering.”<sup>111</sup>
- Giving the parties an opportunity to comment on inaccuracies in the reports.

While not strictly part of the evaluation, parents who have undergone an evaluation noted the lack of follow-up and accountability after the recommendations of the report are implemented.<sup>112</sup> While it would not serve parties and children well to be subject to ongoing monitoring and evaluations (and in an already underfunded and under-resourced system, it is unlikely that such “follow-ups” are feasible), the absence of follow-ups limits accountability and leaves the burden of returning to court on potentially vulnerable parties who may be traumatized by the court process and unlikely to seek assistance from the court.<sup>113</sup>

# What Our Respondents Said

## Introducing Standards

Overall, our respondents supported the introduction of practice standards requirements for report writers, both for the evaluation process and for the contents of the report, to promote consistency and quality, reduce disagreements about the reports, and help clients understand what to expect in the evaluation process. At the same time, some respondents pointed out the need to recognize differences and nuances among families.

## Invisible Injuries

Respondents noted the need for trauma-informed practices. As BC family lawyer Therin Rhaintre said, “It comes back to trauma-informed practice, which everybody in the world should be implementing in our daily lives. Having self-awareness about our own biases, all of those things are important in every aspect of life.”<sup>14</sup>

## Eurocentric Methodology and Lack of Diversity in Report Writers

A common thread in the feedback from lawyers and a health professional in BC was that the tools used to evaluate parties in the parenting assessment process were grounded in a white, colonial/settler background and approach, and the lack of diversity among assessors. For example, BC family lawyer Zara Suleman said:

*I don't think that dominant [psychological] tools deal with really understanding some of the complexities that come with different family formations or with people from different communities, different cultures, different racial backgrounds, different genders. There are a lot of standard tools that we know, whether it's in law or within psychological settings, that don't necessarily have a critical or systemic analysis – which is essential in order to understand some of these dynamics and also in order to respond to people with different lived experiences.*

*The tools have underpinnings of bias, because they were tested on, developed and trained on colonial and dominantly practised views of what psychological wellness and well-being are, based on Western concepts of development, child development, families, relationships, and understanding of individuals... A lot of psychology is based on individualization and the individual, versus in other communities where we might look at working collectively, holistically, and through intergenerational knowledge.<sup>15</sup>*

In 2018, the Canadian Psychological Association and the Psychology Foundation of Canada released a report responding to the Truth and Reconciliation Commission of Canada's report. Describing the situation as "dire," they stated, "We lack the tools, training, understanding of culture, and appropriate recommendations to consistently provide meaningful helpful psychological assessments to Indigenous Peoples."<sup>116</sup>

Given the perceived cultural homogeneity of evaluators and the latent biases in frequently applied standardized testing, it appears that the section 211 process is not helpful for many BC family court users. Concerns identified by Hannah Varto included that "It could be very easy to misinterpret stuff when it's designed by people who are not of the same culture or socio-economic status."<sup>117</sup>

## Psychological Testing

In addition to the concerns described above, some respondents commented that psychological testing was used for no specific reason and their relevance was unclear. One BC family lawyer noted that although tests were relevant in some reports, "I don't believe that's the reason that the psychological testing was done. I think it seems to be standard for psychologists preparing reports, regardless of whether mental illness has been or psychological issues have been raised."<sup>118</sup> Agnes Huang commented that standards were needed on when psychological testing should be conducted and how the assessor should then use the test results. She also commented that limiting or reducing the use of psychological testing could expand the pool of assessors to include professionals who cannot administer them but "they've been there on the ground lots of times in terms of what people go through."<sup>119</sup>

Further regarding psychological testing, Allan Wade said that reports should include "up-to-date valid research that shows why the tests they're intending to use are relevant to the assessment of violence..." He emphasized that assessors need to explain why the tests are being used and lawyers also need to question their applicability.

*They should also include limitations and cautions of the test ... for example, there is research showing that the MMPI, Minnesota Multiphasic Personality Inventory, is gender biased against women in that the threshold for determining that women suffer from mental illness is different and lower than the threshold for showing that men suffer, let's say, a mental disorder. And it does not distinguish between chronic pain and chronic violence. So you need to list that ... if you are being ethical. I would want lawyers empowered, trained to query that ... [e.g.,] 'Can you please tell me what are the five or six independent research articles that you have that you draw upon, in ensuring that the tests that you have used are relevant for the arena of interpersonal violence? Gender balanced and psychologically valid in cases of violence?' And if they can't answer the question, it should be thrown out of court<sup>120</sup>*

## Credibility Assessments and Fact-Finding by Assessors

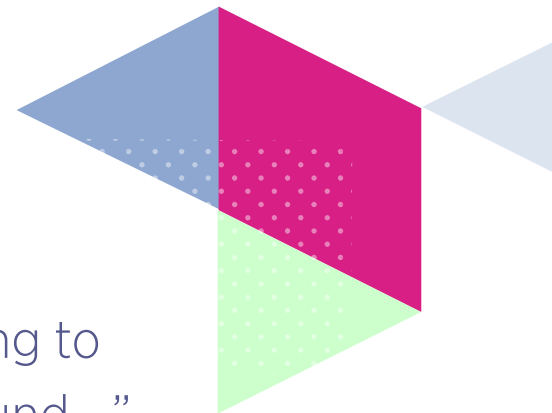
Unlike a trial in which the judge hears *viva voce* evidence directly from a variety of witnesses, the evaluator preparing a section 211 report is at liberty to decide which collateral witnesses to interview and might embed their own perception of the collateral witnesses' credibility within the report. In the words of Agnes Huang, "This is where I have trouble with section 211 report writers, who always say, 'I give very little weight to so-and-so because they're family or friend,' but that's really who's going to be seeing the day to day on the ground. And you can't assume just because they're family that they would make stuff up about whether or not a parent is parenting well."

Furthermore, our respondents noted that the constraints of the evaluation process for section 211 reports can result in unfair portrayals of the parties' strengths, shortcomings, and the dynamics between family members. As Frances Rosner explained, section 211 reports are "point-in-time assessments. I feel like it's not a natural setting for a parent. They may not be at their best; they may be feeling defensive, especially if it's something that's been imposed on them. They may come across as uncooperative, but in fact, they're just fearful because they didn't agree to it in the first place."<sup>121</sup> The constraints of the evaluation process — which, as noted above, may be compounded by preconceived credibility assessments — cast doubt on whether the reports accurately represent the day-to-day reality of the individuals under evaluation.

Suzette Narbonne observed that the evaluations are like a snapshot, which constrains children: "That's one of the failings in a section 211, I wouldn't say it's just a moment in time, but it's a bit of a photograph or snapshot, in the sense that it doesn't recognize that children evolve like any other human being. It doesn't allow a child to take a chance on offering to try a schedule because there is a risk to them if it doesn't go so well."<sup>122</sup>

The setting in which the evaluation takes place may further constrain the evaluation. For example, some of the women interviewed in focus groups noted that the assessors in their case opted to conduct the entire assessment virtually over Zoom, rather than meeting the families in their home

“ This is where I have trouble with section 211 report writers, who always say, 'I give very little weight to so-and-so because they're family or friend,' but that's really who's going to be seeing the day to day on the ground....”



environment, despite no public health restriction in effect that would have prevented in-person visits at the time. Ultimately, as explained by the Honourable Donna Martinson, “judges have a significant oversight role to play in family law cases as part of their responsibilities as equality guardians.”<sup>123</sup> This oversight role is critical when the report – whether directly or implicitly – engages in fact-finding or credibility assessments.

## Concerns in Cases Involving Family Violence

Concerns surrounding family violence were widespread in the focus groups and among respondents from various professional backgrounds. Similar to the empirical data reported by Rise in the “Vanishing of Violence” section of its *Section 211 Toolkit*, lawyers and clinical psychologists were of the view that the reports were inadequate in the context of abusive relationships. A BC family lawyer noted: “I have seen reports that do not appear to take [family violence] seriously or do not appear to properly assess whether family violence was present, [by writers] who do not seem to have the experience that I would like to see with particularly coercive controlling violence.”<sup>124</sup> Similarly, Australian clinical psychologist Robyn Goodwin observed:

*Some things that people would consider to be innocuous can be incredibly fear invoking and psychologically abusive for someone who’s been in a coercively controlling relationship for a long time. And they can come across as silly and stupid and, you know, lacking credibility, whereas they’re making legitimate allegations. It’s definitely the role of family report writers to help educate the court about family violence. I think there’s limited scope to effectively address family violence within the family court.*<sup>125</sup>

Further, Allan Wade noted that “the ways in which the victimized person responds to and resists the violence is virtually always completely absent [in section 211 reports]. So even if violence is acknowledged, the victim is typically portrayed as passive, or as accepting the violence, or as failing to leave. So there’s a whole set of biases that operate in these cases.”<sup>126</sup>

Respondents noted the need to meaningfully address family violence in the reports. Frances Rosner, for example, said:

*Well, at least consider and address it. And don’t gloss over the ongoing impact on the victim of having to deal with a co-parenting arrangement... I feel that we already have some protections in the [Family Law Act], but that they’re not well developed in [section 211 reports] involving family violence... There’s not enough attention paid to it... How do we avoid re-victimizing the victim, and especially in a co-parenting arrangement that’s being recommended where there’s equal decision-making and a duty to consult?*

Accordingly, she noted that her practice was to include a term in the order that counsel will provide the assessor an agreed-upon list of questions, and her questions to the expert include “the history of family violence, and ... what type of parenting plan could be created, given the history of family violence, that would be safe for both the child and the victim? What makes sense? Since you have to specifically put that to the expert ... they’re required to turn their mind to it.”<sup>127</sup> However, Suzette Narbonne pointed out that “a lot of these [evaluators] have a bias toward the maximum contact principle ... Rather than looking at it [the parenting arrangement] from a child-centric perspective — is this best for the child? — they almost appear to be looking at parents’ rights.”<sup>128</sup>

Another aspect of meaningfully addressing family violence was raised by Allan Wade, who said: “If you’re responding to these cases appropriately, you would be providing or trying to arrange for some form of meaningful service follow-up with people who are qualified to provide the service needed. So that means you need to be connected to a community of people who are conversant and knowledgeable and practise in addressing interpersonal violence.”<sup>129</sup> Further, Shelly Dean identified the need for avenues to address risks to children who disclose family violence:

*These reports have the potential to put children in tremendous danger. One process that can mitigate this risk is to meet with both parents together with their legal counsel, to go over the report in detail. However, in cases where a child has disclosed violence and fears a parent who has been violent discovering what they said (for example, may fear for their life or the life of their other parent), it may require releasing the report directly to the judge. It would be very helpful if there was a clear process that directed assessors how and when to do this, in the best interest of children.*<sup>130</sup>

This comment illustrates that children, as well as parties and collaterals, may require protective measures if they disclose family violence. It also suggests that in the absence of protective measures, children, parties, and collaterals may be reluctant to disclose family violence.

## Balanced Processes

Respondents identified the importance of balanced processes and their experiences of evaluations that lacked a balanced approach. For instance, one BC family lawyer provided these examples of unbalanced processes that they have encountered in evaluations:

*It’s difficult to view [a process] as impartial and unbiased, [which fails] to interview one party’s [collaterals], but all of the collateral witnesses listed by [the other] party. Or asking that the parties provide collaterals that are not family members, and then when one party provides only family members, interviewing those family members and using their statements. So [there’s] failure to hold both parties to the same standards. Failure to question one party’s statements, or a follow-up on one party; they’re now taking one party’s statements at face value and not questioning them and then ripping the other party’s statements to shreds.*<sup>131</sup>

## Disclosure of Sensitive Information

Some assessors seek parties' consent to speak with medical and mental health professionals, or to produce medical and counselling records. However, this sensitive information and any records will then be disclosed to the other party as well, in the context of acrimonious litigation, which raises concerns about privacy and misuse of highly sensitive information. As Therin Rhaintre noted:

*For the typical situation, where your client is one of the parents, a parent's privacy issues come into play... Sensitive health information is definitely very sensitive. I don't know what level of understanding mental health professionals have about client privacy issues. I know that mental health professionals have a lot of training about ... patient confidentiality. However, with the 211 reports, there's a lot of sharing of information ... and these people are in a contentious situation with the other party in litigation, where people ... are clawing at each other a lot of the time, trying to use anything they can to get the upper ground over the other person.*

*And when the assessor has complete free rein over confidentiality, what controls are there? That's fine if the assessor is a really responsible person who understands all of the issues and is very sensitive to that. But how do we know? How do we know one assessor to the next how they're going to handle that information?<sup>132</sup>*

## Contents of Reports

Respondents pointed out that opinions should be limited to the questions asked of the assessors, and that reports should be more child-centric. Suzette Narbonne, for example, commented:

*I would love to see standards that required them [assessors] to stay in their lane. So if you've been asked to opine on this, then opine on this only. The report should lay out their opinion on the parent, you know, the diverse capacities of the parents to meet the needs of the children. I think the reports should spend a little more time on what the children's needs actually are as individuals, not as a collective. Children are all unique...*

*I don't think they should tell a judge, "So this is the schedule you should do." They could talk more generally about things that might support the child in terms of scheduling, like, for example, lots of exchanges, because the child is young, and the parents do well. Few exchanges, because it's hard for the child. But simply saying "This is the schedule that the judge should order" really isn't their job... So that's something that could be different. It would be lovely to see standards for these, such as who are they expected to speak with? What kind of collaterals are they expected to use? Because it can be quite a free-for-all.<sup>133</sup>*



A further concern was the utility of the opinions provided. Agnes Huang noted that in assessors' reports, "sometimes they come up with recommendations that just are not practical."<sup>134</sup>

## Review of Reports

Allan Wade highlighted the importance of having another professional review the report as standard practice, through "a review process internally to ensure that the report meets standards." He noted the advantages of having a specialized family assessment team, employed by the province, to ensure that "when a staff member would do an assessment, that their assessment would be evaluated by their manager. So there's more than one set of eyes." He commented that this was standard practice for therapists who deal with challenging cases:

*I think [reports] should be reviewed by peers. Absolutely, they should. I mean, these are very complex matters. And all of us have blind spots. And we all have things that we can miss in, in most arenas... Let's say you're working as a family therapist. And you're dealing with difficult cases, including cases of violence, [then] you have built into your practice what's called clinical supervision. That is where you meet with colleagues who are qualified to provide supervision. And you talk about the challenges you're facing in your work, you talk about difficult cases, you talk about things that come up for you personally, in relation to particular types of cases.*

*Because some things that come up, they ring your bells, because you have personal experiences that relate to them. And so you need to have an opportunity to kind of ensure, with an independent senior person, that you are thinking these things through in the appropriate manner. That's a standard part of practice. In the family law arena, where we're dealing with the welfare of kids, right? No one should be in a position of producing a report that is not reviewed by a qualified colleague.<sup>135</sup>*

“ “ In the family law arena, where we're dealing with the welfare of kids, right? No one should be in a position of producing a report that is not reviewed by a qualified colleague.”





# Financial Barriers

The cost of reports raises concerns that parties who are not affluent would either have no access to assessments or would have to exhaust savings (theirs or their family members') to pay for them.<sup>136</sup> Publicly funded evaluations are one solution, provided, as one author noted, that they are not inferior in quality to privately paid assessments.<sup>137</sup>

These impediments to access to justice were summarized in a 2017 BC Supreme Court case:

*The simple fact of the matter is that, as in the present case, many family law cases involve self-represented litigants with very limited financial resources. Such parties not only have no insight into the technical requirements respecting admissibility of evidence but also have no ability to retain experts to present properly admissible opinion evidence to the court.*<sup>138</sup>

On a broader level, related to the gaps in the research literature discussed above, one of the articles in our literature review stated that it is “irresponsible to ask needy and desperate families to invest their resources, trust, and hope in a process that lacks any demonstrable scientific merit.”<sup>139</sup>

## What Our Respondents Said

Many of our respondents raised the cost of section 211 reports as one of the most significant problems in this area. Some respondents commented that reports are ordered when parties cannot afford to pay for them, while others said, for example, that “judges are pretty sympathetic to the cost argument, because it’s just not feasible for most families to get that kind of report.”<sup>140</sup> Importantly, respondents pointed out that the cost of reports is disproportionate to their utility, such as when the results are highly predictable or when “the results and recommendations are not realistic outcomes at trial.”<sup>141</sup>

Further, parties who live outside of main urban areas may face increased costs for reports. As Therin Rhaintre commented:

*I practise in the interior. Yeah, so access to people in person is, like, none. I don't know of any [section 211 assessors] in the southern interior that would be able to, that we would have ready access to without them having to travel here. So then, are they willing to do interviews by Zoom? Or do they feel like they need to be there in person, and that's going to change the cost drastically. Sometimes the clinical counsellors will be just as expensive as a psychologist, depending on what they're proposing to do.*

Some respondents noted that there should be more public funding of reports, and others suggested that their cost should be standardized.<sup>142</sup>

In describing the financial impact of a privately paid section 211 report, Katherine B. Lawrence commented: “I think they used to be, like, five grand a pop. And now they're, like, 20 to 40. They are completely out of reach for the average Canadian. They shouldn't be costing this much money. It's just too expensive. It's becoming [the] biggest obstacle to getting these reports, which I do think are beneficial.”<sup>143</sup> Hannah Varto explained how family violence can lead to precarious financial circumstances, while facing housing instability and court proceedings: “In most cases, when violence occurs, women leave the home with their children. And they often end up in a shelter. It's not the men who have to leave in many circumstances. I had a patient today, where she's living in a shelter with her child and he gets to stay in the home. And she's got to navigate finding housing for herself and finances and court systems.”<sup>144</sup>

Family lawyers and women with lived experience of intimate partner violence acknowledged the challenging dynamics of financial imbalance in the context of protracted litigation. Katherine B. Lawrence commented that any time “there's an expensive report that needs to be done, and financial violence is at issue, this can be just another way that the other party is using litigation to try to gain leverage ... and can lead to more traumatization for these victims.”<sup>145</sup>

Another significant financial issue, identified by many of our respondents, is the cost of challenging the report, which generally requires cross-examination of the assessor at trial (The hurdles involved in challenging section 211 reports are described in more detail below, in the section on “Judicial Gatekeeping and Court Oversight.”) For example, Katherine B. Lawrence said that “once you get a section 211 report, you've got an uphill battle if you're going to try to go against those recommendations. You're either gonna have to get another report that's very expensive or ... somehow challenge it in court, because that's the only place to challenge the recommendation. So you're asking your client to throw down a lot more money to deal with it.”

Another BC family lawyer said that “the only real opportunity to address any issue in a report is through cross-examination, which is extremely expensive and is generally only going to happen at trial, which is even more expensive. There should definitely be a process for addressing that and other issues, for example, issues with testing or methods that are not generally accepted or outdated—there needs to be some process for that.” Moreover, the same lawyer identified “the evidentiary issues. It is an issue that reports are accepted essentially at face value ... if the party who wants to challenge it [the report] can't afford to call the assessor at trial.”<sup>146</sup> On this note, the lawyer explained:

*Most section 211 reporters [are] requiring a significant trial retainer that needs to be provided well ahead of time, and often only a portion of the retainer is returned if the matter doesn't go to trial. It's a significant barrier, as this is generally the only way to address any issues with the report or the assessor, including inaccuracies in the report or allegations of bias. This results in reports being accepted as evidence if a party cannot afford to pay the expert's trial retainer. There are also section 211 reporters who require parties to sign agreements that they will be represented by counsel at trial and inform parties that they will not agree to attend trial to be cross-examined by self-represented parties.*<sup>147</sup>

While the cost of privately paid evaluations is clearly a significant burden to many parties, underfunding restricts the availability of publicly funded reports.<sup>148</sup> Furthermore, the qualifications of publicly funded evaluators (BC's family justice counsellors) may limit their ability to address some issues, which in turn limits the ability of parties who cannot afford to retain an evaluator to present evidence to the court.<sup>149</sup> Although publicly-funded reports are helpful for low-income litigants, the wait times can render them effectively inaccessible. As one multicultural outreach worker who supports newcomer women with family court matters described during a focus group, "The family justice counsellors can do it, but it's time-consuming. Sometimes six months, sometimes over a year. They need the report because there is no negotiating between the opposing party, right? The child grows up every day. The situation, the environment might change."<sup>150</sup>

Another financial barrier is the inability to afford legal representation and its benefits, including that lawyers have often had prior experience working with the assessors or can obtain information and feedback about them from colleagues. As Katherine B. Lawrence said, "I'm going to be looking at court cases to see whether the presider found them to be credible or accepted their recommendations. I work in a big family law firm. So often if I'm, if we're canvassing good assessors, I'll ask ..., 'Has anyone heard about so-and-so, were they good? What was your experience with them? Do you have an example of their work?' And I'll literally look at previous reports to see what it looks like."<sup>151</sup> Similarly, one family lawyer said:

*Looking at psychologists alone that actually do these reports, the numbers are very, very few. There's like three or four that ever have the time to even do it and that there isn't like some ridiculous waiting list. So, based on those few, I only choose one or two ... that I have seen the reports, and I'm like, now, out of those two, which one? It depends if I'm representing Mum or Dad, depends on whether there are addiction issues, whether there's family violence, and so I tailor it that way. My decision based on that, sometimes it's cost related. There's quite a bit of discrepancy in what each of them charge for these reports, even though they're both psychologists.*<sup>152</sup>

Finally, while many respondents commented on the problem of having just a small group of assessors, Katherine B. Lawrence aptly referred to a "Catch-22," in which, due to the high cost of the report, judges and lawyers are hesitant to appoint "newcomers" whose work they are unfamiliar with, and so the pool of assessors remains very limited.<sup>153</sup>

# Judicial Gatekeeping and Court Oversight

**T**raining, experience, and practice standards requirements are only one side of the equation; children and families are impacted by *actual* practices, which in turn depend on judicial gatekeeping and oversight to ensure that requirements are adhered to, and on the ability of judges, parties, and lawyers to identify and address problematic assessment practices.

## Selection of the Evaluator

Fair and efficient processes for selecting the assessor operate as safeguards by promoting confidence in the evaluator and minimizing opportunities for adversarial, partisan selection based on a party's desire to appoint an expert whom they believe to be aligned with their positions in the litigation.<sup>154</sup> In BC, family justice counsellors are assigned by court services. In contrast, assessors who are in private practice can be selected by the parties by agreement or will otherwise be selected by the court. BC has no formal rules about how to select private-practice assessors, and because contested applications on this issue take place in chambers, there is no well-developed body of reported case law on the criteria used by the court. Overall, having a contested application to select the assessor may place the parties on unequal footing (e.g., when one of them is self-represented due to financial constraints) and undermine confidence one party's confidence in the neutrality of the evaluator. The challenges of selecting an assessor are compounded by the relatively small number of professionals who prepare section 211 reports in BC.

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## Admissibility and Weight

Admissibility and weight are key safeguards, as they regulate whether a section 211 report will become part of the evidence, and the extent to which the court will accept and rely on any of the findings, conclusions, and recommendations of the report. The general practice in Canadian jurisdictions is to admit the report into evidence without a hearing (a *voir dire*) on its admissibility, though in some jurisdictions it may be common for the court to have a process for qualifying the assessor as an expert.<sup>155</sup>

Expert evidence is subject to the criteria in the Supreme Court of Canada decision in *R v Mohan* and the two-step process outlined in the Supreme Court of Canada decision of *White Burgess*.<sup>156</sup> First, the court should consider the four factors of “relevance, necessity, the absence of an exclusionary rule, and a properly qualified expert,”<sup>157</sup> and when the opinion is based on “novel or contested science or science used for a novel purpose,” consider the “reliability of the underlying science for that purpose.”<sup>158</sup> Second, the court should “balance the potential risk and benefits of admitting the evidence to see whether potential benefits justify the risk.”<sup>159</sup> Issues of “independence and impartiality” can arise at both steps and go to admissibility as well as to weight.<sup>160</sup> Furthermore, the gatekeeping function of the court operates whether or not the opposing party objects to the report being admitted, and the more the expert opinion approaches the “ultimate issue” in the proceedings, the more carefully should the courts assess its admissibility.<sup>161</sup>

BC courts apply the *White Burgess* test when a party challenges the admissibility of a report, but generally, section 211 reports seem to be treated as presumptively admissible, even though “in child-related proceedings, it is common for professionals, especially court-appointed experts, to express their opinion about the ultimate issue: the best interests of the child.”<sup>162</sup> Of further note, in contrast to other expert reports, BC courts have held that the facts in a section 211 report are *prima facie* evidence of their truth unless a party contests them.<sup>163</sup> As noted by the Honourable Donna Martinson, “Parenting assessors in BC, unlike other experts, have been given a fact-finding role by judges (in case law, though authority is not found in the *FLA*) which goes so far as to say that facts found by the assessor are *prima facie* correct.”<sup>164</sup>

Of course, admitting the report into evidence is not the end of the matter; the court clearly has the discretion to accept or reject any or all of the report’s findings, conclusions, or recommendations, and BC’s courts certainly exercise this discretion when they deem that appropriate. Moreover, the courts are not bound by anything in the report and must not delegate their decision-making authority to the assessor.<sup>165</sup> However, statements from the courts, such as the often-cited statement that the assessor is “the eyes and ears of the court,” indicate that unless successfully challenged, reports are given considerable weight.<sup>166</sup>

## Challenging the Report in Court

Reports are not prepared in a vacuum; rather, they are prepared within the legal realm, and therefore, “Scrutiny and testing of the evaluator’s work must be considered an inherent part of the work conducted by evaluators.”<sup>167</sup> Given the importance of parenting assessments, and the fact that problematic assessments do occur, the availability and efficacy of avenues to challenge the reports play a major role in safeguarding parties and children.<sup>168</sup> The need for these avenues is underscored by the fact that judges are not necessarily trained in social science, and they may not understand “what constitutes a reliable methodology for forensic reports.”<sup>169</sup> However, the avenues available in BC to challenge section 211 reports present serious obstacles for court users.<sup>170</sup> This section reviews cross examination, which is the main avenue for challenging reports, and seeking to admit additional expert evidence.

### Cross-Examination

The opportunity to cross-examine the evaluator has been described as “critical.”<sup>171</sup> Indeed, in BC, “properly prepared and informed” cross-examination of the evaluator has been described as “the usual and preferred process for testing the opinions and conclusions expressed in the report.”<sup>172</sup> However, in Provincial Court, a party must bring an application to cross-examine the evaluator, and if the trial judge ultimately determines that it was unnecessary to call that person as a witness, they may order that party to pay the costs associated with the evaluator’s attendance.<sup>173</sup> At the BC Supreme Court, no application is required to call the assessor for cross-examination.

At either court, cross-examination still presents serious challenges. First, unless the evaluator is publicly funded (such as a family justice counsellor in BC), the party calling the evaluator for cross-examination has to pay the evaluator’s fees, which may run to thousands of dollars in BC.<sup>174</sup> Litigation and trials are already expensive and beyond the means of many parties, and cross-examination of the expert lengthens the trial and requires additional preparation by counsel, both of which increase legal fees.

Second, properly prepared and informed cross-examination of an expert witness is challenging for lawyers, let alone self-represented litigants.<sup>175</sup> Ideally, the party seeking to cross-examine the evaluator would retain another expert to review the report and assist in preparation, but this entails additional cost. Notably, when psychological testing is conducted as part of the evaluation, the evaluator may not release the raw data of the testing except to another professional who is trained in administering the applicable tests, so parties *and the court* are unable to fully assess the findings and conclusions unless a party retains and pays another expert.<sup>176</sup> Above all, relying on cross-examination as a substitute for robust safeguards and regulation of section 211 reports is a misguided workaround, which results in a misapplication of the rules of evidence and does not adequately protect children and families who are the subjects of the reports.

## Calling Additional Expert Evidence

As an addition to cross-examination (not instead of it), a party may seek to introduce a report by an expert retained by the party to review and comment on the section 211 report (these reports are commonly referred to as “critique reports;” we use the term “Review Report” to align with the CPBC Code, section 11.36). The obstacles to using Review Reports are costs (which in BC can run up to thousands of dollars), admissibility, and significant restrictions on the admissibility of Review Reports.

BC’s case law has established a very high threshold for the admissibility of a Review Report, even though neither the *FLA* nor the court rules impose such a threshold, and even though the College of Psychologists of BC permits its registrants to prepare Review Reports, within limitations.<sup>177</sup> The high threshold arises from concerns about costs and delays, exacerbating adversity in the litigation, concerns about the neutrality of the expert writing the Review Report (since that expert was retained by one party), and concerns that the Review Report will not assist the court because its author has not conducted independent investigations.<sup>178</sup> Furthermore, in addition to cross-examination as the usual way to challenge a section 211 report, the court has stated that there are adequate alternatives to Review Reports, such as “securing a second s. 211 report if appropriate, commissioning a competing psychological or parenting assessment, and the presentation through experts of peer-reviewed, authoritative social science on the parenting issues in dispute.”<sup>179</sup> Lastly, there is no standard procedure for preparing section 211 reports, leaving evaluators free to use their professional judgment and experience in their assessments.<sup>180</sup> Accordingly, the approach to Review Reports in BC is that their admission “will rarely be necessary or appropriate”.<sup>181</sup>

While these concerns are important and serious, and we do not suggest that Review Reports ought to be a standard feature of family law litigation, our findings indicate that these concerns are also problematic as a basis for heavily restricting the admissibility of Review Reports.<sup>182</sup> First, cross-examination and the alternatives listed by the court are in and of themselves costly, adversarial, and time-consuming. Second, family law litigation is indeed adversarial (in BC and other common law jurisdictions); there may be strong arguments for transforming it into a different system altogether, but within the confines of the existing system, it is unclear whether heavily restricting Review Reports to prevent additional adversity is consistent with the goals of procedural fairness and just outcomes, given that in the absence of alternative expert evidence, “courts are left to judge the quality of a report that essentially falls outside their content specialty. Although the quality of the process can be assessed using the [rules] as a guide, the specialist content cannot.”<sup>183</sup>

Most fundamentally, the arguments against Review Reports demonstrate a remarkable level of deference for section 211 reports compared to other types of expert evidence (which is at odds with the cautious views about expert evidence in *Mohan* and *White Burgess*). These arguments also implicitly presume that section 211 reports authors are inherently neutral (whereas Review Report authors are “partisan”), and that problematic section 211 reports are scarce. However,



there is no empirical foundation for sweeping assumptions.<sup>184</sup> Indeed, as summarized by Nicholas Bala and colleagues, “[g]iven the wide variability in the education and experiences of those who undertake assessments, and the limited scope of professional regulation of this type of work, it is important to have external review of the work of assessors,”<sup>185</sup> rather than admitting it only in rare situations, provided that the review or critique meets admissibility criteria.<sup>186</sup> Peer review may in fact be “a routine part of good practice.”<sup>187</sup>

## What Our Respondents Said

Many of our respondents emphasized the need for judicial gatekeeping, at various stages of the section 211 report process, from whether or not to order the report in the first place, to the selection of the assessor in each case, and to admitting the report into evidence. Relatedly, respondents raised the need for relevant judicial training. In addition, respondents repeatedly commented that there need to be other, less cumbersome and expensive ways to challenge reports, since cross-examination is too expensive and essentially means that the parties have to wait for and incur the significant costs of a trial.

Regarding whether or not to order a report, family lawyer Frances Rosner said, “I think there have to be really compelling reasons as to why an expert report is needed, and it shouldn’t be done just as a matter of course.”<sup>188</sup> Suzette Narbonne, of the Society for Children and Youth, noted: “Where I see them being helpful is in providing a deeper dive into the parents’ strengths and weaknesses. Where I see them less helpful often is in actually providing the child’s views. And where I see them failing is in them making really significant recommendations on the basis of very short periods of time with a child.”<sup>189</sup> Another BC family lawyer stated: “There’s too much reliance on them by the court... Why are we ourselves [lawyers, judges] not coming up with the solutions? Why are we deferring to the mental health professional to write a 20-to 30-page report when we can actually try to figure it out? It’s taken me a decade-plus of practice to come to that, [so] I appreciate [that] as [a] young counsel, it may be difficult due to just lack of experience to have that realization.”<sup>190</sup> Additionally, two of our respondents commented that in some cases, family counselling may be more appropriate than ordering a report.

Regarding the selection of the assessor and delineating the questions for the assessor, Suzette Narbonne stated, “If you’re going to order an expert, you should know what the expert has been retained to provide an opinion on.” Further, she said, “What the opinion is being sought on should be defined, so that the report doesn’t go beyond that.”<sup>191</sup> Another lawyer shared:

*There often tends to be one counsel, who is really doing that to ensure that the person being hired is the appropriate person for that particular file. Whereas the other counsel may just be looking for the assessor who’s going to be able to bang a report out as quickly as possible.... My practice is to try and find the assessor*

*that I think is most appropriate.... Family violence, children with disabilities, that's another example that I definitely try [to] find a [writer] I know has experience in that area.*<sup>192</sup>

Regarding admissibility, Frances Rosner commented, "I'm seeing reports get in that shouldn't be getting in based on that person's qualifications... I don't think it's being adequately weighed against the potential harm of just letting it happen."<sup>193</sup> Suzette Narbonne stated, "I'd like to see that counsel for the parties or the parties can first review it [the report] and decide whether or not they want specific portions excised from it, before it goes to the judge, just like you would do in other legal cases... I think that if there's a disagreement about it, the judge should serve a true gatekeeper function, not just say that it all goes to weight, but an actual gatekeeper function." She added:

If you're doing a non-evaluative views of the child, that should go in, there should be no test for the admissibility of the child's views. It's legislated under the *Divorce Act*, and under the *Family Law Act*. If you're now talking about someone's opinion, as to the weight to be given to those views... I think a court should serve its gatekeeper function to determine whether or not now that we have this report, it's going to be admitted, and if so what weight is going to be given to it? Because now we're talking about something different. Now we're talking about something that potentially not just minimizes the child's views, but negates the child's views.

So we have a structure that requires a child's views to be heard. And under the UN Convention on the Rights of the Child ... they should be taken seriously. And then we have someone who's hired to write a report and who potentially says, "Don't give any weight to those views. And don't take that child seriously." So what have we done? We've taken away that child's right. And if you have a safeguard like a lawyer for the child, we can address that. But if we don't ... you need to think hard about are [we] actually complying with that child's rights?<sup>194</sup>



I go over ... the highlights and ... the recommendations and how I came to [them]. And then I take time to answer any questions that they might have. I have to say that in all cases, I've yet to have one where it doesn't end in a consent order."



# Further Insights

In this section, we highlight three additional topics that have emerged from our interviews: creating specific advisory boards regarding evaluators' training and practice standards; having a meeting between the parties and the evaluator after the report is completed; and broader issues in the family justice system.

## Consultation and Advisory Boards

Some of our respondents recommended creating an advisory board or another body to provide the perspectives of vulnerable populations that are impacted by section 211 reports. Shelly Dean, for example, said: ““Having an advisory board of young people would be really important and helpful,” as “what happens to them in these processes is really significant.” She added that as assessors, “we better be seeking supervision from an Indigenous board.”<sup>195</sup>

Similarly, Zara Suleman recommended: “In terms of the governing body, to actually have a community advisory of people who are not just from the psychological profession, it could be people who work specifically with survivors of violence who are on this committee, to oversee and make sure that there is a watchdog for the kind of education, training, and impact of these reports. Because once a psychologist is ordered to do this report, there is no oversight until the report lands as an expert report at court.”<sup>196</sup>

## Post-report Meeting

One method of promoting early resolution of parenting disputes that was endorsed by key informants was a meeting between the parties and the evaluator after the report has been completed. Shelly Dean described her own process as follows:

*After I finish the report, I call a meeting of all parties. So parents, even though things are very tense usually between them, their lawyers, and whoever else they want to bring for support. I send the report out to all parties ... a couple hours*

*ahead of that meeting ... so that they have time to read it and then come to the meeting. And I go over ... the highlights and ... the recommendations and how I came to [them]. And then I take time to answer any questions that they might have. I have to say that in all cases, I've yet to have one where it doesn't end in a consent order.*<sup>197</sup>

Although this approach may not be the norm yet in British Columbia, Frankie Woods, an Ontario lawyer, explained that in Ontario: “Before [assessors] actually release the report, they'll have a meeting with the parties, and if there's counsel, counsel will be part of that. That's called the disclosure meeting. It's an opportunity if the assessors, first of all, got something completely wrong, or completely misunderstood something, counsel have an opportunity to speak with them immediately on the spot and say, 'I think you've misread that,' or 'You got the date wrong,' or something like that. And sometimes the disclosure meeting itself facilitates a resolution.”<sup>198</sup>

## Rethinking the Family Justice System and Its Responses

BC family lawyer Shauna Tucker noted: “I think we need a family court system... If the system that was holding these parents and children was designed for them, like from the ground up, then I think we'd actually need fewer of the reports than we require... It would be more facilitative and being done by people who actually got it.”<sup>199</sup> Allan Wade commented:

*I do think there is a place for assessments... I just think it has to be structured very differently, managed collectively very differently than is currently the case. If we want to have innovation in this arena that truly benefits kids, we need to have a group of people working together with that goal... If our goal is the well-being of kids, we need to have a collective response among professionals who have that goal, that orientation ... and structure that so that there is some accountability within that system.*<sup>200</sup>

Finally, particularly when there are issues of family violence and intense conflict, it is essential that early intervention is provided in resolving parenting arrangements, and waiting over a year for a report is not a workable solution. Allan Wade noted that “there's lots of room for the entire justice system and in the family law arena to be much more decisive and safety oriented much earlier in the development of these cases. If they responded more decisively upfront by requiring the respective parents to engage in a meaningful process of assessment right up front more quickly, they could resolve many of these cases more effectively, more quickly.”<sup>201</sup>



# Recommendations

**B**ased on our interviews, literature review, and review of legislation and case law, here we make recommendations regarding each of the themes identified in this report. Alongside the recommendations, we include examples of legislation from other jurisdictions that have sought to address similar concerns. We do not necessarily endorse the *entire* legislative framework of any specific jurisdiction but point out provisions from these jurisdictions to illustrate potential options. We emphasize that our recommendations are interrelated and complementary, so ideally, they would form part of a coherent framework of requirements and oversight.

## Theme I: Assessor Training and Experience

We recommend mandatory, evaluation-specific training and experience requirements that would apply to all evaluators, of any professional designation. We recommend both foundational/initial training and ongoing (annual) training, and that evaluators would need to show completion and currency of training requirements in order to be appointed. We further recommend that training would be approved by a single body (such as the Attorney General). The training curriculum should include (but not be limited to) the topics identified under the “Assessor training and experience” theme discussed above, such as the following:

- All aspects and forms of family violence, including coercive controlling violence, the impact of IPV on children and parenting, and appropriate, evidence-based services for survivors and perpetrators of family violence.
- Child development and capacity, and skills for interviewing children.

Our recommendations are interrelated and complementary, so ideally, they would form part of a coherent framework of requirements and oversight.

- Fundamentals/foundations of family law.
- Participation of Indigenous people as educators to provide insight into cultural systems that intersect with family law and parenting issues.

In addition to standardized mandatory training, we recommend exploring possibilities for new evaluators to shadow and co-work with more experienced and qualified evaluators before undertaking evaluations on their own, and for ongoing mentorship and peer review. We further recommend that evaluators meet work experience requirements that are relevant to evaluations, including working with children and adults impacted by family violence and intimate partner violence.<sup>202</sup>

We recommend judicial oversight to ensure that prospective evaluators meet the training and experience requirements. In this regard, we recommend exploring the possibility of creating a publicly available list of evaluators who have the required training and experience (including completion of annual training requirements). This list could be created and kept current by the court or the Attorney General.

As examples in other jurisdictions, we point out the extensive—initial and ongoing—training requirements of the California Rules of Court.<sup>203</sup> New Zealand’s Family Court Practice Note for Specialist Report Writers and Ohio’s Supreme Court Rules also set requirements for experience, initial and ongoing training, and court oversight mechanisms to ensure that proposed assessors fulfill these requirements.<sup>204</sup> These requirements apply to all assessors, of any professional designation, and whether they are in private practice or government employees or contractors, which promotes consistency and accountability.<sup>205</sup>

Alongside training for evaluators, we also recommend enhancing training for judges. As Therin Rhaintre noted, “If we are going to have these family matters decided in a courtroom, at least the judge should [have] very specific training and qualifications. The selection process for who serves as a judge in a family law court should be very specific in that way, so that judges can understand mental health evidence.”<sup>206</sup> Zara Suleman stated: “You are not going to be able to challenge or critique a report if you do not even know what should or should not be in the report, or what kind of analysis should be in the report. So I think judges need to be trained specifically about what section 211 reports are and how they’re done, but also the critique to section 211 reports.”<sup>207</sup> Regarding judicial and lawyer training, Allan Wade further observed that judges and lawyers lack training in social science, which is a handicap when dealing with reports.

*Lawyers generally have little or no training in understanding interpersonal violence. And they have no training in understanding social science.... The lawyers are not equipped to do any critical analysis of expert reports, particularly those that use psychological products like psychological testing, because lawyers and judges have no training and understanding of what those tests do and do not mean. And so what that means is that lawyers are vulnerable to misinformation.*<sup>208</sup>

## Theme II: Practice Standards

Our literature review and interviews revealed a general consensus in favour of practice standards, with their potential to enhance the quality and consistency of reports and help clients to understand what to expect during the evaluation. Some of the jurisdictions outside of BC that we have considered provide a useful starting point for developing a set of standards to guide section 211 reports.

Screening for family violence is a key concern that has been recognized by all those who work in the family law arena. On this topic, the California Rules of Court require assessors to undertake a fulsome analysis of family violence and its impact, ranging from risk assessment and the safety of children and parties to the parenting capacity of each parent.

We recommend the implementation of rules that provide for the following:

- Mandatory screening for family violence, which requires evaluators to meaningfully address any history of violence, consider what parenting plan would best ensure safety going forward, and arrange for follow-up with mental health professionals for clients who have experienced family violence
- Restrictions on the evaluator from making broad recommendations that exceed their area of expertise
- Effective strategies for mitigating and guarding against biases
- Require evaluators to include any information and research that does not support their findings, conclusions, and recommendations and to acknowledge any limitations
- Guarding against disclosure of sensitive information and balance the potential utility of disclosure against the potential harm (e.g., avoid requiring parties to sign sweeping consents for disclosure of medical records, and consider the potential harm of disclosing sensitive records to an opposing party)

Regarding testing, we recommend that assessors who implement psychological testing be required to provide information on the following:

- Population that the test was standardized on;
- Limitations that arise from trauma, domestic violence, Indigeneity
- Purpose of using the test and how it relates to the issues under consideration
- Statement that the test does not have predictive ability for litigation

Additionally, we recommend that standards be implemented as to when psychological testing is appropriate or inappropriate, and how test results could be used. Under Ontario's *Family Law Rules*, evaluators who use tests have to include "an explanation of the scientific principles underlying the test and of the meaning of the test results" as well as "a description of any substantial influence a person's gender, socio-economic status, culture or race had or may have had on the test results or on the expert's assessment of the test results."<sup>209</sup> These provisions caution, at least implicitly, against rote use of psychological testing and require evaluators to turn their minds to any limitations and biases of tests, but doing so requires training and remaining up to date on research.

Finally, we recommend consideration of two additional issues:

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

## Theme III: Financial Barriers

As noted above, our respondents identified the cost of reports as a major problem. One suggestion to address this issue was to standardize the fees for the reports, while another was to have all reports provided by salaried government employees, at no cost to the parties. We identified various approaches taken in different jurisdictions to address the affordability of reports.<sup>210</sup>

In Alberta, paragraph 9 of Practice Note 8 (PN8) provides that the court will only order a report if the parties are able to pay its costs, or if the applicant can pay for the report in the first instance, subject to seeking contribution from the other party after the report is concluded.<sup>211</sup>



One suggestion to address cost was to standardize the fees for the reports, while another was to have all reports provided by salaried government employees, at no cost to the parties.



In Ohio, Rule 91.05(F)(2) grants the parties the right to be heard by the court about the allocation of “reasonable fees and expenses” for the report, and the court must determine the ability of each party to pay for the report based on the “anticipated fees and expenses of the custody evaluator,” evidence about the “income, assets, liabilities, and financial circumstances” of the parties, and the “complexity of the issues.” Importantly, the rule provides that the evidence about the evaluator’s anticipated fees include “any fees or expenses related to potential testimony.” This is an important consideration given our respondents’ comments that the fees of cross-examination are a barrier to parties’ ability to challenge reports.

If the court in Ohio determines that the report should be ordered, it must make an order that allocates the “reasonable fees and expenses” for the evaluation between the parties, as well as for any other “entity or individual” to contribute to these costs. Further, based on “a change of financial circumstances, the conduct of any party, or other unforeseen circumstances,” Rule 91.05(4) permits the court to approve additional fees or expenses for the assessor, to reallocate the fees between the parties, or to require a party to reimburse the other for some or all of the fees of the evaluation.

New Zealand’s model provides two mechanisms to control costs. First, the court’s registrar negotiates the fees with the assessor and has to approve the hourly rate and an estimate of the time and costs, including any disbursements.<sup>212</sup> Any additional hours have to be approved in advance by the registrar, and if the matter proceeds to trial, the registrar has to approve the assessor’s fees for preparation and attendance.<sup>213</sup> Second, the fees for the report are paid by the *government* in the first instance; the court must then order the parties to reimburse the government for a prescribed portion of these fees (with each party paying one-half, subject to the discretion of the court). However, the court may exempt a party from reimbursement if the payment would cause “serious hardship to the party or to a dependent child of the party.”<sup>214</sup>

We recognize the benefits of publicly funded reports, which include easing the financial burden on economically vulnerable parties and increasing the potential for workplace-based ongoing supervision, training, and mentorship. That being said, if the current model of privately paid assessors continues, then we recommend addressing affordability expressly through legislation. At a minimum, we recommend that orders for reports be limited to those cases in which the party or parties is/are able to pay for them (similar to Alberta’s PN8), and that the legislation set out the evidence to be considered by the court when determining whether the parties can afford these costs. Building on Ohio’s Rule 91.05, we recommend consideration of each party’s income, assets, liabilities, and financial circumstances, and that the inquiry focus not only on the costs to prepare the report, but also the potential costs of challenging the report.

We stress that the goal of these recommendations is not to foment litigation, but rather to “level the playing field” for financially disadvantaged parties. Our interviews and literature review suggest that challenges to reports are often limited by financial resources rather than the merits of the challenge or the quality of the report.

## Theme IV: Judicial Gatekeeping and Court Oversight

Our recommendations under this theme cover five areas of process for section 211 reports, namely when to order a report, the appointment of an assessor, admissibility, the ability to challenge the report, and addressing safety concerns.

### When to Order a Report

We recommend enacting provisions that specify when the court may order a report and the factors that the court should consider in its decision. Such provisions would promote consistency and a robust inquiry into the need for a report.

An example of such legislation is New Zealand's *Care of Children Act* (section 133(6)), which authorizes the court to order a report only if satisfied that:

- (a) the information that the report will provide is essential for the proper disposition of the application; and
- (b) the report is the best source of the information, having regard to the quality, timeliness, and cost of other sources; and
- (c) the proceedings will not be unduly delayed by the time taken to prepare the psychological report;
- (d) any delay in the proceedings will not have an unacceptable effect on the child.<sup>215</sup>

Further, the court may not order a report for the sole or primary purpose of ascertaining the wishes of the child.<sup>216</sup>

Some of our respondents pointed out the time gap between the completion of the report and the date of trial, which reduces the utility of the report. In this regard, we note that Alberta's PN8 requires case management in all cases in which an evaluation is ordered.

### Selecting an Assessor

We recommend two measures for selecting an assessor. First, assuming that BC establishes mandatory training and experience requirements, we recommend that the court ascertain that the assessor has fulfilled all training (initial and ongoing) and experience requirements for assessors in general. Second, when a report is expected to address specific issues (e.g., a child who has special needs, addictions and substance misuse, etc.), we recommend that the court inquire into

the assessor’s training and experience in those issues, including their currency and breadth, and refrain from assuming that a degree, professional designation, or limited coursework is sufficient.

## Admissibility

While it is beyond the scope of this report to formulate a comprehensive test for the admissibility of section 211 reports, we make two general recommendations. First, we encourage a shift from the view of assessors as “the eyes and ears of the court” to a more qualified view. We recognize that section 211 reports can be valuable and helpful, but overall, assessors spend relatively limited time with the parties and the children, and they do not observe them over a period of time or in their everyday lives.<sup>217</sup>

Second, we recommend that if practice standards are enacted, then compliance with these standards would be required to admit the report into evidence. An example of such legislation is California’s Family Code, which provides that “A child custody evaluation, investigation, or assessment, and a resulting report, may be considered by the court only if it is conducted in accordance with the requirements set forth in the standards adopted by the Judicial Council pursuant to Section 3117.” As an exception, “nonsubstantive or inconsequential errors” do not preclude consideration of the report.<sup>218</sup>

## Ability to Challenge the Report

The ability to challenge a section 211 report is an important safeguard identified by many of our respondents. This safeguard is also among the most difficult to structure in a way that is timely, accessible (financially and to self-represented parties), and fair to everyone involved.

Although no jurisdiction we are aware of offers perfect remedies for challenging reports, we recommend that Review Reports be more readily admissible and that parties could obtain them without taking the risk of incurring the expense only to have the Review Report excluded at trial. In this regard, for example, Alberta’s PN8 provides for a “work file critique”:

*Either party may apply to the Case Management Justice to retain, at their sole expense, another Parenting Expert to conduct a work file critique. In granting this Order, the Case Management Justice must be satisfied that the work file critique can be completed within a reasonable time prior to the date for final determination of the parenting issues. The work file critique shall be a documentary review and shall not involve re-interviewing the parties, the child(ren), or any collateral witnesses.*<sup>219</sup>

Further, we recommend considering alternatives to cross-examination, at least with respect to disputed facts. We provided above the example of “disclosure meetings” in Ontario. Another example is Alberta’s PN8 that requires a case management conference within 60 days after the report is completed to canvas potential settlement and address procedural and evidentiary issues related to the report if the case proceeds to trial (such as admissibility of documents and whether collaterals will be called as witnesses).<sup>220</sup>

## Addressing Safety Concerns

Disclosing abuse to the assessor may put a child, a party, or a collateral at risk, which may discourage disclosure if no safety measures are in place. We therefore recommend consideration of mechanisms that allow assessors to bring safety concerns to the attention of the court before releasing the report. We do not make this recommendation lightly, as it entails procedural fairness issues; however, if abuse goes undisclosed due to safety concerns, or the disclosing person is harmed, then the very purpose of the report is defeated. New Zealand’s Family Court Practice Note for Specialist Report Writers provides that reports are first filed with the court, and the registrar will refer to the judge any concerns about releasing the report.<sup>221</sup> Further, the court may order that a party’s lawyer shall not release the report to their client, and when a party is self-represented, the court may decline to release the report to that party if “satisfied that the information in the report, if provided directly to that party, would place the child concerned or another person at risk of physical, sexual or psychological abuse.” In these circumstances, the court may appoint counsel to assist the court to explain the contents of the report to the self-represented party.<sup>222</sup>

## Additional Recommendations

**Robust research of outcomes:** We recommend funding and support for longitudinal studies that look into the outcomes for children and families over time and compare how children and families fared when section 211 report recommendations were implemented, not implemented, or when no report had been prepared. When recommendations were implemented, studies should explore whether any training, experience, or practices of the evaluator resulted in recommendations that led to positive or negative outcomes for children and families.<sup>223</sup>

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




# Conclusion

This research project examined potential safeguards for children and families who undergo assessments under section 211, taking into account the diverse population of children and families who participate in or are impacted by the family justice system. Our literature review and our interviews revealed the importance of assessors' training and experience, implementing practice standards, reducing financial barriers, and enhancing judicial gatekeeping and court oversight over the evaluations. We recommend that all of these issues be addressed consistently for all evaluations, regardless of court level or the professional designation of the evaluator.

Our literature review and examples of legislation from other jurisdictions indicate that problems with evaluations are not unique to BC, and that various other jurisdictions have grappled with how to effectively address similar problems. We do not recommend wholesale adoption of legislation from any specific jurisdiction, but we suggest that carefully examining existing options would facilitate introducing much-needed legislation on section 211 reports in BC. Further, while reports can be helpful and valuable, it is important to keep in mind their limitations and the gaps in research evidence about the outcomes for children and families. Although it is an ambitious endeavour to ensure that every section 211 report is flawlessly prepared and addresses all of the diverse concerns identified in this project, concrete steps for improvement are available and can prioritize the safety and wellbeing of children and families.

Although it is an ambitious endeavour to ensure that every section 211 report is flawlessly prepared and addresses all of the diverse concerns identified in this project, concrete steps for improvement are available and can prioritize the safety and wellbeing of children and families.



# Endnotes

- 1 SBC 2011, c 25 [FLA].
- 2 *Ibid*, s 211.
- 3 Nicholas Bala et al., “Addressing Controversies About Experts in Disputes Over Children” (2017) 30:1 Can J of Fam L 71 at 96 [Bala et al., “Addressing Controversies”]; James N Bow, “Review of Empirical Research on Child Custody Practice” (2006) 3:1 J of Child Custody 23 at 44 [Bow, “Review of Empirical Research”]. In the BC context, see *NI v JI*, 2020 BCSC 409 at para 35.
- 4 Non-expert professionals (e.g., lawyers) can prepare non-evaluative reports about the views of children under section 202 of the FLA, but these reports only report what the child said (i.e., they do not “assess” the views of the child) and are not addressed in this report.
- 5 Clinical counsellors typically have a master’s level education, whereas registered psychologists have a doctorate (BC Association of Clinical Counsellors, “RCC Eligibility,” [bcacc.ca](http://bcacc.ca); College of Psychologists of British Columbia, “Psychologist Registration Overview,” [collegeofpsychologists.bc.ca](http://collegeofpsychologists.bc.ca) [[web.archive.org/web/20240110190717](http://web.archive.org/web/20240110190717)]).
- 6 Provincial Court of British Columbia, “Affordable access to justice for separating families” (January 2017), [provincialcourt.bc.ca](http://provincialcourt.bc.ca).
- 7 Government of British Columbia, “Mediators”, [gov.bc.ca](http://gov.bc.ca) [[web.archive.org/web/20240110001707](http://web.archive.org/web/20240110001707)]. Family justice counsellors can also conduct “needs assessments”, provide free mediation services (on designated issues), and provide information about family law and the family justice system (see FLA, s 10(2); Provincial Court Family Rules, BC Reg 120/2020, rr 16 and 93 [PCFR]).
- 8 Supreme Court Family Rules, BC Reg 169/2009 [SCFR], PCFR, *supra* note 7.
- 9 Alison T O’Neill et al., “The Views of Psychologists, Lawyers, and Judges on Key Components and the Quality of Child Custody Evaluations in Australia” (2018) 56:1 Fam Ct Rev 64 at 65 [O’Neill et al., “Views of Psychologists, Lawyers, and Judges”], citing Michael A. Saini, “Evidence Base of Custody and Access Evaluations” (2008) 8:1 Brief Treatment and Crisis Intervention 111.
- 10 Bow, “Review of Empirical Research”, *supra* note 3 at 46.
- 11 See e.g., Alison T O’Neill et al., “Steps Towards Assessing the Quality and Consistency of Family Reports Prepared by Psychologists Appointed as Single Expert Witnesses — An Australian Pilot Study” (2022) 35:2 Austl J Fam L 104 [O’Neill et al., “Australian Pilot Study”].
- 12 Marsha Kline Pruett & Barbara A Babb, “Editorial Note” (January 2023) 61:1 Fam Ct Rev 5 at 5. For examples of BC cases in which the court has critiqued parenting assessments in the litigation context, see Appendix.
- 13 O’Neill et al., “Views of Psychologists, Lawyers, and Judges”, *supra* note 9 at 64–66.
- 14 *Ibid* at 64.
- 15 Interview with the Honourable Donna Martinson, October 27, 2023.
- 16 See e.g., Donna Martinson & Margaret Jackson, “Family Violence and Parenting Assessments: Law, Skills and Social Context” (June 2019) FREDA Centre for Research on Violence Against Women and Children, [fredacentre.com](http://fredacentre.com) [[web.archive.org/web/20240110192321](http://web.archive.org/web/20240110192321)] at 6–7 and 29–37 [Martinson & Jackson]; Shahnaz Rahman & Laura Track, “Troubling Assessments: Custody and Access Reports and their Equality Implications for BC Women” (2012) West Coast LEAF, [westcoastleaf.org](http://westcoastleaf.org) [[web.archive.org/web/20240110192528](http://web.archive.org/web/20240110192528)]; Hannah Goddard-Rebstein & Amber Prince, “The Limits of Psychological Testing in Parental Capacity Assessment Reports: A Literature Review” (2016) Atira Women’s

- Resource Society, [atira.bc.ca](http://atira.bc.ca) ([web.archive.org/web/20240110192636/](http://web.archive.org/web/20240110192636/)) [Goddard-Rebstein & Prince]; Haley Hrymak & Kim Hawkins, “Section 211 Toolkit” (March 2021) Rise Women’s Legal Centre, [womenslegalcentre.ca](http://womenslegalcentre.ca) [[web.archive.org/web/20240113233333/](http://web.archive.org/web/20240113233333/)] at 28 [Hrymak & Hawkins]; Canadian Bar Association BC Branch, “Submission on Section 211 Reports under the Family Law Act” (December 2023), [cbabc.org](http://cbabc.org) [[web.archive.org/web/20240110193552/](http://web.archive.org/web/20240110193552/)] [CBABC Submission].
- 17 Hrymak & Hawkins, *supra* note 16 at 8. (The analysis of 211 reports was conducted by Dr Linda Coates and Dr Ellen Faulkner.)
  - 18 For a greater discussion on mandatory training and practice standards, see ‘Theme II: Practice Standards’.
  - 19 Martinson & Jackson, *supra* note 16 at 29–37.
  - 20 See e.g., Bala et al., “Addressing Controversies”, *supra* note 3 at 96 (“there are no tests that can conclusively establish who is a good parent, and what childcare arrangements will be ‘best’ for the child”); Martinson & Jackson, *supra* note 16 at 30–35. See also “Report of the Blue-Ribbon Commission on Forensic Custody Evaluations” (December 2021), [ocfs.ny.gov](http://ocfs.ny.gov) [[web.archive.org/web/20240110194135/](http://web.archive.org/web/20240110194135/)] at 6–7 (the Blue Ribbon Commission was convened in June 2021 by the Governor of the State of New York).
  - 21 For examples of jurisdictions that have introduced legislation or guidelines aimed at addressing these issues, see “Recommendations”. The Association of Family and Conciliation Courts’ guidelines were developed over several years and replaced the Association of Family and Conciliation Courts’ 2006 Model Standards of Practice for Child Custody Evaluations (Association of Family and Conciliation Courts, “Guidelines for Parenting Plan Evaluations in Family Law Cases” (2022), [afcnet.org](http://afcnet.org) [[web.archive.org/web/20240110195020/](http://web.archive.org/web/20240110195020/)]; Association of Family and Conciliation Courts “Model Standards of Practice for Child Custody Evaluations” (2006), [afcnet.org](http://afcnet.org) [[web.archive.org/web/20240113232053/](http://web.archive.org/web/20240113232053/)]).
  - 22 British Columbia College of Social Workers, “Child Custody and Access Assessments Standards of Practice” (2010), [bccsw.ca](http://bccsw.ca) [[web.archive.org/web/20240110200029/](http://web.archive.org/web/20240110200029/)] at 4 [BCCSW Standards].
  - 23 Dimitrijevic v Pavlovich, 2016 BCSC 1529 at para 30 [Dimitrijevic]; College of Psychologists of British Columbia, “CPBC Code of Conduct” (September 2014), [collegeofpsychologists.bc.ca](http://collegeofpsychologists.bc.ca) [[web.archive.org/web/20240110200516/](http://web.archive.org/web/20240110200516/)] [CPBC Code]; “PS Checklist #16: Psychological Assessments” (August 2021), [collegeofpsychologists.bc.ca](http://collegeofpsychologists.bc.ca) [[web.archive.org/web/20240110200825/](http://web.archive.org/web/20240110200825/)] [PS Checklist #16]; “PS Checklist #17: Family Law Parenting Assessments” (August 2021), [collegeofpsychologists.bc.ca](http://collegeofpsychologists.bc.ca) [[web.archive.org/web/20240110200834/](http://web.archive.org/web/20240110200834/)] [PS Checklist #17].
  - 24 Using the language of section 211 of the FLA, for example, a “full” report would assess the “needs” and “views” of the child(ren) “in relation to a family law dispute” (if applicable) as well as “the ability and willingness” of each party to “satisfy [those] needs”.
  - 25 Section 202 of the FLA authorizes the court to admit hearsay evidence of children and give directions regarding the receipt of children’s evidence. Unlike reports under section 211, reports under section 202 do not provide an opinion or assessment and only relay what the child told the author.
  - 26 Other areas for empirical research include (but are not limited to) assessing reports through reviews by qualified experts, comparisons between report recommendations and court outcomes and out-of-court settlements, and the weight that judges give to reports.
  - 27 We also confirmed this point with some of our interview respondents. See also Benjamin D Garber, “The Emperor Has No Clothes: A Systemic View of the Status and Future of Child Custody Evaluation (CCE)” (2023) 61:4 Fam Ct Rev 747 at 749 [Garber].
  - 28 Bow, “Review of Empirical Research”, *supra* note 3 at 47.
  - 29 O’Neill et al., “Australian Pilot Study”, *supra* note 11.
  - 30 *Ibid.*

- 31 Alison T O’Neill et al., “The Development and Psychometric Properties of a Quality Measure for Child Custody Evaluations” (2023) 20:1 J of Fam Trauma, Child Custody & Child Development 37 at 41 [O’Neill et al., “Quality Measure for Child Custody Evaluations”].
- 32 Alison T O’Neill et al., “What Constitutes a High-Quality Child Custody Evaluation? A Qualitative Analysis” (2021) 19:2 J of Fam Trauma, Child Custody & Child Development 157 at 158 [O’Neill et al., “What Constitutes a High-Quality Child Custody Evaluation?”].
- 33 O’Neill et al., “Australian Pilot Study”, supra note 11 at 3. There are various obstacles to accessing actual reports, including confidentiality and consents. O’Neill and colleagues note that an archival study of a random sample of reports would be “truly representative and unbiased” (O’Neill et al., “Australian Pilot Study”, supra note 11 at 16).
- 34 O’Neill et al., “What Constitutes a High-Quality Child Custody Evaluation?” supra note 32 at 159.
- 35 Garber, supra note 27 at 748.
- 36 Robert L Kaufman et al., “Training Parenting Plan Evaluators: Looking Towards the Future” (2023) 61:4 Fam Ct Rev 719 at 723 [Kaufman et al.].
- 37 Ibid.
- 38 Marc J Ackerman et al., “Child Custody Evaluation Practices: Where We Were, Where We Are, and Where We Are Going” (2021) 52:4 Professional Psychology: Research & Practice 406 [Ackerman et al.]; Bala et al., “Addressing Controversies”, supra note 3 at 97. See also Jane L Ireland, “Evaluating Expert Witness Psychological Reports: Exploring Quality Summary Report” University of Central Lancashire (February 2012), [netk.net.au](https://www.netk.net.au) [[web.archive.org/web/20240111000950/](https://web.archive.org/web/20240111000950/)] [Ireland] (this report assesses the quality of expert psychological reports used in England family court proceedings, with Ireland recommending that the experts that author these reports receive ongoing, and more detailed, trainings on the drafting and use of these reports which would “ideally” include “some element of practice assessment (i.e. not just academic training)” (at 34)).
- 39 Aaron Robb, “Producing Quality Evaluations at a Reasonable Cost” (2023) 61:1 Fam Ct Rev 65 at 67 [Robb, “Producing Quality Evaluations”].
- 40 Ackerman et al., supra note 38 at 407.
- 41 Ibid. For additional comments about the need for evaluators’ training, see Kaufman et al., supra note 36 at 721.
- 42 Kaufman et al., supra note 36 at 724–725.
- 43 Lindsey S Davis & Philip M Stahl, “Identifying and Managing Evaluator Biases in Parenting Plan Evaluations” (2023) 61:4 Fam Ct Rev 762 at 763 [Davis & Stahl].
- 44 On the various types of biases and their potential impact on evaluators’ work, see generally Davis & Stahl, supra note 43.
- 45 Davis & Stahl, supra note 43 at 763.
- 46 Ibid at 767–768.
- 47 Ibid at 763.
- 48 Kaufman et al., supra note 36 at 724.
- 49 Ibid at 726.
- 50 April Harris-Britt, “A Compass but Not a Road Map: Diversity Considerations with the AFCC Guidelines on Parenting Plan Evaluations” (2023) 61:1 Fam Ct Rev 54 at 55.
- 51 Ibid at 56.
- 52 Ackerman et al., supra note 38 at 407. For the importance of mentorship, see Kaufman et al., supra note 36 at 728.
- 53 See e.g., Ackerman et al., supra note 38 at 407–408; O’Neill et al., “Quality Measure for Child Custody Evaluations”, supra note 31 at 52.
- 54 Robb, “Producing Quality Evaluations”, supra note 39 at 67.
- 55 Kaufman et al., supra note 36 at 730.
- 56 Ibid at 725.
- 57 Interview with Suzette Narbonne, September 12, 2023.
- 58 Interview with Katherine B Lawrence, August 15, 2023.
- 59 Interview with Suzette Narbonne, September 12, 2023.
- 60 Interview with Allan Wade, August 2, 2023.
- 61 Interview with Vancouver & Lower Mainland Multicultural Family Support Services Society worker, September 20, 2023.



- 62 Interview with anonymous participant, 2023.
- 63 Interview with Shelly Dean, August 9, 2023.
- 64 Interview with Suzette Narbonne, September 12, 2023.
- 65 Interview with Agnes Huang, September 15, 2023.
- 66 Interview with anonymous participant, 2023.
- 67 Interview with Frances Rosner, August 30, 2023.
- 68 Interview with Suzette Narbonne, September 12, 2023.
- 69 Interview with Allan Wade, August 2, 2023.
- 70 Interview with Karen Mason, September 19, 2023.
- 71 Interview with Hannah Varto, October 5, 2023.
- 72 Interview with Hannah Varto, November 20, 2023.
- 73 Interview with Agnes Huang, September 15, 2023.
- 74 Interview with Suzette Narbonne, September 12, 2023.
- 75 Interview with Karen Mason, September 19, 2023.
- 76 Interview with Zoe Rathus, August 30, 2023.
- 77 Interview with anonymous participant, 2023.
- 78 Interview with Agnes Huang, September 15, 2023.
- 79 Interview with Jennifer Neoh, August 23, 2023 (Neoh has been appointed as a “single expert witness” in Australia, which is a fairly close equivalent of section 211 assessors in BC). These jurisdictions include Hong Kong, Japan, New Zealand (Aotearoa), Singapore, and Australia (see Pacifica Congress, “What We Do”, [pacificacongress.org](https://web.archive.org/web/20240111005232/pacificacongress.org) [web.archive.org/web/20240111005232]).
- 80 Interview with Jennifer Neoh, August 23, 2023.
- 81 Interview with Sarah Calvert, October 15, 2023 (Calvert is a “psychological report writer” in New Zealand, which is a fairly close equivalent of section 211 assessors in BC).
- 82 Interview with Robyn Goodwin, September 13, 2023. For more on this point, see Kaufman et al., supra note 36 at 728.
- 83 Interview with Allan Wade, August 2, 2023.
- 84 Interview with anonymous participant.
- 85 Some evaluators have expressed concern that such guidelines could provide “ammunition” for lawyers who cross-examine them (see generally David A Martindale, “Been There; Done That: Commentary on the Guidelines for Parenting Plan Evaluations in Family Law Cases by the Reporter for the Model Standards” (2023) 61:1 Fam Ct Rev 62 at 63).
- 86 *Dowell v Hamper*, 2019 BCSC 1266 at para 43.
- 87 SCFR, supra note 8 at r 13-2.
- 88 As part of these requirements, the report must identify the expert’s “area of expertise” as well as any “qualifications and employment and educational experience” they have in their area of expertise (SCFR, supra note 8, r 13-6).
- 89 See e.g., CPBC Code, supra note 23; PS Checklist #16, supra note 23; PS Checklist #17, supra note 23; BCCSW Standards, supra note 22. Note, however, that none of these standards are specific to section 211 reports.
- 90 See “Theme IV: Judicial Gatekeeping and Court Oversight” for a greater discussion on this issue.
- 91 CBABC Submission, supra note 16 at 7.
- 92 James N Bow & Francella A Quinell, “Critique of Child Custody Evaluations by the Legal Profession” (2004) 42:1 Fam Ct Rev 115 at 116 and 125 [Bow & Quinell]; James N Bow et al., “Attorneys’ Beliefs and Opinions about Child Custody Evaluations” (2011) 49:2 Fam Ct Rev 301 at 302; O’Neill et al., “Views of Psychologists, Lawyers, and Judges”, supra note 9 at 66 and 73-75.
- 93 O’Neill et al., “Views of Psychologists, Lawyers, and Judges”, supra note 9 at 75.
- 94 O’Neill et al., “Views of Psychologists, Lawyers, and Judges”, supra note 9 at 75. See also O’Neill et al., “Australian Pilot Study”, supra note 11 (in this article, the authors suggest, as a preliminary hypothesis, that lawyers’ views about the quality of reports may be more accurate than the view of evaluators).
- 95 O’Neill et al., “What Constitutes a High-Quality Child Custody Evaluation?”, supra note 32 at 163-171.

- 96 Views about the appropriateness of recommendations vary. Some scholars or evaluators take the view that reports should not make express recommendations on parenting arrangements, while studies of evaluators and legal professionals reveal widespread preference for including recommendations in the report (Bow, “Review of Empirical Research”, supra note 3 at 46; Bow & Quinnell, supra note 92 at 121; O’Neill et al., “What Constitutes a High-Quality Child Custody Evaluation?”, supra note 32 at 169 and 174–175).
- 97 Davis & Stahl, supra note 43 at 777.
- 98 Ibid at 776.
- 99 For a fuller list of strategies and explanations, see Davis & Stahl, supra note 47 at 774–777.
- 100 David A Martindale & Leslie E Shear, “Best Practices for Structuring a Family Court Parenting Plan Evaluation under the 2022 AFCC Guidelines” (2023) 61:4 Fam Ct Rev 734 at 740 [Martindale & Shear].
- 101 Benjamin D Garber & Robert A Simon, “Individual Adult Psychometric Testing and Child Custody Evaluations: If the Shoe Doesn’t Fit, Don’t Wear It” (2018) 30:2 J of the Am Academy of Matrimonial Lawyers 325 at 333 [Garber & Simon].
- 102 See Aaron Robb, “Models and Methods of Cost-Effective Child Custody Evaluation” (2023) 61:4 Fam Ct Rev 703 [Robb, “Models and Methods”]. For a greater discussion of financial barriers, see “Theme III: Financial Barriers”.
- 103 See e.g., Sol R Rappaport et al., “Psychological Testing Can Be of Significant Value in Child Custody Evaluations: Don’t Buy the Anti-Testing, Anti-Individual, Pro-Family Systems Woozle” (2018) 30:2 J of the Am Academy of Matrimonial Lawyers 405 at 407–408 and 427–436; David Frenkel & Irwin S Butkowsky, “The Importance of Psychological Testing in Canadian Family Law” (2020) 39:2 Can Fam L Quarterly 151 at 183–184.
- 104 Garber & Simon, supra note 101 at 330 and 334–335.
- 105 Goddard-Rebstein & Prince, supra note 16 at 6.
- 106 Nicholas Bala, “Mohan, Assessments and Expert Evidence: Understanding the Family Law Context” (2007) Queen’s University Legal Studies Research Paper Series, Research Paper No. 07-02.
- 107 New Zealand Ministry of Justice, Te Korowai Ture ā-Whānau: The Final Report of the Independent Panel Examining the 2014 Family Justice Reforms (Wellington: Ministry of Justice, May 2019), [justice.govt.nz](https://www.justice.govt.nz) [[web.archive.org/web/20240111021439/](https://web.archive.org/web/20240111021439/)] [NZ MOJ Report] at pp. 9-10 and 53; New Zealand Law Society, “Family Court Review” (November 2018), [lawsociety.org.nz](https://www.lawsociety.org.nz) [[web.archive.org/web/20240111221442/](https://web.archive.org/web/20240111221442/)] at p. 30 [NZLS Report]. See also preliminary findings from O’Neill et al., “Australian Pilot Study”, supra note 11.
- 108 NZ MOJ Report, supra note 107 at 36.
- 109 Martindale & Shear, supra note 100 at 741–742.
- 110 Nicola Taylor et al., Parenting Arrangements after Separation Study: Evaluating the 2014 Family Law Reforms — Family Justice Professionals’ Perspectives (Full Report) (Dunedin: University of Otago Children’s Issues Centre, 2019), [lawfoundation.org.nz](https://www.lawfoundation.org.nz) [[web.archive.org/web/20240111223052/](https://web.archive.org/web/20240111223052/)]; NZ MOJ Report, supra note 107 at 90. We discuss this issue further under “Theme IV: Judicial Gatekeeping and Court Oversight.”
- 111 Megan Gollop et al., Parenting Arrangements after Separation Study: Evaluating the 2014 Family Law Reforms — Parents’ and Caregivers’ Perspectives — Part 1 (Dunedin: University of Otago Children’s Issues Centre, 2019), [lawfoundation.org.nz](https://www.lawfoundation.org.nz) [[web.archive.org/web/20240111224816/](https://web.archive.org/web/20240111224816/)] at 304 [Parents’ Perspectives] (this report includes feedback from parents who have undergone assessments provides important insights from a users’ perspective).
- 112 Ibid at 373.
- 113 As a respondent in Parents’ Perspectives, supra note 111, noted, “Father looks perfect. There are no follow-ups to these reports, so if he doesn’t follow through with what he says he will do nobody in the court knows about it. Yet in the real world we do know about it. It’s a joke” (at 304).
- 114 Interview with Therin Rhaintre, August 16, 2023.
- 115 Interview with Zara Suleman, September 14, 2023.

- 116 Canadian Psychological Association and Psychological Foundation of Canada, Psychology's Response to the Truth and Reconciliation Commission of Canada's Report (May 2018), [cpa.ca](http://cpa.ca) [[web.archive.org/web/20240111022807](http://web.archive.org/web/20240111022807)] at 16.
- 117 Interview with Hannah Varto, October 5, 2023.
- 118 Interview with anonymous participant, 2023.
- 119 Interview with Agnes Huang, September 15, 2023.
- 120 Interview with Allan Wade, August 2, 2023.
- 121 Interview with Frances Rosner, August 30, 2023.
- 122 Interview with Suzette Narbonne, September 12, 2023.
- 123 Interview with the Honourable Donna Martinson, October 27, 2023.
- 124 Interview with anonymous participant, 2023.
- 125 Interview with Robyn Goodwin, September 13, 2023.
- 126 Interview with Allan Wade, August 2, 2023.
- 127 Interview with Frances Rosner, August 30, 2023.
- 128 Interview with Suzette Narbonne, September 12, 2023. The "maximum contact" principle appeared in ss 16(10) and 17(9) of the Divorce Act, RSC 1985, c 3 (2nd Supp) [Divorce Act] until 2021 when new amendments came into effect and this language was replaced. The Divorce Act now provides, *inter alia*, that "the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child" (Divorce Act, s 16(6); see also *Barendregt v Grebliunas*, 2022 SCC 22 at paras 9 and 134-135). Despite the fact that the maximum contact principle was always supposed to be subordinate to the best interests of the child, numerous anti-violence organizations argued that maximum contact or 50/50 shared parenting was effectively being treated as a legal presumption and should be removed from the Divorce Act (Luke's Place Support and Resource Centre and National Association of Women and the Law, "Brief on Bill C-78, An Act to amend the Divorce Act" (November 2018), [lukesplace.ca](http://lukesplace.ca) [[web.archive.org/web/20240111233209](http://web.archive.org/web/20240111233209)] at 6-7; West Coast Legal Education and Action Fund "Briefing Note on Divorce Act Amendments" (September 2018), [westcoastleaf.org](http://westcoastleaf.org). Narbonne's comments reflect the view that in spite of legislative changes the maximum contact principle continues to carry weight in family litigation, a perspective that has been shared by other commentators (see e.g., Nicholas Bala "Shared Parenting in Ontario: Not Presumed and Still Controversial, but a 'General Trend'" (Paper prepared for Ontario Bar Association, Family Law Section Professional Development Program, Toronto, 2 June 2023), [canlii.org](http://canlii.org)) and is also reflected in judgments rendered after the 2021 Divorce Act amendments like *Gill v Kaur*, 2023 BCSC 178 and *Burton v Carter*, 2022 BCSC 2004, both of which were decided after the 2021 Divorce Act amendments came into force and continue to refer to the maximum contact principle. (Note that other decisions do underscore the amendments to the Divorce Act, the *Barendregt* decision, and the differences between the Divorce Act and the Family Law Act; see for example *TKH v MDH*, 2022 BCSC 1986 and *TF v JF*, 2023 BCSC 2226.)
- 129 Interview with Allan Wade, August 2, 2023.
- 130 Interview with Shelly Dean, August 9, 2023.
- 131 Interview with anonymous participant, 2023.
- 132 Interview with Therin Rhaintre, August 16, 2023.
- 133 Interview with Suzette Narbonne, September 12, 2023.
- 134 Interview with Agnes Huang, September 15, 2023.
- 135 Interview with Allan Wade, August 2, 2023.
- 136 Ackerman et al., *supra* note 38 at 408.
- 137 Andrea Jones, "The AFCC Guidelines and Publicly Funded Parenting Plan Evaluations" (2023) 61:1 *Fam Ct Rev* 58 at 58-59.
- 138 *Kanta v Kanta*, 2017 BCSC 1428 at para 45 [Kanta].
- 139 Garber, *supra* note 27 at 757.
- 140 Interview with Katherine B Lawrence, August 15, 2023.
- 141 Interview with anonymous participant, 2023.
- 142 Similar suggestions have been made in other jurisdictions (see e.g., Parliament of the Commonwealth of Australia, Standing Committee on Social Policy and Legal Affairs, "A better family law system to support and protect those affected by family violence" (December 2017),

- [parlinfo.aph.gov.au](http://parlinfo.aph.gov.au), [2017 Australian Report] at pp. 227-228 (“Recommendation 22”) (as part of Recommendation 22, the report also recommends having a fee schedule to regulate the costs of reports and experts).
- 143 Interview with Katherine B Lawrence, August 15, 2023.
- 144 Interview with Hannah Varto, October 5, 2023.
- 145 Interview with Katherine B Lawrence, August 15, 2023.
- 146 Interview with anonymous participant, 2023.
- 147 Interview with anonymous participant, 2023.
- 148 Hrymak & Hawkins, *supra* note 16 at 35 and 148.
- 149 In *Kanta*, *supra* note 138, for example, the Court noted that family justice counsellors are not “trained psychologists” and would not be able to assess the mother’s claims of alienation by the father (at para 47).
- 150 Interview with Vancouver & Lower Mainland Multicultural Family Support Services Society worker, September 20, 2023.
- 151 Interview with Katherine B Lawrence, August 15, 2023.
- 152 Interview with anonymous participant, 2023.
- 153 Interview with Katherine B Lawrence, August 15, 2023.
- 154 While beyond the scope of this report, California requires each county to develop local rules to determine whether peremptory challenges to a court-appointed evaluator are allowed (see California Rules of Court (Title 5: Family and Juvenile Rules), c 8, art 2, § 5.220(d)(1)(A)(iii) [CRC]). Some counties (e.g., San Francisco County and Marin County) do not allow peremptory challenges. Others (e.g., Los Angeles County and Orange County) allow limited peremptory challenges.
- 155 Bala et al., “Addressing Controversies”, *supra* note 3 at 102.
- 156 R v Mohan, 1994 CanLII 80 (SCC) [Mohan] at para 17; *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 [White Burgess] at paras 23-24. Note that the courts of each province also have various technical requirements for expert evidence in their respective court rules.
- 157 Martinson & Jackson, *supra* note 16 at 43.
- 158 White Burgess, *supra* note 156 at para 23.
- 159 Martinson & Jackson, *supra* note 16 at 43.
- 160 *Ibid*.
- 161 Bala et al., “Addressing Controversies”, *supra* note 3 at 76-79.
- 162 *Ibid* at 77. For cases where a party has challenged the admissibility of a report, see e.g., *JS v SS*, 2018 BCSC 355 at para 93; *PGE v HRC*, 2016 BCSC 1316 at paras 34–36. For the presumptive admissibility of section 211 reports, see Hrymak & Hawkins, *supra* note 16 at 14–18.
- 163 See e.g., *TMVDL v PAMT*, 2023 BCSC 1747 at para 42; *KRP v OMP*, 2022 BCSC 37 at para 18; *DAB v CAS*, 2020 BCSC 807 at para 77; *CTM v TJM*, 2019 BCSC 1630 at para 26.
- 164 Interview with the Honourable Donna Martinson, October 27, 2023.
- 165 See e.g., *KB v JB*, 2015 BCSC 704 at para 10; *AP v JC*, 2018 BCSC 1381 at para 118.
- 166 See e.g., *TEA v RLHC*, 2018 BCSC 2515 at para 18.
- 167 Brian J Burke, “‘Both Sides Now’: The Role of the Law in the AFCC Guidelines for Parenting Plan Evaluations in Family Law Cases” (2023) 61:1 *Fam Ct Rev* 47 at 51 (in this article, Burke highlights cross-examination as the method for scrutiny and testing).
- 168 In BC, for example, court decisions have found flaws in various aspects of reports, such as evaluation procedures, analysis and evaluation, advocacy for a party, and report contents (for examples, see Appendix). See e.g., *JO v JS*, 2020 ABQB 777 with respect to the ability to challenge reports as a matter of procedural fairness.
- 169 O’Neill et al., “Quality Measure for Child Custody Evaluations”, *supra* note 31 at 38.
- 170 See e.g., Hrymak & Hawkins, *supra* note 16 at 20–23 and 62–66.
- 171 Bala et al., “Addressing Controversies”, *supra* note 3 at 103. Indeed, in Ontario, the court will rarely rely on recommendations at an interim hearing because there has been no opportunity to cross-examine the evaluator (Bala et al., “Addressing Controversies”, *supra* note 3 at 103), and in Alberta, the Court of King’s Bench

- prohibits the use of Practice Note 8 Evaluations (“Child Custody/Parenting Evaluations”) at interim hearings except in “extraordinary circumstances” (Court of Queen’s Bench of Alberta, “Family Law Practice Note 8 Child Custody/Parenting Evaluation” (effective May 2019), [albertacourts.ca](http://albertacourts.ca) [[web.archive.org/web/20240123021132/](http://web.archive.org/web/20240123021132/)] at para 4 (see note 3) [PN8]). In BC, the Supreme Court recently addressed the issues of relying on the report’s recommendations in interim applications and cross-examination of the evaluator in *Ellis v Alvarez*, 2023 BCSC 544.
- 172 Dimitrijevic, *supra* note 23 at para 37.
- 173 PCFR, *supra* note 7.
- 174 Hrymak & Hawkins, *supra* note 16 at 17.
- 175 *Ibid* at 22.
- 176 CPBC Code, *supra* note 23, s 11.12. While beyond the scope of this report, note that jurisdictions vary in the level of disclosure of the evaluator’s file, such as notes and even the report itself, and the process for obtaining this disclosure. New Zealand, for example, is particularly stringent in this regard for psychological reports.
- 177 Dimitrijevic, *supra* note 23 at paras 37–38; CPBC Code, *supra* note 23, s 11.36. The reviewing psychologist must limit the review to information that is relevant to the matter at issue according to professional literature. Comments may only be made regarding methods, procedures, and processes, as well as “the sufficiency and accuracy of the conclusions, recommendations, or diagnoses,” provided that the comments are based on the data in the original report. The reviewing psychologist may not make “any conclusions, diagnoses, assessment of psychological status, or recommendations” about the individuals who were the subject of the report, and must state any limitations and conflicts of interest.
- 178 Dimitrijevic, *supra* note 23 at para 37. See also *JN v LG*, 2017 BCSC 885 at para 36.
- 179 Dimitrijevic, *supra* note 23 at para 37.
- 180 *Ibid*.
- 181 *Ibid* at para 38.
- 182 Martinson & Jackson, *supra* note 16. See also Bala et al., “Addressing Controversies”, *supra* note 3; Hrymak & Hawkins, *supra* note 16.
- 183 Ireland, *supra* note 38 at 5. The ability of judges to assess the content of section 211 reports also engages the issue of judicial training on what to require from reports (this is beyond the scope of this report, but see Martinson & Jackson, *supra* note 16).
- 184 See e.g., Bala et al., “Addressing Controversies”, *supra* note 3.
- 185 *Ibid* at 109. Commentators like Alison O’Neill have suggested that product reviews could improve quality control, and increase accountability and quality, but also note there are currently no “empirically driven quality criteria against which to judge the report” (see O’Neill et al., “Quality Measure for Child Custody Evaluations”, *supra* note 31 at 41).
- 186 Bala et al., “Addressing Controversies”, *supra* note 3 at 103-104.
- 187 Ireland, *supra* note 38 at 34–35.
- 188 Interview with Frances Rosner, August 30, 2023.
- 189 Interview with Suzette Narbonne, September 12, 2023.
- 190 Interview with anonymous participant, 2023.
- 191 Interview with Suzette Narbonne, September 12, 2023.
- 192 Interview with anonymous participant, 2023.
- 193 Interview with Frances Rosner, August 30, 2023.
- 194 Interview with Suzette Narbonne, September 12, 2023.
- 195 Interview with Shelly Dean, August 9, 2023.
- 196 Interview with Zara Suleman, September 14, 2023.
- 197 Interview with Shelly Dean, August 9, 2023.
- 198 Interview with Frankie Woods, September 15, 2023.
- 199 Interview with Shauna Tucker, September 14, 2023.
- 200 Interview with Allan Wade, August 2, 2023.
- 201 *Ibid*.

- 202 In New Zealand, for example, psychological report writers must have at least five years of clinical experience with at least three years in child and family work (New Zealand Ministry of Justice, “Family Court Practice Note: Specialist Report Writers” (2018), [justice.govt.nz](https://www.justice.govt.nz/web/20240111031414) [[web.archive.org/web/20240111031414](https://web.archive.org/web/20240111031414)] [NZ Practice Note]).
- 203 See CRC, supra note 154, rr 5.225 and 5.230. These rules also require evaluators to certify to the court that they have completed the required training (see supra rules 5.225(l)(1) and 5.230(f)). In California and Ohio, training has to be approved by specific bodies (respectively, the Judicial Council of California and the Supreme Court of Ohio or a provider approved by it).
- 204 NZ Practice Note, supra note 202; Rules of Superintendence for the Courts of Ohio, [supremecourt.ohio.gov](https://supremecourt.ohio.gov) [[web.archive.org/web/20240112014456](https://web.archive.org/web/20240112014456)] rr 91.01–91.09.
- 205 Assessors in these jurisdictions have to be on a list of approved assessors.
- 206 Interview with Therin Rhaintre, August 16, 2023.
- 207 Interview with Zara Suleman, September 14, 2023.
- 208 Interview with Allan Wade, August 2, 2023. On the issue of judicial training, a different interviewee noted that psychological report writers in New Zealand are required to follow the guidelines of the New Zealand Psychological Society (NZ Practice Note, supra note 202, s 8.2), and that judges receive training on these guidelines (Interview with Sarah Calvert, October 15, 2023.)
- 209 Family Law Rules, O Reg 114/99, r 20.2(2)(6)(B).
- 210 In addition to the mechanisms described here, some US states provide for a sliding scale (see Robb, “Models and Methods”, supra note 102 at 706).
- 211 PN8, supra note 171. Regarding Alberta’s practice notes, in *Huitt v Huitt*, 2021 ABCA 235, the Alberta Court of Appeal stated: “Practice notes do not have full force of law, as for example do the Rules of Court, but they should still generally be followed. They have been described as ‘informational statement(s) published by the Chief Justice for the guidance and assistance of the registry staff, the legal profession and the public’ ... Practice notes provide guidance to litigants and the Bar as to what they can expect of each other, what the Court expects of them, and what they can expect of the Court. If the Court routinely undermines the efficacy of a practice direction, counsel and the litigants will be tempted to do the same. Procedural uncertainty does not assist in resolving disputes, and indeed can divert attention from the substantive issues” (at para 7).
- 212 NZ Practice Note, supra note 202, s 6.3.
- 213 *Ibid*, ss 6.2 and 6.5.
- 214 Care of Children Act 2004 (NZ), 2004/90, s 135A.
- 215 *Ibid*, s 133(6) (this section applies to “psychological reports,” which are a close equivalent of section 211 reports under the FLA).
- 216 As psychological report writer Sarah Calvert explained in cases in which a report is ordered, the court also appoints a lawyer for the child, whose role includes providing the child’s wishes (Interview with Sarah Calvert, October 15, 2023).
- 217 In Alberta, reports are subject to the Mohan criteria and some decisions have stated that they are subject to the same evidentiary rules used in commercial or criminal cases (see e.g., *AJU v GSU*, 2015 ABQB 6 at para 176; *SK v DG*, 2022 ABQB 425 at para 103).
- 218 Family Code (California), 8 FAM § 3111(a).
- 219 PN8, supra note 171 at para 36.
- 220 PN8, supra note 171 at para 38. We note that in Alberta, “admitting an expert’s opinion does not prove the underlying facts relied upon by that expert” (*AJU v GSU*, 2015 ABQB 6 at para 177).
- 221 NZ Practice Note, supra note 202, s 8.8.
- 222 *Ibid*, s 8.5.
- 223 This is a rough description, and research topics would have to be refined.

# Problematic Aspects of Section 211 Reports Identified in Sample of BC Cases

This appendix summarizes problematic aspects of section 211 reports that have been identified in various British Columbia court decisions in which the report was in evidence. The summary is organized by the themes that have emerged from these decisions: procedures; advocacy; analysis and evaluation; and report content.

Note: some of the cases identified multiple issues with the report and are therefore listed more than once.

## Procedures

- Not obtaining information from all relevant sources (e.g., not obtaining information from the children’s school counsellor, to whom the children disclosed family violence by their father).<sup>1</sup>
- Reaching adverse conclusions about one parent, based on information from the other parent or other sources, without confirming the truth of that information with the relevant parent.<sup>2</sup>
- Not reading important and relevant materials that were provided to the assessor (in this case, the materials included a report from the child’s therapist and from a psychologist who had treated the father, with information about serious mental health issues of the parent), and therefore not assessing important issues (in this case, the impact of the parent’s mental health issues on his parenting and relationship with the child).<sup>3</sup>

1 *NJ v SJ*, 2018 BCSC 2352 at paras 72, 80–83 and 219.

2 *Dowell v Hamper*, 2019 BCSC 1266 at paras 62, 64 and 91 [*Dowell*].

3 *Ibid* at paras 57 and 90.

- Using imbalanced procedures and reporting (e.g., spending significantly more time interviewing one parent, and giving that parent an opportunity to elaborate on questionnaires that both parties had completed; reaching conclusions on home environments based on unparallel observations).<sup>4</sup>
- Reaching key conclusions based on self-serving statements of one parent, without further investigation or assessment.<sup>5</sup>
- Approaching interviews with collaterals for confirmation of the assessor’s existing conclusions rather than impartial investigation.<sup>6</sup>

## Advocacy

- Engaging in advocacy for a parent.<sup>7</sup>
- Minimizing problematic conduct by one parent.<sup>8</sup>
- Appearing to re-argue issues on behalf of one parent.<sup>9</sup>

## Analysis and Evaluation

- Concluding that alienation has taken place, or that a parent is responsible for the breakdown of the relationship between the children and the other parent, when the evidence did not support this conclusion (and rather, the evidence indicated that the relationship between the parent and the children had broken down, in whole or in part, due to the conduct of that parent, including due to family violence or impact of excessive alcohol consumption).<sup>10</sup>

4 *RJM v ANM*, 2018 BCSC 698 [*RJM*]; *RSD v KD*, 2018 BCSC 2416 at paras 62–63, 71 and 76 [*RSD*].

5 *Bradford v Bradford*, 2017 BCSC 661 [*Bradford*].

6 *DJD v MLD*, 2016 BCSC 1515 at para 60.

7 *KW v LH*, 2018 BCCA 204 at para 59 [*KW* 2018]; *KW v LH*, 2017 BCSC 1441 at para 54 [*KW* 2017].

8 *SRM v NGTM*, 2020 BCSC 468 at paras 95 and 109 [*SRM*].

9 *Ibid* at para 112.

10 *NJ v SJ*, *supra* note 1 at paras 222–225; *Dowell*, *supra* note 2 at paras 90–91 and 93; *Bradford*, *supra* note 5 at paras 35, 41, 97–105 and 148; *HK v WK*, 2017 BCSC 1817 at paras 99–102 (views of the child report).



- Concluding or opining that alienation had taken place when the children actually wanted to have a relationship with the parent and/or spend time with the parent in general but not at the time, due to the conduct of that parent.<sup>11</sup>
- Unreasonably rejecting the children’s disclosures of a parent’s drinking habits.<sup>12</sup>
- Not differentiating between alienation and estrangement.<sup>13</sup>
- Making far-reaching recommendations without considering the potential adverse consequences of their implementation (recommending against relocation; recommending significant reduction in the parenting time of one parent).<sup>14</sup>
- Recommending significant variation of decision-making authority without taking into account how the children have been doing in the existing decision-making regime and how a parent’s approach would exacerbate conflict if decision-making was varied (other recommendations were accepted by the court).<sup>15</sup>
- Recommending major variation of parental responsibilities and decision-making due to a parent’s “problematic gatekeeping,” without considering that some “gatekeeping” resulted from the other parent’s conduct, and the parties’ respective parenting skills and parenting history overall.<sup>16</sup>
- Failing to provide sufficient evaluation of family violence and its consequences.<sup>17</sup>
- Not evaluating the impartiality of collateral witnesses.<sup>18</sup>
- Failing to grasp relevant family dynamics.<sup>19</sup>
- Making adverse findings about one parent without clear evidence and contrary to clear collateral information, and making drastic recommendations based on these findings.<sup>20</sup>

11 *Bradford, supra* note 5 at paras 80 and 107–111; *HK v WK, supra* note 10 at paras 101–103 (views of the child report).

12 *NJ v SJ, supra* note 1 at paras 225 and 229; *Bradford, supra* note 5 at para 105.

13 *Dowell, supra* note 2 at para 93.

14 *KW 2018, supra* note 7 at paras 130–131; *SRM, supra* note 8 at para 110; *Dowell, supra* note 2 at para 94; *NL v DL, 2018 BCSC 1580* at paras 187–188.

15 *SDH v TH, 2016 BCSC 380* at paras 139–145.

16 *SMM v JPH, 2019 BCSC 472* at paras 81–82; *Shapiro v Simpson, 2016 BCSC 211* at paras 153–154.

17 *NJ v SJ, supra* note 1 at para 211; *NL v DL, supra* note 14 at paras 189–190; *Bradford, supra* note 5 at paras 127–128.

18 *RSD, supra* note 4 at paras 88 and 90.

19 *Ibid* at para 136.

20 *SRM, supra* note 8 at paras 93–94, 96, 98, 101–102 and 110–113.

- Making serious mental health diagnoses based on limited information and without explicitly applying diagnostic criteria, and recommending, based on these diagnoses, a significant reduction of a parent’s parenting time if that parent does not undertake intensive therapy.<sup>21</sup>
- Focusing on explaining the conduct of one parent and how it can be treated, rather than its impact on the children. Conversely, providing little analysis of the other parent’s circumstances and their effect on the children.<sup>22</sup>
- Demonstrating inconsistency between findings and recommendations.<sup>23</sup>
- Refusing to accept, unsustainably, that a parent had been abusive.<sup>24</sup>
- Not considering the statutory factors of the best interests of the child.<sup>25</sup>
- Treating maximization of parenting time as a presumption or giving it improper weight.<sup>26</sup>
- Making a recommendation without having experience in the outcome of implementing such a recommendation.<sup>27</sup>
- Recommending against relocation without assessing the financial and social factors underlying the parent’s relocation application.<sup>28</sup>
- Accepting with “considerable credulity” the highly unreliable (and sometimes “patently incredible”) statements of one of the parties and his collaterals and basing the recommendations on these statements.<sup>29</sup>
- Recommending parallel parenting and parenting coordination when one party has committed serious family violence; despite ongoing counselling, that party has already repeatedly breached court orders, bail conditions, and MCFD rules; and there have been no changes in the “toxic conflict” between the parties.<sup>30</sup>

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21 *Ibid* at paras 108, 111 and 113.

22 *NL v DL*, *supra* note 14 at para 187.

23 *Ibid* at para 189.

24 *KW* 2017, *supra* note 7 at para 55.

25 *DLM v ALF*, 2022 BCSC 1874 at paras 40–43 [*DLM*].

26 *Ibid* at para 44.

27 *Ibid* at paras 52–53.

28 *AH v OH*, 2021 BCSC 1240 at paras 94–98 *aff’d* *Hayun v Hayun*, 2022 BCCA 34 at para 48.

29 *MFSJ862 v FFSJ862*, 2022 BCSC 1259 at para 134.

30 *KSP v JTP*, 2023 BCSC 1188 at paras 333–334, 341–344 and 353.

## Report Content

- Not referring to all instances of family violence (the assessor said that there were too many reports to include them all).<sup>31</sup>
- Misstating the information provided to the assessor.<sup>32</sup>
- Making unreasonable criticism of a parent (in this case, for cancelling an interview with the assessor after working a night shift).<sup>33</sup>
- Suggesting, without diagnosing, that one parent had a mental health disorder, and engaging in “self-fulfilling” analysis.<sup>34</sup>
- Forming and relying on negative beliefs about a parent, without providing a foundation for those beliefs.<sup>35</sup>
- Failing to explain the assessor’s analysis and how they reached their conclusions.<sup>36</sup>

## Testimony

- Giving an opinion on matters outside the assessor’s expertise.<sup>37</sup>
- Giving an opinion on the mental health of persons that the assessor had not met.<sup>38</sup>
- Speculating, without foundation, on special needs of the child.<sup>39</sup>
- Criticizing a parent based on the assessor’s personal opinions.<sup>40</sup>

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31 *NJ v SJ*, *supra* note 1 at para 220.

32 *RJM*, *supra* note 4 at para 49.

33 *Ibid* at para 49.

34 *RSD*, *supra* note 4 at para 118.

35 *SRM*, *supra* note 8 at paras 94, and 96–98.

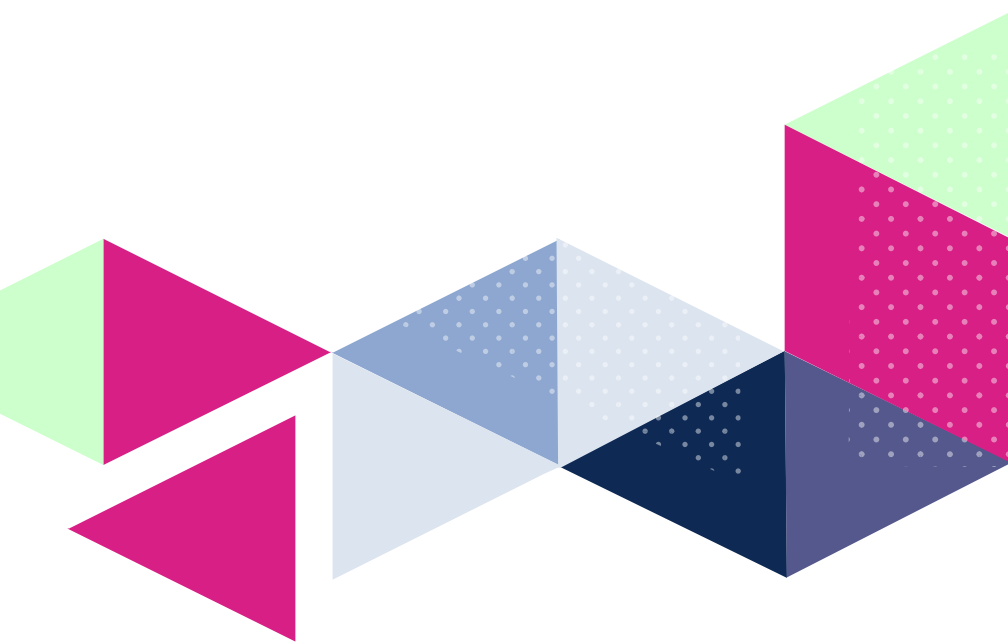
36 *DLM*, *supra* note 25 at paras 40, 44, and 47.

37 *KW 2017*, *supra* note 7 at para 29.

38 *Ibid* at para 46.

39 *Ibid* at para 49.

40 *Ibid* at para 51.



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