

November 20, 2019

Overview of major amendments to the *Divorce Act*

Senator Pierre J. Dalphond
Independent - Quebec

Previous attempts at reform

November 1997:

- **Special Joint Committee on Child Custody and Access** established to assess “the need for a more child-centred approach to family law policies and practices”

December 1998:

- **Final report** recommends substantial amendments to the *Divorce Act*

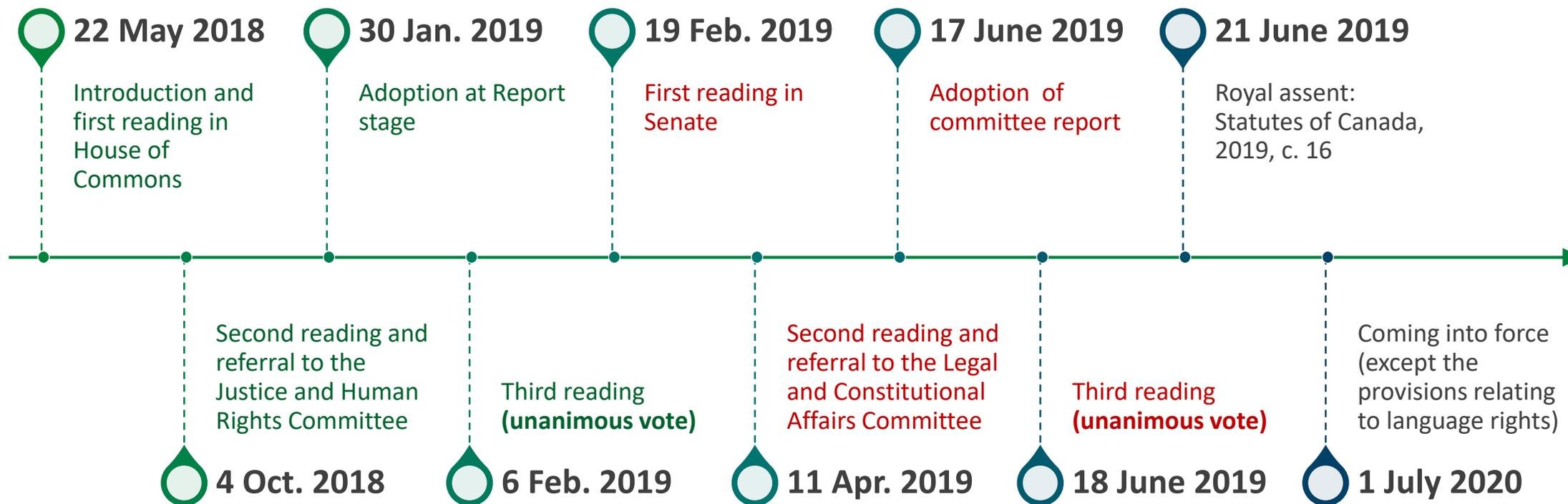
December 2002:

- Launch of the **Family Justice Strategy**

December 2002:

- Introduction of **Bill C-22**, which died on the Order Paper.

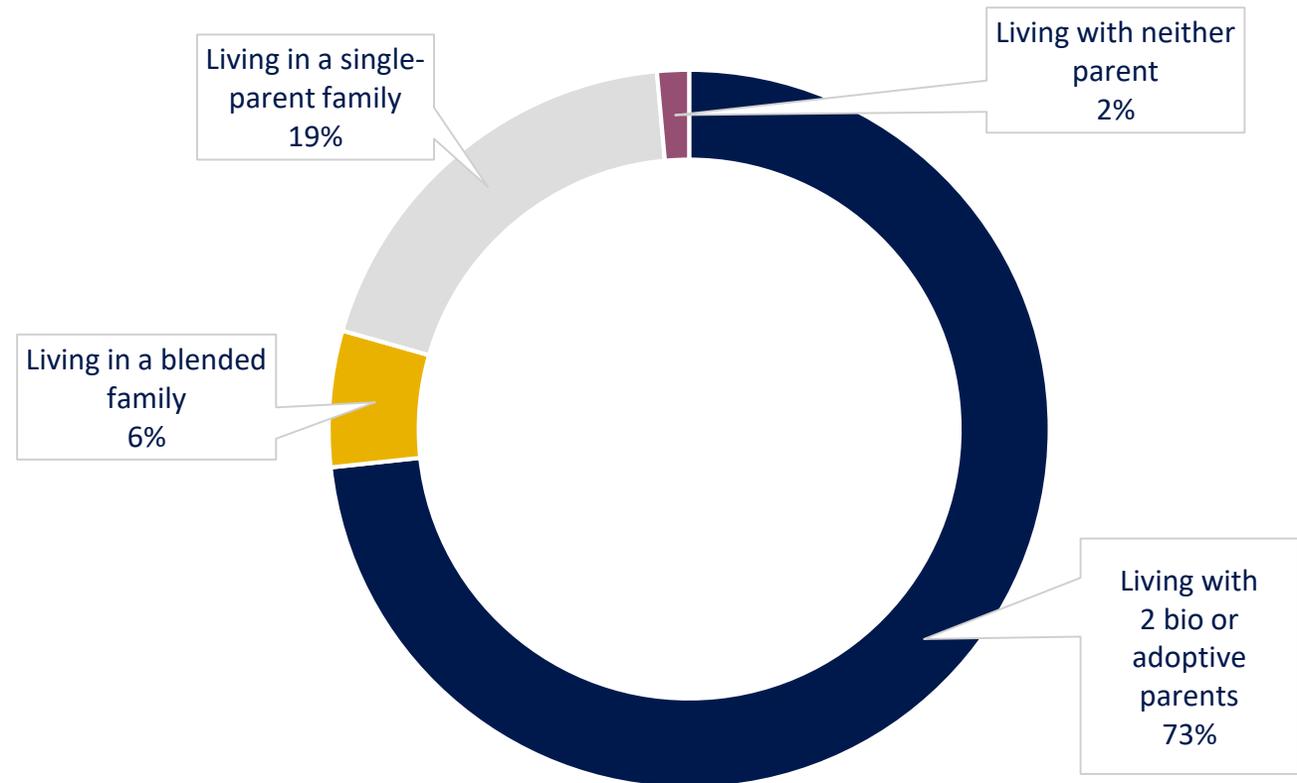
Legislative path



Why reform?

- **Most recent substantial reform over 30 years ago (1985)**
- It is important that family law **reflect the changing realities of Canadian families**
- As of 1 July 2018, **12% of Canadians** and 15% of Quebecers **were divorced**
- Of the 5 million Canadians who divorced or separated between 1991 and 2011, **38% had a child together**

Family situation of children from 0-14 years old



2016 Census: 5,817,085 children from 0-14 years old

Changing realities

Single Fathers

- 1976: approximately **one in 70 Canadian single-parent families was headed by a father**
- 2015: increased to approximately **one in 10** single-parent families

Single-parent families

- 2001 to 2016: **increase of 34.5%**
- Compared to 4.8% for single-parent families headed by a women
- Ultimately, however, 81% of these families are headed by women

More “joint custody”

- **Uncontested orders:** joint custody in 12% of files before 2006 → 28% in 2014-2015
- **Contested orders:** 8% before 2006 → 23% in 2014-2015

Changing realities

Fathers more active in the domestic sphere

- 1986: 12% of total hours of **cleaning** and other **domestic work** done by men; 28% in 2015
- Fathers devoting time to **to help or care for children**: app. 1/3 fathers in 1986 → 1/2 fathers in 2015

Time spent on domestic activities among the population aged 15 or over, Quebec, 2015

	Number of hours per day
All women	3h29
All men	2h27
Gap between men and women	1h02
Mothers of children under 5	5h20
Fathers of children under 5	3h56
Gap between mothers and fathers of children under 5	1h24

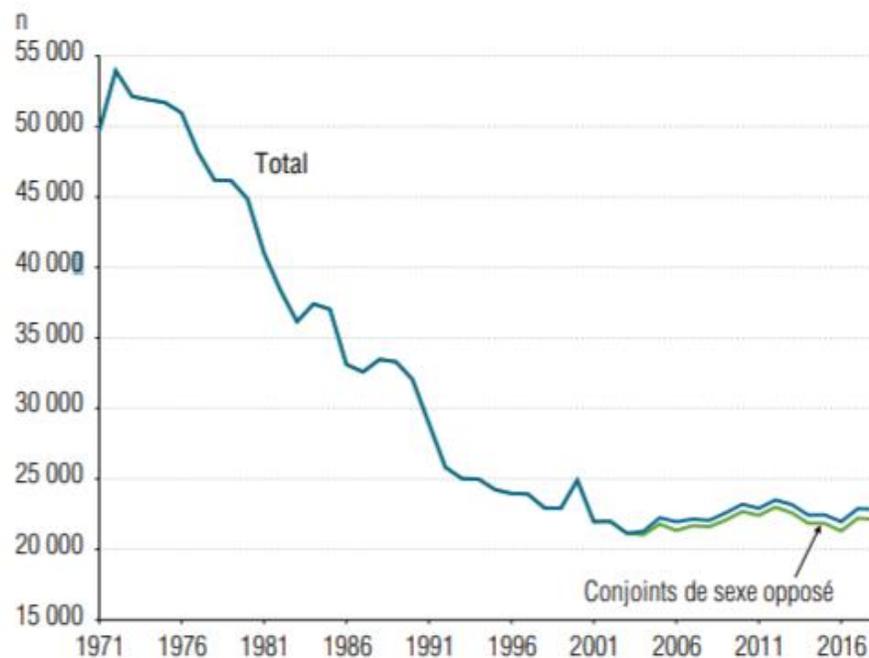
Conseil du statut de la femme, 2018

In short, the distribution of family responsibilities is still not equitable in many families.

Changing realities

Fewer and fewer marriages in Quebec...

Number of marriages, Quebec, 1971-2018



Note: Same-sex marriages are allowed since 2004.

Source: Institut de la statistique du Québec

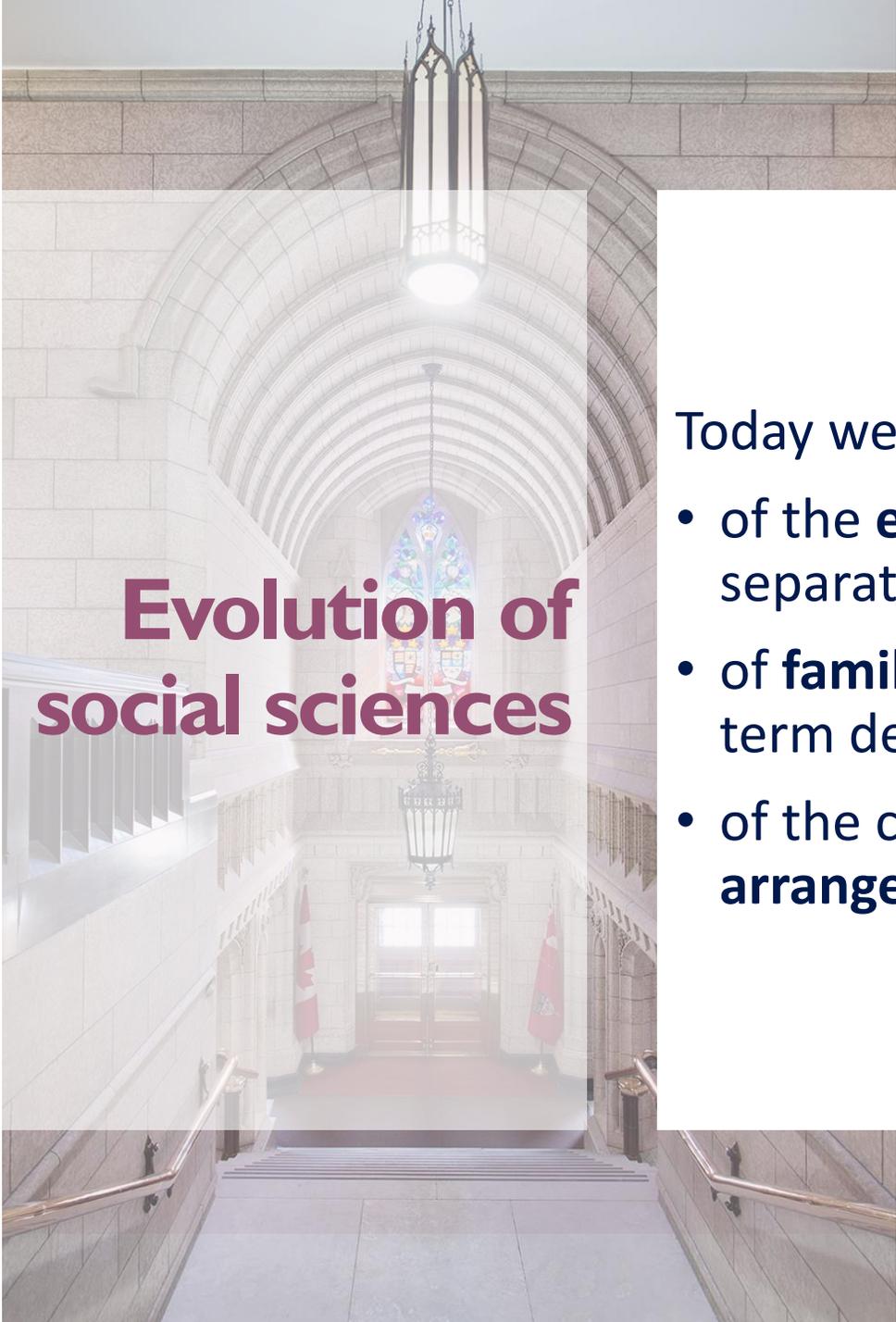
...but there are still a significant number of families with married parents

- In 2016, 40.4% (520,375) of Quebec families consist of a married couple, compared to 30.1% (387,960) of common-law couples and 29.5% (379,210) of single parents
- In 2018, 62.3% (52,233) of Quebec babies are born to unmarried parents, compared to 24.7% in 1985
- When at least one parent is a new Canadian, majority of babies are born to married parents: 74% in 2015

Multi-parent and multi-generational households

Blended families: In 2016, children from 0-14 years of age constituted almost 17% (5,839,565) of the Canadian population. Of those, 356,230 (6%) lived in a blended family.

Multi-generational households: In 2016, 6.3% of Canadians (2.2 million) lived in a multi-generational household, where at least three generations of the same family live together.



Evolution of social sciences

Today we have a better understanding

- of the **economic and psychosocial effects** of separation on children and ex-spouses,
- of **family violence** and its impact on the child's long-term development
- of the consequences of different types of **parental arrangements**

Overview of amendments

Divorce Act

- Replaces terminology relating to custody and access with **terminology focused on the parent-child relationship**
- Adds **criteria relating to the best interests of the child**
- Defines **family violence** and adds specific criteria to consider in such cases
- Adds measures designed to encourage **resolution of family disputes**
- Establishes a process for cases where a child **relocates**
- Implementation of 2 **international conventions**

Family Orders and Agreement Enforcement Assistance Act

- Notably: authorization to communicate information when setting child support

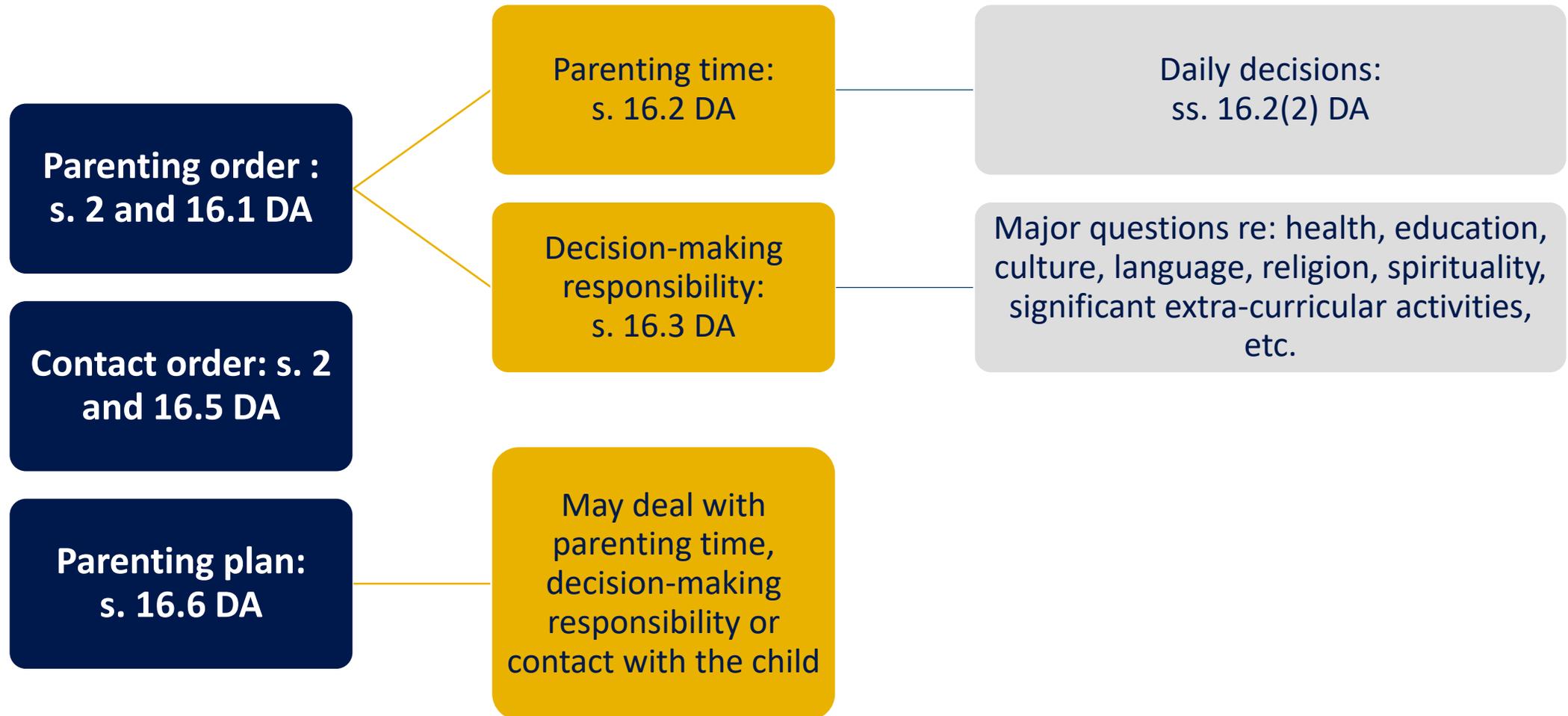
Garnishment, Attachment and Pension Diversion Act

- Notably: priority ranking for support obligations

NEW TERMINOLOGY

Parenting orders, decision-making responsibility, parenting time, contact orders and parenting plan

New terminology



Who can obtain a parenting order?

16.1 (1) A court of competent jurisdiction may make an order providing for the exercise of parenting time or decision-making responsibility in respect of any child of the marriage, on application by

(a) either or both spouses; or

(b) a person, other than a spouse, who is a parent of the child, stands in the place of a parent or intends to stand in the place of a parent.

(2) The court may, on application by a person described in subsection (1), make an interim parenting order in respect of the child, pending the determination of an application made under that subsection.

16.1 (3) A person described in paragraph (1)(b) may make an application under subsection (1) or (2) only with leave of the court.

Content of parenting orders

- 16.1 (4)** The court may, in the order,
- (a) allocate parenting time in accordance with section 16.2;
 - (b) allocate decision-making responsibility in accordance with section 16.3;
 - (c) include requirements with respect to any means of communication, that is to occur during the parenting time allocated to a person, between a child and another person to whom parenting time or decision-making responsibility is allocated; and
 - (d) provide for any other matter that the court considers appropriate.

Content of parenting orders (continued)

16.1 (7) The order may authorize or prohibit the relocation of the child.

16.1 (8) The order may require that parenting time or the transfer of the child from one person to another be supervised.

16.1 (9) The order may prohibit the removal of a child from a specified geographic area without the written consent of any specified person or without a court order authorizing the removal.

Decision-making responsibility

2 (1) In this Act,

decision-making responsibility means the responsibility for making significant decisions about a child's well-being, including in respect of

- (a) health;
- (b) education;
- (c) culture, language, religion and spirituality; and
- (d) significant extra-curricular activities;

16.3 Decision-making responsibility in respect of a child, or any aspect of that responsibility, may be allocated to either spouse, to both spouses, to a person described in paragraph 16.1(1)(b), or to any combination of those persons.

Parenting time

2 (1) In this Act,

parenting time means the time that a child of the marriage spends in the care of a person referred to in subsection 16.1(1), whether or not the child is physically with that person during that entire time;

16.2 (3) Unless the court orders otherwise, a person to whom parenting time is allocated under paragraph 16.1(4)(a) has exclusive authority to make, during that time, day-to-day decisions affecting the child.

Contact order: jurisdiction of court

2 (1) In this Act,

contact order means an order made under subsection 16.5(1);
(*ordonnance de contact*)

6.1 (3) For greater certainty, if no parenting order has been made in respect of a child, no application for a contact order may be brought under this Act in respect of the child.

16.5 (1) A court of competent jurisdiction may, on application by a person other than a spouse, make an order providing for contact between that person and a child of the marriage.

16.5 (3) A person may make an application under subsection (1) or (2) only with leave of the court, unless they obtained leave of the court to make an application under section 16.1.

Contract order: elements to consider

16.5 (4) In determining whether to make a contact order under this section, the court shall consider all relevant factors, including whether contact between the applicant and the child could otherwise occur, for example during the parenting time of another person.

16.5 (5) The court may, in the contact order,

- (a) provide for contact between the applicant and the child in the form of visits or by any means of communication; and
- (b) provide for any other matter that the court considers appropriate.

Parenting plan

16.6 (1) The court shall include in a parenting order or a contact order, as the case may be, any parenting plan submitted by the parties unless, in the opinion of the court, it is not in the best interests of the child to do so, in which case the court may make any modifications to the plan that it considers appropriate and include it in the order.

(2) In subsection (1), parenting plan means a document or part of a document that contains the elements relating to parenting time, decision-making responsibility or contact to which the parties agree.



Resource: Interactive form “Parenting plan tool”: <https://www.justice.gc.ca/eng/fl-df/parent/ppt-ecppp/form/form.html>

THE BEST INTERESTS OF THE CHILD REAFFIRMED AND DEFINED

Parties' obligations and factors

Obligation to protect the child from conflict

7.1 A person to whom parenting time or decision-making responsibility has been allocated in respect of a child of the marriage or who has contact with that child under a contact order shall exercise that time, responsibility or contact in a manner that is consistent with the best interests of the child.

7.2 A party to a proceeding under this Act shall, to the best of their ability, protect any child of the marriage from conflict arising from the proceeding.

**Guiding principle:
the interests of
the child**

**Primary consideration:
the child's safety,
security and well-
being**

16 (1) The court shall take into consideration only the best interests of the child of the marriage in making a parenting order or a contact order.

(2) When considering the factors referred to in subsection (3), the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being.

Factors relating to interests of the child

a) the **child's needs**, given the child's age and stage of development, such as the child's need for stability

b) the **nature and strength of the child's relationship** with each spouse, his/her siblings and grandparents and other who play an important role in his/her life

c) each spouse's willingness to support the **development and maintenance of the child's relationship with the other spouse**

d) the **history of care** of the child

e) the child's **views and preferences**, giving due weight to the child's age and maturity, unless they cannot be ascertained

f) the child's **cultural, linguistic, religious and spiritual upbringing and heritage**, including Indigenous upbringing and heritage

g) any **plans** for the child's care

h) the **ability and willingness** of each person in respect of whom the order would apply to **care for and meet the needs of the child**

i) the **ability and willingness of each person to communicate and cooperate**, in particular with one another, on matters affecting the child

j) any **family violence** and its impact

k) any **civil or criminal proceeding, order, condition, or measure** that is relevant to the safety, security and well-being of the child

Past conduct

Old ss. 16(9)

16 (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

New ss. 16(5)

16 (5) In determining what is in the best interests of the child, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order.

This rule is designed to prevent conduct that was once judged immoral, such as adultery, from being taken into consideration. However, it does not exclude past conduct that is relevant to assessing the capacity to perform a parenting role (see Justice Canada's evidence).

No equal shared parenting presumption

“A number of witnesses addressed the issue of a presumption of equal shared parenting under the Divorce Act. While some witnesses were in favour of a presumption, most were strongly opposed to it. Creating such a presumption would have gone against our commitment to ensure that each child's best interests would always be put first. **Given that each child and each family's circumstances are unique, courts need flexibility to tailor parenting orders to the needs of each particular child.**”

Hon. David Lametti, Minister of Justice

30 January 2019 (Hansard, House of Commons)

Undertaking from the Department to amend marginal note for ss. 16 (6) in order to eliminate any possibility of seeing it as encouraging the granting of a presumption

~~Maximum parenting time~~ Parenting time consistent with the best interests of the child

16 (6) In allocating parenting time, 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.

MESURES TO DE- JUDICIALIZE RELATIONS BETWEEN EX-SPOUSES

Definition, obligations and administrative calculation of support



2016-2017: family matters represent **38% of cases** heard by the courts



Over a period of 3 years, **5.1% of adult Canadians** (1M+) will have family-related legal problems



2009-2010: **32% of cases** involving access rights and support claims remain in the justice system for at least four years



In 2012, **40 - 57% of parties** to a family matter represent themselves

Family dispute resolution process

2 (1) In this Act,

[...]

family dispute resolution process means a process outside of court that is used by parties to a family law dispute to attempt to resolve any matters in dispute, including negotiation, mediation and collaborative law;

Obligations of legal counsel

Former provision

9 (2) It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters.

New provision

7.7 (2) It is also the duty of every legal adviser who undertakes to act on a person's behalf in any proceeding under this Act

- (a) to encourage the person to attempt to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so;
- (b) to inform the person of the family justice services known to the legal adviser that might assist the person
 - (i) in resolving the matters that may be the subject of an order under this Act, and
 - (ii) in complying with any order or decision made under this Act; and;
- (c) to inform the person of the parties' duties under this Act.



Inventory of Government-Based Family Justice Services: <https://www.justice.gc.ca/eng/fl-df/fjs-sjf/sch-rch.asp>

Duties of the parties

7.3 To the extent that it is appropriate to do so, the parties to a proceeding shall try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process.

7.6 Every document that formally commences a proceeding under this Act, or that responds to such a document, that is filed with a court by a party to a proceeding shall contain a statement by the party certifying that they are aware of their duties under sections 7.1 to 7.5.

The limits of the family dispute resolution process

The parties should choose the approach that best suits them, based on numerous factors, including:

the level of conflict between the spouses	the extent to which the dependent children are involved in the conflict between the spouses	the extent to which the spouses are prepared to cooperate to reach an agreement	the existence of family violence in the relationship.
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Court order to use ADR

16.1 (6) Subject to provincial law, the order may direct the parties to attend a family dispute resolution process.

16 (3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

(ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child;

Administrative calculation of child support

25.01 (1) With the approval of the Governor in Council, the Minister of Justice may, on behalf of the Government of Canada, enter into an agreement with a province authorizing a provincial child support service designated in the agreement to calculate the amount of child support in accordance with the applicable guidelines and set it out in a decision.

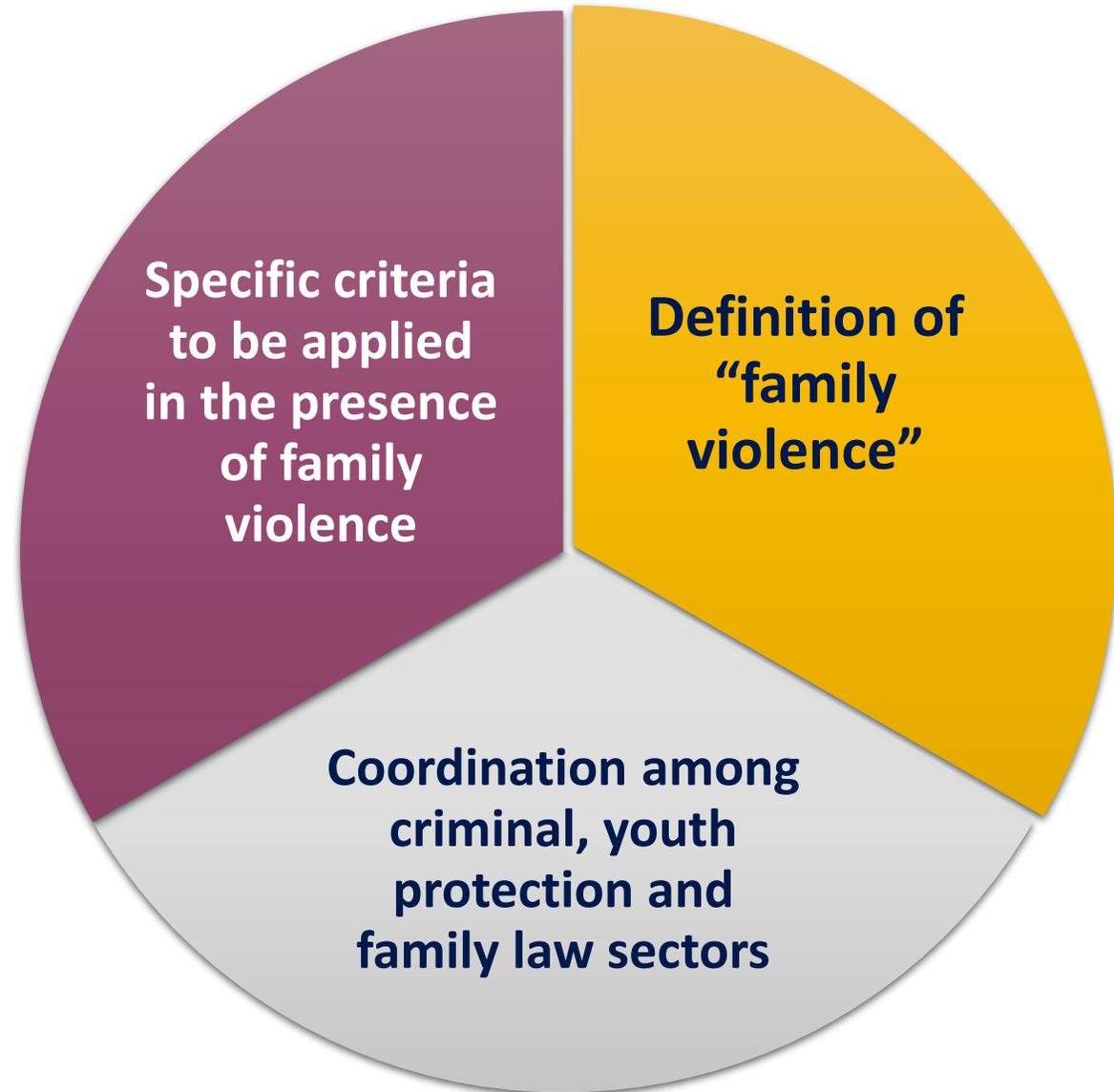
25.1 (1) With the approval of the Governor in Council, the Minister of Justice may, on behalf of the Government of Canada, enter into an agreement with a province authorizing a provincial child support service designated in the agreement to recalculate, in accordance with the applicable guidelines, the amount of child support orders on the basis of updated income information.

FAMILY VIOLENCE

Definition, factors, coordination with other sectors of the justice system and screening

Changes

Three changes supporting the fight against family violence



Family violence by the numbers



2017: **intimate partner violence** represented almost a third (30%) of all violent crimes reported by the police, representing almost 96,000 victims between the ages of 15 and 89



Almost 8 out of 10 (79%) victims were **women**



Off all the **homicides between spouses** (current or former) committed between 2007 and 2017, almost two-thirds (62%) were preceded by incidents of family violence



Of the 59,236 victims of violence from 0-17 years of age, almost one-third (30 %) were **assaulted by a family member**



Almost 6 out of 10 (58%) victims of domestic violence were **assaulted by a parent**



2009: almost two-thirds (64%) of victims of acts of violence during or after separation said that **a child heard or saw the act**

Definition of family member

2 (1) In this Act,

family member includes a member of the household of a child of the marriage or of a spouse or former spouse as well as a dating partner of a spouse or former spouse who participates in the activities of the household.

- Essentially, the definition looks at **the household of the child or either spouse**, not family ties to the child
- Explicitly includes any **dating partner** (boyfriend, girlfriend) to the extent that they participate in the activities of the child's household or that of either spouse

Definition of family violence: 4 major categories of conducts

The definition encompasses **four major categories of conducts**, whether or not it is criminal, directed from one family member to another:

Violent
conduct

Threatening
conduct

Conduct that
constitutes a
pattern of **coercive**
and **controlling**
behaviour

Conduct that
causes that other
family member to
fear for their own
safety or for that
of another person

Non exhaustive list of examples of the behaviour in question

a) physical abuse, including forced isolation, but not including the use of reasonable force to protect oneself or someone else

b) sexual abuse

c) threats to kill or cause bodily harm to any person

d) harassment, including stalking

e) the failure to provide the necessities of life

f) psychological abuse

g) financial abuse

h) threats to kill or harm an animal or damage property

i) the killing or harming of an animal or the damaging of property



Other examples of violent acts: *Making Plans: A guide to parenting arrangements after separation or divorce* https://www.justice.gc.ca/eng/fl-df/parent/mp-fdp/En-Parenting_Guide.pdf

Family violence against a spouse cannot be ignored when determining the best interests of the child

16 (3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including [...]

- (j)** any family violence and its impact on, among other things,
- (i)** the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and,
 - (ii)** the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and

Examples of questions to consider:

- Is the violent spouse using their relationship with the child to continue to exercise control over a member of the family, including the ex-spouse?
- Do the necessary interactions between the spouses create a threat to the safety, security and well-being of the child, one of the spouses or any other member of the family?

If family violence is present, additional factors to consider before making a decision on any parenting order

a) the **nature, seriousness** and **frequency** of the family violence and when it occurred

b) whether there is a **pattern of coercive and controlling behaviour** in relation to a family member

c) whether the family violence is **directed toward the child** or whether the child is **directly or indirectly exposed** to the family violence

d) the **physical, emotional** and **psychological** harm or risk of harm to the **child**

e) any **compromise to the safety** of the child or other family member

f) whether the family violence causes the child or other family member to **fear for their own safety or for that of another person**

g) any **steps taken** by the person engaging in the family violence to **prevent further family violence** and improve their ability to care for and meet the needs of the child

h) any other **relevant factor**

Obligation of the court to consider relevant undertakings/recognizances, orders and proceedings (s. 7.8)

Civil

Civil protection order requires a person to stay away from somebody or some place

Youth protection

An agreement with the DPJ, a measure or order made under s. 91 of the *Youth Protection Act*

Criminal

Prohibition of contact, undertaking made under s. 810 Crim. Code, criminal conviction involving a child or a party, etc.

The purpose of this provision is to coordinate among proceedings and better inform the court and, in particular, to identify the relevant elements in cases of family violence.

Legal counsel and family violence

Screening for violence

- Ongoing obligation for the professional to **gather information on a person or former couple...**
- in order to **determine whether there is a history of family violence and the appropriate line of conduct** with the client and to direct them to the appropriate resources.

Different from risk assessment

- Evaluation of various **factors** (e.g. consumption of alcohol) **present in a family violence situation...**
- in order to qualify and **quantify the risk** and develop a safety plan to **reduce to the minimum the probability of violence** in the future

Lawyers are not being asked to act like psychologists or social workers but simply to take account of family violence in the advice they give to clients.

Screening for family violence

- Being aware of the **history of family violence** and identifying the type of violence are crucial steps when making decisions about the best interests of the child, the safety and security of the victims and the appropriate resolution mechanisms
- Victims often suffer **ongoing trauma**, which can make them reluctant to talk about violence, influence their ability to engage effectively in their case and reduce their capacity to negotiate effectively
- Currently: family law practitioners have **no universal tool or procedure for screening for family violence**
- Tools can help create a **space to discuss** and raise awareness of family violence

Screening for family violence

The information gathered can help you:

- determine the **safety issues** and direct the client to the appropriate resources
- consider the **legal options** appropriate to cases of violence to present to the client
- apply an **approach that takes account of trauma** in your interactions with client
- determine **which procedure would be preferable**, including whether mediation (or other mechanisms) would be preferable to a trial

What would a family violence screening tool look like?

- **Oral or written**
- **Yes/no** and **open** questions
- The **length** of the tool (number of questions asked) **will depend on the objective** (acquire a nuanced understanding of the experience of violence vs. determine whether the violence is a factor to consider)
- Generally **divided into sections** (physical violence, sexual violence, fear of spouse, threats, etc.)
- Use of **non-gendered language**
- Omits certain **terms that may stigmatize** the person or have a negative connotation, such as “rape,” “battered” and “domestic violence”

Some recommendations from the Family Violence Screening Tool (FVST) Working Group

- That family law practitioners be required to conduct **universal screening**
- A **two-step approach**: 1) a short tool to quickly detect warning signs and 2) a longer tool when warning signs are present or clients have of their own accord revealed family violence
- That all practitioners follow **(free) training on the use of the tool**
- That work be done to develop **culturally adapted tools**, i.e. tools adapted to Aboriginal families, new immigrants, etc.

Family violence: Some resources

- Linda C. NEILSON, *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal, family, child protection): A Family Law, Domestic Violence Perspective*, Ottawa, Department of Justice Canada, 2013, on-line: https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/enhancement/nelson_web.pdf.
- FEDERAL-PROVINCIAL TERRITORIAL AD HOC WORKING GROUP ON FAMILY VIOLENCE, *Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems*, volume I (report), Ottawa, Department of Justice Canada, 2013, on-line: <https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mlfvc-elcvf/index.html>
- Michael P. JOHNSON, « **Les types de violence familiale** » in Maryse RINFRET-RAYNOR, Élisabeth LESIEUX, Marie-Marthe COUSINEAU, Sonia GAUTHIER and Elizabeth HARPER eds.), *Violence envers les femmes. Réalités complexes et nouveaux enjeux dans un monde en transformation*, Québec, Les presses de l'Université du Québec, 2014, p. 15.



NEW PROCEDURE FOR RELOCATION

Definition, notice and opposition



Separated or divorced people are more mobile
than married people



Canadian jurisprudence: in **92% of cases**, it is
mothers who are seeking to move



Principal motives: improved economic situation,
new intimate relationship, seeking support from
family



Survey: 98% of lawyers and judges think that **family**
cases are more difficult to resolve when a move is
involved



State of law before changes

Gordon v. Goertz, [1996] 2 SCR 27

- Any dispute concerning a relocation of the child should be resolved based on the **criterion of the child's best interests**
- **Non exhaustive list of relevant factors**, including the opportunity to promote maximum contact between the child and both parents, the child's physical, emotional, social and economic needs, and the child's wishes and preferences
- The **reason for the move** was to be taken into account only in **exceptional cases**
- Many, sometimes contradictory, jurisprudential trends, including:
 - Move is refused in cases of equal sharing of parental time

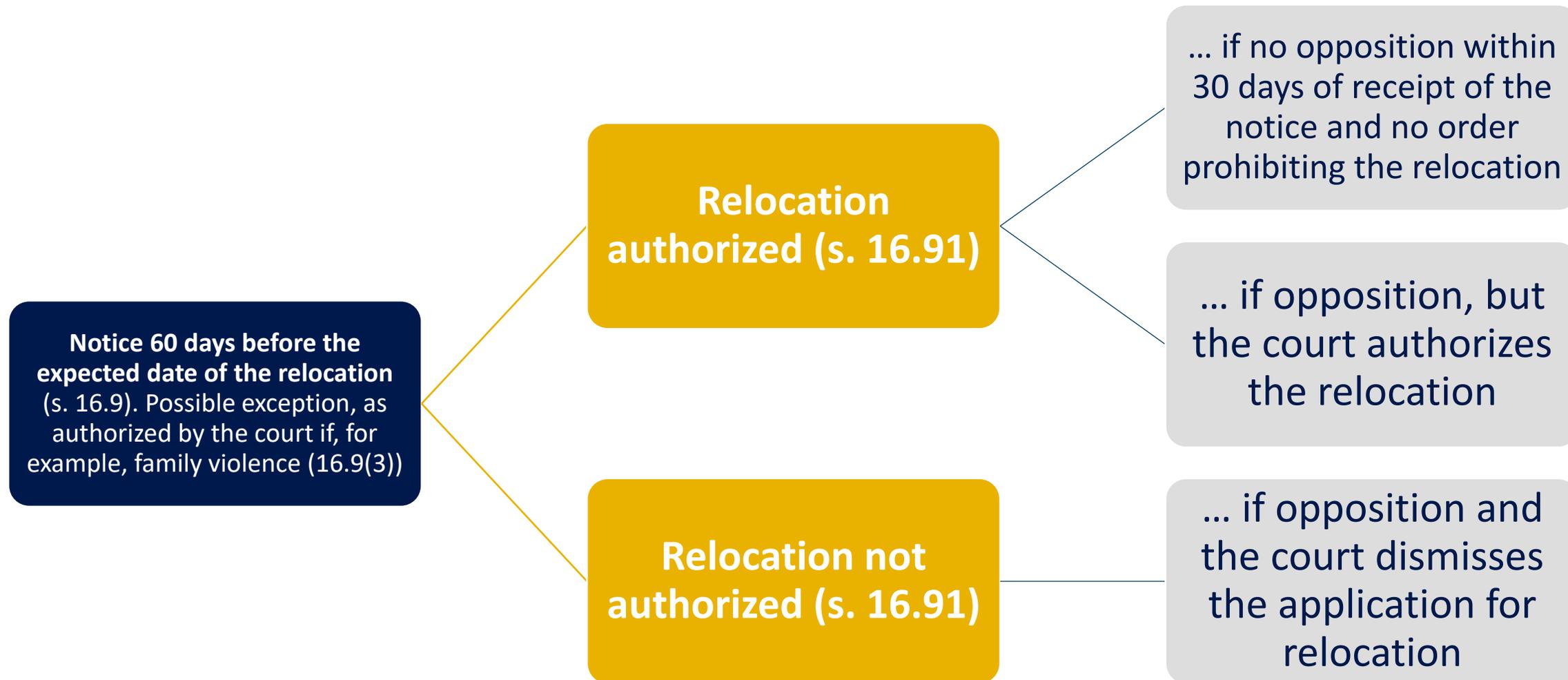
Definition of relocation

relocation means a change in the place of residence of a child of the marriage or a person who has parenting time or decision-making responsibility — or who has a pending application for a parenting order — that is likely to have a significant impact on the child’s relationship with

- (a) a person who has parenting time, decision-making responsibility or an application for a parenting order in respect of that child pending; or
- (b) a person who has contact with the child under a contact order;

Any move that does not have a significant impact on the relationship maintained with or by the child is called a “**change in the place of residence**”.

Relocation of a person with parenting time or decision-making responsibility



Burden of proof

Child spends **substantially equal time** in the care of each party

Burden lies on the **person who intends to relocate** the child

Must demonstrate that the relocation is in the **best interests of the child**

Child spends the **vast majority of their time** in the care of the party who intends to relocate the child

Burden lies on the **person who opposes** the relocation

Must demonstrate that the relocation is **not in the best interests of the child**

Any other case

Burden lies on **both parties**

Must demonstrate that the relocation is or is not in the **best interests of the child**

Relevant factors

a) **reasons for the relocation**

b) the **impact** of the relocation **on the child**

c) the **amount of time spent with the child** by each person and the **level of involvement** in the child's life of each of those persons

d) whether the person **complied with any applicable notice requirement**

e) the existence of an order, arbitral award, or agreement that specifies the **geographic area in which the child is to reside**

f) the reasonableness of the **proposal to vary the exercise of parenting time, decision-making responsibility or contact**

g) whether each person who has parenting time or decision-making responsibility or a pending application for a parenting order has **complied with their obligations**

BUT NOT: whether the person would relocate without the child or would not move if an order prohibited the child's relocation

Costs relating to exercise of parenting time after relocation

16.95 If a court authorizes the relocation of a child of the marriage, it may provide for the apportionment of costs relating to the exercise of parenting time by a person who is not relocating between that person and the person who is relocating the child.

Change of place of residence of a person with parenting time or decision-making responsibility

Notice (s. 16.8) – no prescribed notice period. Possible exception, as authorized by the court if, for example, family violence (16.8(3))

No opposition allowed

Change of place of residence of a person with a contact order

Notice. Possible exception, as authorized by the court if, for example, family violence (16.96)

60 days if the change of residence is likely to have a significant impact on the child's relationship with that person (16.96(2))

No opposition allowed

No prescribed notice period for any other change of residence

No opposition allowed

LANGUAGE RIGHTS



2016 Census: there are **more than one million (1,024,195) Francophones living outside Quebec** and a similar number of Anglophones (1.1 million) living in Quebec

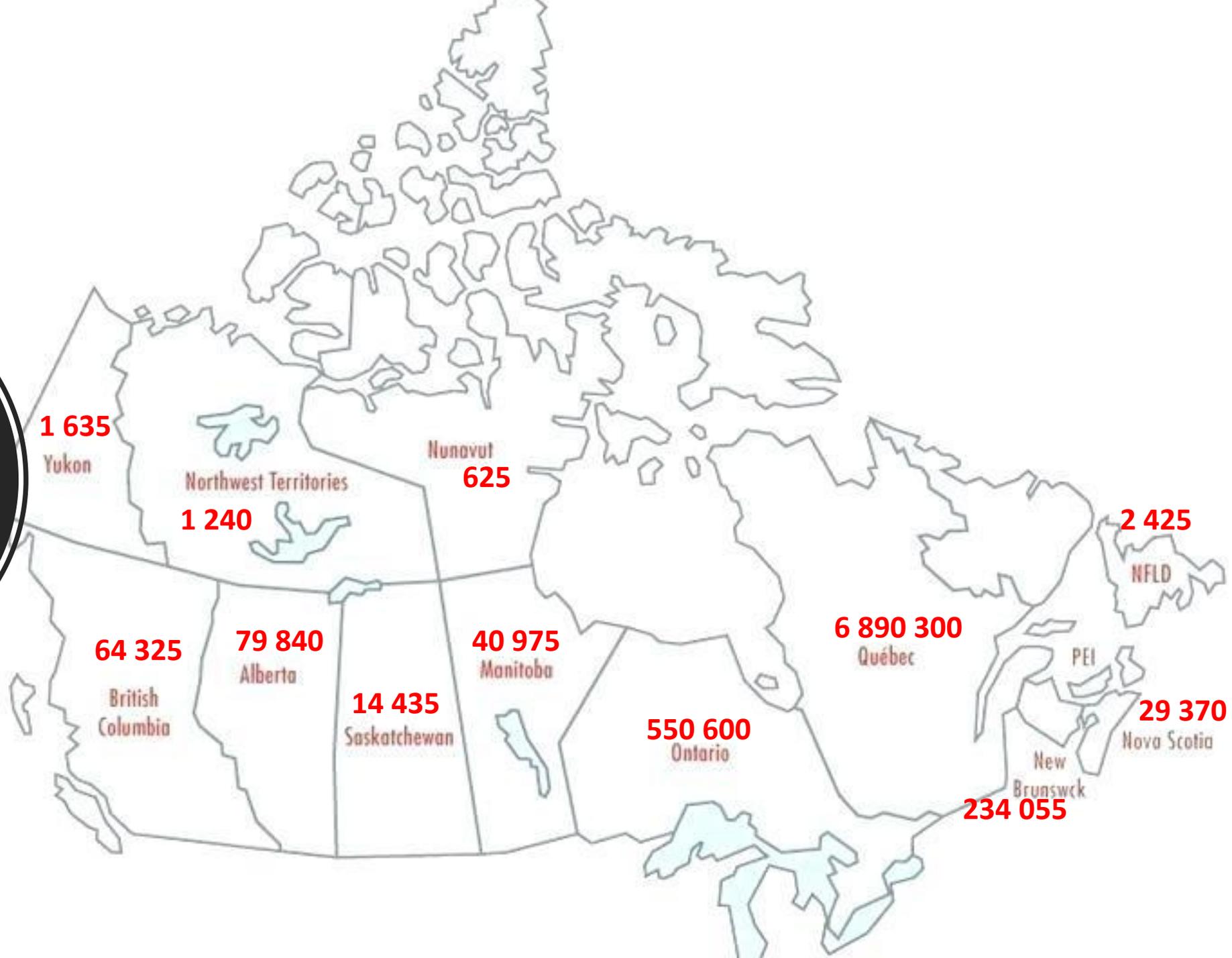


Canadians living outside Quebec with French as their first official language spoken represent **4% of the country's total population**



54% of lawyers outside Quebec consider that additional delays have an impact on the choice of whether or not to proceed in French and 39% of them consider that additional costs have such an impact

Population with
French as first
official language
spoken



Access to divorce in French across Canada

Terr./prov. where divorce is available in **French and English**

Quebec

Ontario

New-Brunswick

Manitoba

Saskatchewan

NWT

Yukon

Nunavut

Prov. s where divorce is sometimes available **in French, at considerable effort** (uncontested divorces only)

Nova Scotia

PEI

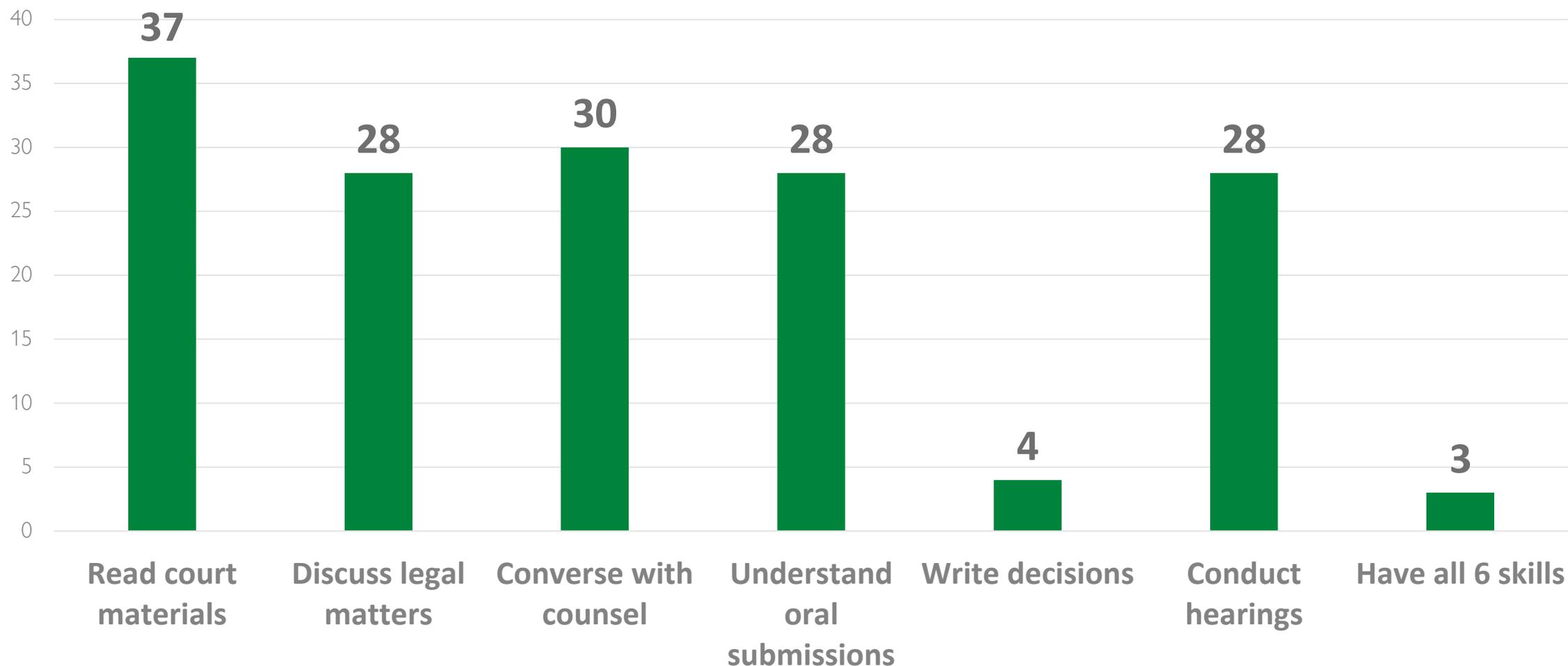
Alberta

Prov. where divorce is available **only in English**

BC

NL

Language skills in both languages of the 86 superior court judges appointed from October 2018 to October 2019



Importance of language rights in divorce matters

- Divorce **affects many Canadians** and their children
- Divorce affects families **financially and emotionally**
- The recognition of both official languages promotes **access to justice**, especially for self-represented individuals
- Language, which is very personal in nature, forms an important part of **cultural identity**

Joint Committee's Recommendation (1998)

"The Committee agrees that, as the Divorce Act governs all divorces in Canada, and Canadians whose preferred language is either French or English are found across the country, **divorce-related judicial services in both languages should be available nationwide.** [...] To this end, the Committee has concluded that **the *Divorce Act* should be amended** to specify the right of parties to a divorce to have their proceedings go ahead in the official language of their choice. These amendments should be modelled on the language rights provisions in section 530.1 of the *Criminal Code*."

Special Joint Committee on Child Custody and Access

December 1998

20 years later: FAJEF's recommendation

"The Fédération des associations de juristes d'expression française de common law inc believes that to fill that void, Bill C-78 should expressly recognize language rights in any proceeding introduced under the Divorce Act."

**Fédération des associations de juristes d'expression
française**

November 2018

Part XVII of the Criminal Code

530 (1) On application by an accused whose language is one of the official languages of Canada, made not later than [...] a judge, provincial court judge, judge of the Nunavut Court of Justice or justice of the peace shall grant an order directing that the accused be tried before a justice of the peace, provincial court judge, judge or judge and jury, as the case may be, who speak the official language of Canada that is the language of the accused or, if the circumstances warrant, who speak both official languages of Canada.

Beaulac Case

- Juge Bastarache: « Language rights are not negative rights, or passive rights; they can only be enjoyed if the means are provided. This is consistent with the notion favoured in the area of international law that the **freedom to choose is meaningless in the absence of a duty of the State to take positive steps to implement language guarantees.** »
- The State has a duty to take positive measures to implement the language guarantees it has recognized and that aim to “**protect official language minorities in this country and to insure the equality of status of French and English**”.

Mazraani Case

- "Language rights are not procedural rights related to the dispute that brought the parties before the court in question. Rather, they are **fundamental rights** related to access of the parties and their witnesses to that court in the official language of their choice. **Absent vigilance on the judge's part, this bilingual status is purely symbolic.**"
- "the right at issue in this case is that of speaking in the official language of one's choice. [...] When a person exercises this right, there is thus no need to verify whether he or she speaks better in one language or the other. **A person may choose to stick to a single official language or may even change his or her mind while testifying.**"
- "In our view, it seems inappropriate to speak in this regard of "waiver" of a right, be it directly or through counsel. The right is not a right to speak in one's mother tongue or in a language that the court deems to be the person's language: it is the right to make a personal *choice*. [...] **What the courts concerned must protect is not just the fact of speaking in one of the official languages, but also the free and informed nature of the choice to speak in one of them rather than the other.**"

New Provision in the *Divorce Act*

23.2 (1) A proceeding under this Act may be conducted in English or French, or in both official languages of Canada.

Right to use either official language

23.2 (2) (2) In any proceeding under this Act,

- (a) any person has the right to use either official language, including to
- (i) file pleadings or other documents,
 - (ii) give evidence, or
 - (iii) make submissions;

Simultaneous interpretation

23.2 (2) In any proceeding under this Act,

(b) the court shall, at the request of any person, provide simultaneous interpretation from one official language into the other;

Right to a judge who speaks the same official language

23.2 (2) In any proceeding under this Act,

(c) any party to that proceeding has the right to a judge who speaks the same official language as that party or both official languages, as the case may be;

Right to request a transcript or recording

23.2 (2) In any proceeding under this Act,

(d) any party to that proceeding has the right to request a transcript or recording, as the case may be, of

- (i) what was said during that proceeding in the official language in which it was said, if what was said was taken down by a stenographer or a sound recording apparatus, and
- (ii) any interpretation into the other official language of what was said; and

Judgment or order

23.2 (2) In any proceeding under this Act,

(e) the court shall, at the request of any party to that proceeding, make available in that party's official language of choice any judgment or order that is rendered or made under this Act and that relates to that party.

Original version prevails and court forms

23.2 (3) In the case of a discrepancy between the original version of a document referred to in paragraph (2)(a) or (e) and the translated text, the original version shall prevail.

(4) The court forms relating to any proceedings under this Act shall be made available in both official languages.

Financement annoncé

2019 Budget: 21.6 million over five years, beginning in 2020-2021, to support legislative amendments to increase access to family justice - particularly in divorce matters - in the official language of one's choice. Funding will be provided through the Department of Justice Canada

April 2019: \$329,105 for professional development in legal translation at McGill University's School of Continuing Studies, as part of the Access to Justice in Both Official Languages Support Fund

VARIA



Procedures involving several jurisdictions

- The first proceeding introduced takes precedence (ss. 3(2), 4(2) and 5(2), as amended by the remedial statute)
- If introduced the same day and not abandoned within 40 days, the Federal Court may determine which Canadian court has jurisdiction (ss. 3(3), 4(3) and 5(3), as amended by the remedial statute)
- Jurisdiction of court in the province or territory where a child habitually resides in cases where the child is removed from that province or territory or retained in another (new s. 6.2)

Jurisdiction to hear an application for contact order

6.1 (1) If a court in a province is seized of an application for a parenting order in respect of a child, the court has jurisdiction to hear and determine an application for a contact order in respect of the child.

(2) If no variation proceeding related to a parenting order in respect of a child is pending, a court in a province in which the child is habitually resident has jurisdiction to hear and determine an application for a contact order, an application for a variation order in respect of a contact order or an application for a variation order in respect of a parenting order brought by a person referred to in subparagraph 17(1)(b)(ii), unless the court considers that a court in another province is better placed to hear and determine the application, in which case the court shall transfer the proceeding to the court in that other province.

Jurisdiction when the child resides outside Canada

6.3 (1) If a child of the marriage is not habitually resident in Canada, a court in the province that would otherwise have jurisdiction under sections 3 to 5 to make a parenting order or contact order, or a variation order in respect of such an order, has jurisdiction to do so only in exceptional circumstances and if the child is present in the province.

(2) In determining whether there are exceptional circumstances, the court shall consider all relevant factors, including

- (a)** whether there is a sufficient connection between the child and the province;
- (b)** the urgency of the situation;
- (c)** the importance of avoiding a multiplicity of proceedings and inconsistent decisions; and
- (d)** the importance of discouraging child abduction.

Ratified international conventions

2007 Convention on the international recovery of child support and other forms of family maintenance

Designed to establish an equitable, efficient and effective international support obligation recovery system

The Convention provides for:

- guarantees of effective access to transboundary support obligation enforcement procedures
- a system for recognition and enforcement of support obligation decisions
- measures to ensure rapid and effective enforcement of obligations

Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

Designed to establish “a structure for effective international co-operation in child protection matters”

The Convention provides for:

- rules governing jurisdiction and the applicable law
- automatic recognition and enforcement of court orders
- exchanges of information and cooperation among judicial and administrative authorities
- urgent or provisional protection measures

The implementation of these two conventions also requires provincial ratification.

Related amended legislation

Family Orders and Agreement Enforcement Assistance Act

- Transmission of data by federal authorities (e.g. Revenue Canada) to the provinces permitted to establish or amend a support provision. Before: only for the *enforcement* (s. 7)
- Measures to ensure that the information communicated cannot be made public (s. 13)
- Simultaneous search of federal and provincial files permitted (s. 8)
- Expanded authority for provincial child support services. May establish the initial child support amount and perform new calculations (ss. 25.01 et seq.)

Garnishment, Attachment and Pension Diversion Act

- The GAPDA provides for garnishment of wages and other remuneration paid to federal public servants in order to satisfy support obligations
- New section 27.2 GAPDA: payment of support obligations will have priority over all other debts, except debts payable to the State

Next step: appeal

- The FAJEF recommended the addition of a right to require that the appeal be heard by a judge or judges who understand French and English without the assistance of an interpreter.
- Ultimately, recommendation was not implemented.

Coming into force

Order of 7 August 2019 sets **1 July 2020** for the coming into force of most amendments to the *Divorce Act*.

The **language rights** provision will come into force in one or more provinces on a date or dates to be set by **order in council**.



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Thank you. Meegwetch.

<https://sencanada.ca/en/senators/dalphond-pierre/>