Department of Justice Canada
Ministère de la Justice Canada

Overview and Assessment of Approaches to Access Enforcement: An Update

Prepared by:
Dr. Martha Bailey
Professor
Faculty of Law, Queen's University

Presented to:
Family, Children and Youth Section
Department of Justice Canada

27 March 2017

Canada

ISBN 978-0-660-24160-9
Cat. No. J3-5/2017-8E-PDF

Table of Contents

Executive Summary

In most cases, access arrangements are generally complied with and parents are satisfied with the arrangements. Many custodial parents deny access occasionally for reasons such as illness of the child. As well, many non-custodial parents cancel access visits occasionally for various reasons. The cases of more concern are those involving ongoing resistance to and denial of access, those where there is a high level of conflict between the parents and those where the non-custodial parents fail to exercise access or to maintain a positive relationship with their children.

In considering the enforcement of access orders, the focus must always be on the best interests of the child. The views of the child are a relevant consideration in determining the best interests of the child, provided the child is capable of expressing views. Canadian statutes generally provide that orders regarding access should be in the best interests of the child and that the views of the child should be considered in determining the best interests of the child. In practice, however, some courts have applied a strong presumption that access is in the best interests of the child, with the result that some orders may be made that do not further the child's best interests. Researchers have found that courts sometimes order that access be supervised in order to address concerns such as abusive behavior, but that supervision orders do not always address the concerns or ensure protection of the child's best interests. An approach more consistent with statutes, leading case law and Canada's obligations under the *Convention on the Rights of the Child* is to determine what is in the best interests of each child without the application of presumptions and to give effect to research indicating that in some cases no access is in the best interests of the child. Another issue that is revealed in practice is that the views of the child are not always brought before the court. Additional efforts could be made to ensure that capable children have an opportunity to have their views considered.

Courts generally attempt to respond to enforcement problems that arise *after* an order is made, but at that stage it may be too late to successfully deal with the problems underlying the denial of access. Programs that identify the cases that are likely to involve ongoing enforcement problems *before* the initial access order is made and that include preventive measures to avoid problems are more likely to be effective in protecting the interests of children. Early screening and provision of services appropriate to the nature of the problems identified results in more efficient and cost-effective dispute resolution. None of the provinces or territories provide by statute or otherwise for screening of all cases and provision of appropriate services, although some screening is carried out in some parts of the country. States such as Connecticut that have introduced systematic screening and provision of appropriate services have found that this approach increases rates of settlement, decreases rates of returning to court and enhances the efficiency and cost-effectiveness of the family court system. A similar approach could be adopted in Canada.

Preventive measures and services aimed at non-adversarial resolution of disputes are highly important. In recent years, provinces and territories have expanded services to

facilitate conflict prevention and resolution of disputes. Parental education programs, aimed at informing the parents (and sometimes the children) about post-separation parenting arrangements that promote the best interests of the child, are provided across Canada. Many of these programs are available online, thereby facilitating access. The parental education programs may be generic in nature, or be tailored to parents with high levels of conflict. All provinces and territories provide for mediation and assessments, and some provide such services without charge in some circumstances. In addition, supervised access services are available in all provinces and territories, although these services may not be available in all communities. As well, provinces and territories now play an expanded role in providing legal information to parties. They provide free online access to statutes, regulations and information about court procedures. This is particularly important because of the large increase in unrepresented litigants in family court. Ongoing efforts to improve and enhance parental education, mediation and assessment services, supervised access services and the provision of online information will make successful resolution and management of access disputes more likely.

Children have a right to maintain contact with the non-custodial parent, unless access is not in their best interests. Therefore, adequate remedies for access denial and for failure to exercise access are necessary to protect the rights and interests of children. All provinces and territories have statutory measures to sanction access denial. Only some have statutory sanctions for failure to exercise access. Those that do not have such sanctions may want to consider amendments to add them.

The distinctive nature of access orders influences the choice of enforcement measure. Denial of access and refusal to exercise access are different from refusal to pay a judgment debt, and different interventions may be appropriate depending on the nature of the case. The different circumstances in which access denial and failure to exercise access arise call for different legal interventions. Generally, the best interests of the child standard will support an incremental application of enforcement measures, under which alternative approaches are stressed and compensatory remedies are used initially. When access denial or failure to exercise access persists, remedies become more coercive and punitive. The use of coercive or punitive measures is problematic when there are good reasons for non-compliance. In such cases, it may be in the best interests of the child to vary the custody and access order. Coercive and punitive measures often undermine the best interests of the child and are therefore considered appropriate only after other measures have failed.

Australia, the UK and the US have legal cultures and socio-economic conditions that are similar to Canada's. Canadian law and policy-makers can learn from or use as models the laws and processes used in these countries to deal with access enforcement. Australia and Connecticut are particularly helpful models in regard to early screening and provision of services. Australia has long recognized the need for early identification of particularly problematic parenting issues in order to provide appropriate services. Recent efforts there have focused on improving early identification of serious problems at an early stage. As well, Australia encourages settlement of access disputes and funds a range of services to assist families. In regard to supervised access, Australia's guidelines to enhance the

relationship between the family courts and the supervised access service may be a useful model for Canada. These guidelines outline factors to consider before ordering supervised access, and they may prevent supervised orders being made or continuing when they are not in the best interests of the child. Connecticut has an early screening program and provides differentiated services appropriate to the nature of the access dispute. The evaluation of Connecticut's program indicates that it significantly improves outcomes. Connecticut provides a good model for Canadian law and policy-makers. Recent efforts in England and Wales to improve access enforcement by introducing new statutory sanctions points to the limits of punitive measures and the importance of preventive and alternative measures. England's experience indicates that punitive measures may be appropriate primarily in the relatively small number of cases where the custodial parent is hostile to access. For high-conflict cases, cases involving safety concerns, and those involving older children who are dissatisfied with the access arrangements, more emphasis should be given to problem-solving and to facilitating a workable plan for the future. Michigan provides a model of a state that provides full-service government enforcement of access orders. Because the state assumes the responsibility of enforcing access, much of the burden in lifted from parents. For provinces and territories interested in providing an access-enforcement service, Michigan provides a good model.

Introduction

1) Terminology

Although the language of post-separation parenting has changed over the years, the traditional language is still used in many legal instruments and by parties and judges, and it will be used in this report. It must be noted, however, that the change in language is in part explained by the increase in shared parenting arrangements, which makes the traditional terms "custody" and "access" less appropriate. It is less common now for one parent to have all the incidents of custody, with the other parent having only a right to visit the child. This report uses the term "access" to include "contact," "parenting time," visitation, etc. "Access parent" is used to refer to a parent who has rights of access in this broad sense. "Custodial parent" is used to refer to the other parent, who is often (though not necessarily) the primary residential parent.

2) Purpose

In 2001, the Department of Justice Canada published *Overview and Assessment of Approaches to Access Enforcement*. The current project does not repeat but updates the 2001 report. There will necessarily be some repetition, but the focus here will be on changes in legislation and cases decided since 2001 and on the many new and expanded services. The purpose is to identify current best practices and to identify areas where improvements can be made. The most important developments since 2001 have been in regard to early screening and provision of services and a new emphasis on preventive and alternative measures.

3) Method

Information for this report was collected through a review of the literature, Canadian statutes and Canadian case law. In addition, the author contacted government officials and others involved in access enforcement across Canada for information and comment.

4) Overview

This report looks at the problem of access enforcement in the context of disputes between parents. Enforcement of access in the context of child welfare or adoption cases will not be considered, and special issues raised by access orders in favour of non-parents are not addressed.

The report first reviews the literature and discusses processes relating to access enforcement. The identified processes are: 1) ensuring that access arrangements and access enforcement measures are in the best interests of the child; 2) ensuring that cases are evaluated to determine the appropriate interventions; and 3) ensuring that effective preventive and alternative measures are available to resolve conflicts.

The report then examines Canadian statutes and case law, assessing the extent to which they provide for the identified processes and whether new approaches are needed. As well, Canadian access enforcement services that are proving most effective are described. Some laws and programs from outside of Canada are considered.

The report concludes with a discussion of how access enforcement in Canada could better address the identified challenges.

The overarching theme of this report is the importance of adopting a child-centred approach. This is in keeping with nationally and internationally accepted principles.

Nature and Scope of Access Enforcement Problems

It is still the case that mothers are more likely to have primary care of the children after separation or divorce. In 2011, 70 per cent of separated or divorced parents indicated that the child lived primarily with his or her mother, 15 per cent indicated that the child mainly lived with the father, and nine per cent reported equal living time between the two parents' homes (Canada, 2014). Thus, most cases of access denial involve custodial mothers denying access to non-custodial fathers. Most cases of failure to exercise access involve non-custodial fathers who do not follow the access arrangements.

In most cases, access arrangements are followed. In 2011, 53 per cent of parents reported full compliance with the arrangements in the last 12 months, and 25 per cent reported that the arrangements were followed most of the time. Nine percent of parents reported that the arrangements were only followed some of the time, and 12 per cent said that the arrangements were either rarely or never followed. The most common reason given for non-compliance was that the non-custodial parent failed to exercise access. Another reason given was cancellation of the visit by the custodial parent. Other reasons given for non-compliance were that the arrangements no longer worked for the child, and conflict with ex-partner (Canada, 2014).

In 2011, almost 75 per cent of separated and divorced parents reported satisfaction with the amount of time they spent with their children. Custodial parents were much more likely to report satisfaction than non-custodial parents. The most common reason for dissatisfaction was insufficient time with their children. Eighteen per cent of non-custodial parents indicated that they did not spend any time with their child within the last year, and 44 per cent stated that they spent some time but less than three months. Non-custodial parents who spent more time with their children were more likely to report satisfaction (Canada, 2014).

Most custodial parents are satisfied with the access arrangement and support continued access by the non-custodial parent. Indeed, two-thirds of both custodial and non-custodial parents reported being satisfied with the time spent by their ex-partner with the children. The highest rates of satisfaction (83%) were among parents whose children spent an equal amount of time with both parents.

In most cases, access arrangements are generally complied with and parents are satisfied with the arrangements. Many custodial parents deny access occasionally for reasons such as illness of the child. More problematic is ongoing resistance to and denial of access, a problem more likely to arise in the minority of cases that involve high levels of conflict between the parents (Canada, 2001). Many non-custodial parents cancel access visits occasionally for various reasons. The cases of more concern are those where the non-custodial parents more generally fail to exercise access or to maintain a positive relationship with their children (Canada, 2001).

Processes Relating to Access Enforcement

1) Protecting the Best Interests of the Child

Crafting access enforcement measures that are consistent with the best interests of the child is a challenge. If the access order or agreement is not consistent with the best interests of the child, then enforcing the order will not be either. In some cases, the best interests of the child have been displaced by a focus on the rights of a parent or an assumption that access is always in the best interests of the child. As well, evidence that was not available when the access order was made may now indicate that the order is not in the best interests of the child. In such cases, a variation of the access order rather than enforcement is indicated. Even when the access order or agreement is in the best interests of the child, some enforcement measures will undermine those interests. For example, jailing a custodial parent for contempt of an access order may be harmful to a child whose best interests are served by the ongoing care of the custodial parent.

Determining what access arrangements or enforcement measures are in the best interests of the child requires consideration of all relevant factors, including the views of the child (if the child is capable of expressing views). Researchers emphasize that it is important to listen to children and attempt to see divorce and separation through their eyes. However, even when the views of the child are included in the statutory factors that must be considered when determining the best interests of the child, the legal system regularly excludes children from decisions made about them (Dale, 2014).

One explanation for the exclusion of children from the decision-making process is the procedural rules. Despite the statutory focus on the best interests of the child and the inclusion of the child's views as a factor that must be considered, family law procedures primarily empower the parents rather than the child (Semple, 2010). The parents are the parties, and they may not make efforts to ensure that their children's views are brought into consideration. Many procedures are in place to determine the views of the children, but for the most part they are not mandatory and are often not called into play.

Bertrand and his colleagues identified various ways in which the child's views may be ascertained:

> 1. Through a report prepared by a court-appointed mental health professional (social worker or psychologist – often called an evaluator or assessor) after a series of interviews with the child. This report may focus solely on the wishes and perceptions of the child, though more commonly it is part of a broader report about the child's best interests;
> 2. Through a report (or affidavit) prepared by a neutral lawyer or mental health professional after a single interview with a child;
> 3. Through testimony of a mental health professional who has interviewed the child and is retained by a parent;
> 4. Having a lawyer for the child;

> 5. Having the child testify in court;
> 6. Having an interview of the child by the judge in chambers;
> 7. Allowing parties (i.e., parents) to testify about what the child has told them (i.e., hearsay evidence) through their oral testimony (or video/audiotape) or by calling other witnesses (for example, teachers); and
> 8. Allowing the child (or parent) to submit a letter, e-mail or videotaped statement. (Bertrand et al, 2012: 1-2)

Bala and his colleagues argue that judicial interviews with the child may be valuable, pointing out that often children feel ignored and that outcomes are generally better if children feel that they have a "voice" in the process. They also found that a significant portion of children would like to meet with the judge, even when other measures have been used to ascertain their views. They suggest that, provided the child wishes it

> A child should be able to meet the judge, in addition to having a lawyer, guardian, or evaluation. A primary purpose of such meetings is to let children know that their views and feelings were taken into account, even if not reflected in the final decision. Such meetings may also benefit the judge and other family members, and facilitate dispute resolution. (Bala et al, 2013)

After considering all relevant factors, including the views of the child, the court must determine what access arrangements are in the best interests of the child. In most cases ongoing contact with both parents will be in the best interests of the child, but this is not always the case. While in low-conflict cases, children generally have long-term benefits from having regular and significant involvement with both parents, research suggests that in some high-conflict cases the child's well-being may actually be enhanced if there is no access (Bala & Bailey, 2004/2005).

Supervised access can provide a safe, neutral and child-focused venue for facilitated visits and changeovers to occur between children and their parents. Supervision of access can alleviate risks that otherwise would prevent ongoing contact between the child and the non-custodial parent. Kelly found that supervised access was most commonly ordered where there was evidence of: domestic violence; child abuse; poor parenting skills; mental illness; risk of abduction; reintroduction of a parent; drug or alcohol abuse; or entrenched conflict between the parents, and that often two or more of these factors were present (Kelly, 2011).

Supervised access is sometimes perceived as a way to maintain the relationship between a child and the non-custodial parent in high-conflict cases. Researchers have found that supervised access may be used inappropriately to maintain access in cases where it is not in the best interests of the child. In such cases there appears to be an undue emphasis on maintaining the parent-child relationship. Birnbaum & Chipeur note that supervised access

> is not a substitute for difficult decisions that sometimes need to be made by the court. While legal precedents indicate that access should only be ordered by the court if it actually benefits the child, some judges order supervised access as a

> compromise when access should be terminated until the non-custodial parent obtains the help he or she requires. It would seem that the maximum contact principle has been equated with the best interests of the child. (Birnbaum & Chipeur, 2010: 93)

Kelly found that the emphasis on maximum contact was particularly strong in relation to access by fathers:

> Judges appeared intent on maintaining father/child relationships even in the most desperate of circumstances, often against the wishes of both mother and child. The rationale provided was typically that children do best if they remain in contact with their fathers. While some research tentatively supports this conclusion in relation to low-conflict families, there is little to support the assertion in situations of high conflict or where the father has actually abused the child or mother. (Kelly, 2011: 295)

Access is not always in the best interests of the child, and supervised access should not be ordered as a way to avoid denying access when it is not in the child's best interests. As Kelly pointed out: "In high-conflict families and families where domestic violence is present, ongoing access between children and violent parents may actually increase the risk of harm to children" (Kelly, 2011: 308).

Some supervised access services also serve a parental education function (Michigan, 1999; Bailey, 1999). Supervised exchange of children may be in the best interests of the child when the exchange is conflictual or when one parent uses exchange as a time to abuse the other (Bala et al, 1998: 35). Courts have also ordered supervised pick-up of children when there has been denial of access, thus providing an opportunity to document instances of wrongful denial on the part of the custodial parent (Pearson & Thoennes, 2000: 124).

2) Early Screening

Early screening of parenting disputes is important to determine the most effective way to deal with the problems. The custodial parent, the access parent or the child may resist access, and different responses are required in each case. As well, the reason for resistance to access must be identified in order to address the problem. A determination must be made as to whether the resistance is justified (for example, when access is refused because the access parent is intoxicated). In addition, assessing the nature of the problem – whether it is general opposition to access or occasional refusals of access – will facilitate identification of appropriate responses.

Courts generally attempt to respond to enforcement problems that arise *after* an order is made, but at that stage it may be too late to successfully deal with the problems underlying the denial of access. Programs that identify the cases that are likely to involve ongoing enforcement problems *before* the initial access order is made and that include preventive measures to avoid problems are more likely to be effective in protecting the interests of children.

Researchers point out the importance of early identification of "high conflict" families, arguing that "timely identification of types of conflict would allow for the earliest and most appropriate intervention with families, thereby reducing the associated risks to children" (Birnbaum & Bala, 2010: 413). And without timely identification and intervention, some problems may become intractable. For example, early intervention in cases of parental alienation (where a parent is influencing a child to reject the other parent) is crucial because resistance to access generally becomes increasingly entrenched over time (Fidler & Bala, 2010: 35-36).

The idea of early screening is not new. Back in 1997, Parliament struck the Special Joint Committee on Child Custody and Access to examine the issues relating to custody and access arrangements after separation and divorce, with a special emphasis on the "needs and best interests" of children. After extensive investigations and deliberations, this Committee recommended that there be early identification of high-conflict families, and that such families be streamed into a specialized, expedited process and offered services designed to improve outcomes for their children (Canada, 1998b, Recommendation 32). This recommendation has not been extensively implemented in Canada. The Australian Law Reform Commission also recommended early identification of cases likely to give rise to ongoing problems and allocation of additional resources to these cases, as follows:

> 1) a judge who would deal with the case at all stages (to ensure consistency and to eliminate the need for new judges to learn the history of the case);
> 2) separate legal representation for the children (to ensure that the children's rights and interests are represented);
> 3) an assessment (to ensure that an expert opinion based on objective information is available);
> 4) counselling for parents and children; and
> 5) mediation services for appropriate cases (ALRC, 1995b: chapter 3).

In Australia, early screening to identify cases involving particular risks has been integrated into the court process, and there are ongoing efforts to improve the process (Australia June 2015).

Early screening is also important for determining the appropriate terms of agreements and court orders. For cases in which ongoing access disputes are likely to arise, an access order that is specific about times and dates for access should be made. Enforcement actions are not possible unless the access order is specific (Michigan, 1998b: 6). A specific access order may prevent or alleviate disputes between parents who are not able to work out "reasonable" terms of access, and will allow immediate enforcement when the terms of the order are not followed.

Early screening also enables tailoring of services to meet the needs of the particular family. In cases of access denial or failure to exercise access, high-conflict families will more likely require full-scale evaluations and other services. For low-conflict families, where there are no issues of abuse or parental alienation, brief evaluations that focus on

solutions and parental responsibilities may be effective. Thus, early identification can lead to a more cost-efficient and effective evaluation model (Birnbaum & Radovanovic, 1999).

Increasingly, Canadian courts are using the notion of "high conflict" families but not in a consistent fashion – it is important for the legal system and service providers to adopt clearer and more specific terms to identify and differentiate among the various types of high-conflict cases. Not all cases that are labeled "high conflict" require the same interventions. Researchers argue

> By providing a common language associated with high conflict, there would be a reduction in the extent to which multiple services (adult and children's mental health, child welfare, education, medical, police involvement and legal) are provided to these families without results. Further, having an empirically validated instrument that identifies different levels of conflict would assist mental health practitioners in targeting specific interventions thereby reducing the stress on children and families, and ultimately, would assist the courts in early case management of these families. (Birnbaum & Bala, 2010: 413).

Consistent use of a validated instrument to screen cases in order to identify the particular interventions appropriate would likely lead to a more cost-efficient and effective approach to access problems.

3) Preventive and Alternative Measures

Apart from judicial involvement in settlement through measures such as case management (which will not be addressed in this report), increasingly, governments are offering parental education programs and services to assist parents in resolving conflicts. These services are particularly important to the increasing number of unrepresented litigants in family courts. About 40-57% of litigants in court for family law matters are unrepresented (Canada, 2016).

Parental education programs, which are aimed at improving outcomes for children and at decreasing ongoing conflict and litigation, are now available across Canada. Some of these programs are aimed at children as well as parents. Most programs in Canada are generic and not aimed at high-conflict situations, but some are focused on high-conflict cases. Alberta, for example, provides a parental education course that can be taken online or in person. Information about the course and links are available at https://www.alberta.ca/pas.aspx#toc-0. The course is required for those filing for divorce or when ordered by the court. Topics covered include the following:

1) building relationships;
2) how separation affects parents;
3) how separation affects children;
4) communication skills;
5) legal issues;
6) alternative dispute resolution; and

7) parenting plans.

Those who have completed the parental education course may voluntarily or be ordered by the court to take the parental education course for families in high conflict. Each party takes the course separately. The topics covered include the following:

1) parental involvement and disengagement techniques;
2) parenting plans for high-conflict families;
3) anger, abuse, power and control issues;
4) child development and the needs of children; and
5) renegotiating boundaries.

McIsaac and Finn found some positive results from a parental education program aimed at high-conflict families, but cautioned that it "is not a panacea but is one piece in an array of interventions designed to protect children from the very negative consequences of unresolved conflict and hostility between parents" (McIsaac & Finn, 1999: 81). Fuhrman and colleagues, however, advise against limiting education on domestic violence to families in which it is present because of screening difficulties and the lack of specialized programs. These authors recommend that *all* parental education programs be designed so that they are appropriate for parents who have had an abusive relationship (Fuhrman et al, 1999).

Another method of preventing or dealing with access enforcement disputes is mediation. When there has not been domestic violence and parents are able to work co-operatively, mediation may facilitate resolution of access disputes and prevent enforcement problems or be helpful when working out enforcement problems. Mediation is generally inappropriate when there has been a history of domestic violence (Bala et al., 1998: 72). Therefore, there should be adequate safeguards to prevent inappropriate use of mediation when there has been domestic violence. Many researchers take the view that mandatory mediation is not appropriate for family law cases (Cossman & Myktiuk, 1998: 67-70). Mediation may be the most effective response to some high-conflict cases with access problems, but the decision about whether to participate must be voluntary (Bala & Bailey, 2004/2005). Kruk as well emphasizes the importance of parental education and mediation in addressing access disputes, but argues that these should be voluntary. He recommends that enforcement of orders proceed only after mediation efforts have been unsuccessful or support services refused. He further says: "A mandatory introduction to mediation session should be considered only in cases where violence and abuse are not a factor" (Kruk, 2008: 77).

Canadian Access Enforcement Law

1) **Best Interests of the Child**

Canada is a party to the UN *Convention on the Rights of the Child*. This Convention requires that decisions about access be in the best interests of the child. In order to protect the best interests of the child, the Convention also requires that the views of children be given due weight. As well, the Convention requires that children be protected from all forms of abuse and neglect. Many other factors are relevant to the best interests of the child, but this report will focus on the views of the child and protection of the child from abuse and neglect because these are factors that require additional attention.

Article 3 of the *Convention on the Rights of the Child* provides: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

On the issue of access, the Convention includes the following provisions:

> Article 9(1): States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
>
> Article 9(3): States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Under article 9(3), the best interests principle must not only be a primary consideration in access decisions but also must govern the result. Thus, under the Convention, a child has the right to maintain contact with the non-custodial parent unless contact is not in the best interests of the child. Parents have a right and duty to maintain contact with their children unless contact is not in the best interests of the child. Governments have a responsibility to respect the child's right of access.

In regard to the views of the child, the Convention states

> Article 12 (1): States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

> Article 12(2): For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Thus, children who are capable of forming views have a right to be heard on questions relating to access. They must be provided with an opportunity to be heard directly or through representation.

In regard to abuse and neglect, the Convention provides

> Article 19(1): States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Thus, in access and access enforcement decisions, children have a right to arrangements and measures that do not expose them to any form of abuse or neglect.

A necessary first step for improving access enforcement is to ensure that access orders meet the best interests of the child standard, with the views of the child and the protection of the child from abuse and neglect duly considered. Access orders that do not meet this standard are more likely to give rise to enforcement problems. A custodial parent is less likely to comply with an access order that is not in the best interests of the child. A child is more likely to resist access arrangements that have been made without consideration of the child's views or that expose the child to abuse or neglect.

As indicated in Appendix A, every Canadian jurisdiction requires that access orders be based on the best interests of the child. Alberta, British Columbia, New Brunswick, Newfoundland, the Northwest Territories, Nunavut, Ontario, Quebec, Saskatchewan and Yukon provide a list of factors to consider when determining what access order is in the best interests of the child. The federal government in the *Divorce Act*, and the laws in British Columbia, Manitoba, Newfoundland, the Northwest Territories, Nunavut, Ontario, Saskatchewan and Yukon specifically provide that the conduct of a parent should not be considered unless it affects the ability to parent.

All of the provinces and territories include the views of the child as a statutory factor to consider in determining the best interests of the child. The *Divorce Act* does not mention the views of the child.

The statutes of Alberta, British Columbia, Newfoundland, the Northwest Territories, Nunavut, Nova Scotia and Ontario expressly require that a court hearing an access application take family violence into account when determining what is in the best interests of the child.

As indicated in Appendix A, only the statutes of Alberta, Quebec, Manitoba and Saskatchewan provide that the best interests of the child are a consideration in regard to access enforcement orders.

A review of Canadian case law reveals that accepted principles are not always applied in practice. A guiding principle is that access is a right of the child, not the parent. In *Frame v Smith*, Wilson J (dissenting but not on this point) said "[t]he access right has become the child's right, not the parents' right."[1] Many judges have since adopted this principle, explicitly stating that access is the right of the child.[2]

Another guiding principle is that access arrangements should be determined in light of the best interests of the particular child with no presumptions for or against particular access arrangements. As the Alberta Court of Appeal said in 2008 "there are no longer any presumptions or default positions that regulate decisions as to custody and access."[3]

Despite the lack of presumptions, some judges continue to apply a presumption in favour of access. An Ontario Superior Court judge asserted: "There is a presumption that regular access by a non-custodial parent is in the best interests of children."[4] An Alberta Provincial Court judge made the following comment:

> In attempting to determine what is in the child's best interest, there is a presumption that regular access is in the child's best interest. The right of the child to know and maintain an attachment to the non-custodial parent is, in fact, considered a fundamental right of the child. As a result, incredible deference is given to maintaining the parent-child relationship, but this presumption can be rebutted. A parent does not have an absolute right to access. Therefore, to deny access to a parent is a remedy of last resort.[5]

If access is treated as a presumptive right, attention to the best interests of the child may be displaced by the rights and interests of the parents or by consideration as to whether there is evidence that access would be harmful. The principle that a child has a right to "as much contact with each spouse as is consistent with the best interests of the child" is not a presumption that access is in the best interests of the child.[6] While in low-conflict families, access is generally in the best interests of the child, research shows that in some high-conflict cases no access is in the best interests of the child (Bala & Bailey, 2004/2005). Under Canadian law, each child is entitled to an individualized assessment

---

[1] *Frame* v *Smith*, [1987] 2 SCR 99.
[2] See, e.g. *Boychuck v Singleton*, 2007 BCSC 1387 at para 11; *Harboura v Sitzer*, 2016 ONSC 5844 at para 5; *Billington v VanLarken*, 2009 NSFC 18 at para 6; *KLT v MAT*, 2008 NSFC 16 at para 14.
[3] *Cavanaugh v Balkaron*, 2008 ABCA 423 at para 12.
[4] *VSJ v LJG*, (2004), 5 RFL (6th) 319 (Ont Sup Ct) at para 128.
[5] *WT (Re)*, 2016 ABPC 296. See also *Folahan v Folahan*, 2013 ONSC 2966; *DC v DAC*, 2006 ABQB 526 at para 16.
[6] The *Divorce Act*, s 16(10) provides: "In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact."

based on the individual child's circumstances and without the application of presumptions.

The Ontario Court of Appeal has stressed that "courts are to consider *only* the children's best interests when making custody decisions" and that a "court cannot award custody to one parent to punish the other for non-compliance with court orders."[7]

2) Early Screening

Some screening and triage services are available in some provinces. One example is provided by the Office of the Children's lawyer, part of Ontario's Ministry of the Attorney General, which provides evaluation, representation and intervention services on behalf of the children. The Office of the Children's Lawyer uses an intake form for custody and access cases. Information is collected about violence and the presence of protective orders, criminal charges, mental health and substance abuse issues, as well as information about legal proceedings and the kinds of court services previously used. Use of the intake form facilitates the determination about the best way to deal with the case (Salem et al, 2007: 756; Ontario, 2016).

As yet, no province or territory has made statutory provision for early identification of the particular issues raised in access disputes or the most appropriate interventions and services given the nature of the conflict.

Most provinces and territories have legislation or regulations dealing with court-ordered assessments in custody and access cases. There is no provision for assessments in the federal *Divorce Act*, but courts order assessments in divorce proceedings using provincial or territorial legislation.[8]

3) Preventive and Alternative Measures

a) Parental Education

Parental education programs are now widely available. As indicated in Appendix A, in some provinces completion of a parental education program is mandatory, and in others courts may order parties to attend a program.

Even in the absence of statutory or regulatory authority, judges sometimes order or strongly recommend that parties attend such programs. For example, in a high-conflict case involving domestic violence, the Supreme Court of Prince Edward Island, after awarding the parents joint custody of the children, ordered the father to take anger management treatment and both parents to take a parental education program.[9] The Supreme Court of the Northwest Territories has recommended that parties participate in a parental education program, commenting:

[7] *DD v HD*, 2015 ONCA 409.
[8] See, e.g. *DL v JM*, 2002 CanLII 2764 (ON SC).
[9] *F(JD) v F (JL)*, 2009 PESC 28.

> what would serve the best interests of these children is for both parents to have more awareness of how their actions (and by that I mean both how they act when the children are around and how they treat, and speak to, the children) affect their children and to do everything they can to keep their communications with each other respectful and non-confrontational. If the Parent Education Pilot Program that has, in the past, been offered by the Court Services Division of the Department of Justice in conjunction with the Legal Services Board is available, it may benefit both Mr. and Mrs. Ramsay to participate in it.[10]

b) Mediation

Most Canadian jurisdictions provide for court-ordered mediation, and some provide free or government-subsidized mediation. As indicated in Appendix A, Quebec requires parties to attend an information session on mediation prior to the hearing of any contested custody application. Other provinces provide that courts may order mediation. Ontario and Yukon allow court-ordered mediation only "at the request of the parties." Only Newfoundland, the Northwest Territories and Nunavut explicitly authorize courts to order mediation in the case of wrongful access denial or wrongful failure to exercise access. The *Divorce Act* and some provincial statues require lawyers to discuss with their clients on the advisability of negotiating custody or access matters and to tell them about mediation facilities that might be able to help them negotiate those matters.

c) Supervised Access

Supervision of access can alleviate risks that otherwise would prevent ongoing contact between the child and the non-custodial parent. It is generally ordered when there has been domestic violence, there is a risk of abduction, there is no existing relationship between the child and the non-custodial parent, or the non-custodial parent suffers mental illness, abuses substances, or lacks parenting skills.[11]

The Special Joint Committee recommended the *Divorce Act* be amended to make explicit provision for supervised access orders (Canada, 1998b: Recommendation 35), but this amendment has not been made. As indicated in Appendix A, some provincial statues explicitly provide that supervised access may be ordered, and some provincial statutes explicitly provide that supervised access may be ordered in cases of wrongful denial of access or wrongful failure to exercise access. Even in the absence of such authority, courts have ordered supervised access under their general statutory power to impose terms and conditions on custody and access orders.[12]

[10] *Ramsay v Ramsay*, 2001 NWTSC 61.
[11] See, e.g. *Shamli v Shamli*, 2004 CanLII 12363 (ON SC); *Zahr v Zahr* (1994), 24 Alta LR (3d) 274 (QB); *JVM v MPS*, [1997] BCJ No 1631 (SC).
[12] See, e.g. *Hislap v Gilchrist*, 2013 ABQB 452; *JDG v HMLM*, 2014 BCPC 390.

Supervision may be the only option if the relationship between a child and a non-custodial parent is to continue. This point was made in *Kozachok v Mangaw*, where the court made the following observation:

> The supervised access centre is an excellent access option for this family. In this situation of high conflict, high hostility between the parties, the centre and its staff stand between the parents and permit the monitored, orderly transfer of the child or children to the non-custodial parent. At this point, without a neutral safe access intermediary, I question whether access would be feasible or beneficial to the children.[13]

Courts have recognized, however, that supervision may not address all concerns. In *McEown v Parks*, the court observed that problems relating to access visits may continue even if supervision is ordered:

> Clearly, if there has been an attempt at supervised access which has proven unworkable, such as where the child remains hostile to the father during the visits; the child reacts badly after visits; or, where the access parent continually misses visits or is inappropriate during the access then termination must be considered.[14]

In some cases, the court must decide between supervised access and no access at all. For example, the Yukon Supreme Court rejected a father's request for interim supervised access and ordered that there be no access where there was evidence that the father had abused the mother and child.[15] The Ontario Superior Court denied a mother access, even supervised access, noting that supervised access facilities are not equipped to deal with the mother's actions, which included

> drinking bleach in the son's immediate vicinity, making up criminal charges against the father and organizing a criminal conspiracy to abduct the son. Supervised access centres do not offer a police presence or other measures aimed at preventing criminal action by a parent and are not designed to cope with eventualities such as a mother prone to such behaviour as drinking bleach.[16]

4) Remedies for Access Denial

Children have a right to maintain contact with the non-custodial parent, unless access is not in their best interests. Therefore, adequate remedies for access denial are necessary to protect the rights and interests of children. The issue of access denial may arise when a parent is seeking an initial custody or access order, a variation of custody or access, an order to enforce access, or an order for or variation of support.

[13] *Kozachok v Mangaw*, 2007 ONCJ 70 at para 20.
[14] *McEown v Parks*, 2016 ONSC 6761 at para 140.
[15] *GG v HD*, 2009 YKSC 52.
[16] *MW v EB*, 2006 CanLII 273 (ON SC) at para 25.

The distinctive nature of access orders influences the choice of enforcement measure. For example, denial of access is different from refusal to pay a judgment debt, and different interventions may be appropriate depending on the nature of the case. Some cases of access denial involve custodial parents in conflictual relationships who are hostile to access from the outset and try to thwart it, sometimes using unproven allegations of violence, sexual abuse of the child or other problematic behaviour. As noted above, these high-conflict and "difficult" cases should be identified at the outset and special measures used to deal with them. In other cases, access is denied on a particular occasion because of a child's illness or some other temporary situation. Relatively minor grievances, such as failure to return the child's clothes or medication after an access visit, might precipitate access denial. In some cases, children may not want to continue with the same access schedule because of a conflict with their activities. In such cases, the parents can often solve the dispute relatively easily and work out a new access arrangement, when appropriate, perhaps with some assistance from a mediator or other person.

The different circumstances in which access denial arises call for different legal interventions. Generally, the best interests of the child standard will support an incremental application of enforcement measures, under which alternative approaches are stressed and compensatory remedies are used initially. When access denial persists, remedies become more coercive and punitive. The use of coercive or punitive measures is problematic when there are good reasons for non-compliance (for example, abuse or hostility by the non-custodial parent that causes the child to fear and resist visits). In such cases, it may be in the best interests of the child to vary the order to reduce or eliminate access; it is open to custodial parents to seek such a variation.

a) Justified vs Wrongful Access Denial

Canadian courts have ruled that custodial parents have an obligation to promote compliance with custody and access orders and cannot simply leave the questions of custody and access up to the child. The obligation of a parent to actively promote compliance continues, even as the child gets older. The custodial parent must not only make the child available for access and encourage the child to comply but must require that access occur and actively facilitate it.[17]

Despite the obligation to actively promote and facilitate access, the custodial parent will be justified in denying access in some circumstances. Access orders involve ongoing relationships in which flexibility is required from all parties. Although access may generally be in the child's best interests, on some occasions it may not be. Denial of access in such cases, for example, when the child is ill or the non-custodial parent is intoxicated, is justified. As indicated in Appendix A, some provincial statutes explicitly address the issue of justified access denial and provide for sanctions only if the denial is wrongful.

[17] The case law is summarized in *Jackson v Jackson*, 2016 ONSC 3466 at para 63.

Although other Canadian jurisdictions do not expressly deal with justified access denial in their statutes, courts have discretion to excuse denial of access in some circumstances, as discussed in *Frame v Smith* by Wilson J:

> At times, a perfectly legitimate exercise by the custodial parent of his or her custodial rights or custodial obligations will result in an individual denial of access to the other parent. It is not the role of the court to review this sort of exercise of discretion with respect to the child. It is only when a sustained course of conduct designed to destroy the relationship is being engaged in that there is a breach of the duty. If and when a custodial parent comes to believe that continued access to the child by the other parent is not in the child's interests or is harmful to the child, the proper course for the custodial parent to follow is not to engage in ongoing wilful violations of the access order but to apply to the court to vary or rescind it.[18]

Some cases suggest that denial of court-ordered access may be justified when the custodial parent reasonably and honestly believes that there is a risk of danger to the child and takes immediate court action to terminate or restrict access. In *Salloum v Salloum*, Viet J said: "Where the court can find that a parent is disobeying a court order out of honest concern for the welfare of the children, a court will be [loath] to stigmatize and sanction the parent's behaviour. One test for the honest concern of the offending parent is whether that parent has promptly moved the court to modify the existing custody or access order."[19] It should be noted, however, that access denial may be appropriate even when circumstances justifying a variation of the custody or access order exist. The access order may still be in the best interests of the child, but on a particular occasion denial of access was appropriate.

A statutory guideline such as that provided in Newfoundland's *Children's Law Act* is helpful. The Newfoundland statute makes clear that a remedy is available only when a denial of access is "wrongful," and provides a definition of this term. Newfoundland's statute gives parents a clear statement of their rights and responsibilities related to the exercise of access. The custodial parent knows, for example, that when the non-custodial parent is more than an hour late, they need not stand by with the child, ready, willing and able to provide access. The non-custodial parent knows, for example, that when they arrive intoxicated, access will be denied. While there will continue to be disagreements on such issues as whether there were "reasonable grounds" to believe that the child would suffer harm if access were exercised, this provision adds needed clarity to the issue of justified access denial. In addition, this provision expands the circumstances under which access denial will be justified to include more than immediate risk of harm to the child. This is appropriate because it allows the court to focus on the best interests of the child not simply the risk of harm to the child, and because it clarifies that the custodial parent will not be found in contempt when, for example, he or she has not continued to be ready to provide access after repeated failures by the non-custodial parent to exercise access.

[18] *Frame v Smith*, [1987] 2 SCR 99 at para 84.
[19] *Salloum v Salloum* (1994), 154 AR 65 (QB) at para 19.

All provinces and territories should enact a provision that defines when access denial is wrongful, and should provide remedies for access denial only when it is wrongful.

b) Compensatory Access and Compensation for Expenses

Compensatory access, where an access parent is given additional time with the child to make up for denied access visits, and compensation for expenses incurred as a result of access denial is explicitly provided for in some provincial and territorial statutes, as indicated in Appendix A.

Even in the absence of explicit statutory authority, courts have ordered compensatory access under their general power to make or vary custody and access orders under provincial or territorial legislation, under the federal *Divorce Act* or without reference to any specific statutory authority.[20]

Compensatory access should be explicitly available as an immediate remedy when a wrongful denial of access is proven on the balance of probabilities, subject to the best interests of the child. Although civil enforcement of access orders is primarily a matter of provincial responsibility, the *Divorce Act*, as well as all provincial and territorial legislation, should explicitly authorize courts to order compensatory access. This is because such an order may be appropriate when determining access under the *Divorce Act*, when access as previously agreed to or ordered has been wrongfully denied.

In the 1987 *Frame v Smith* decision, the Supreme Court of Canada ruled that tort actions for denial of access are not available in Canada.[21] The Alberta Court of Appeal similarly held that a non-custodial father had no common law cause of action against the custodial mother for interfering with his access rights.[22] The Ontario Superior Court confirmed that *Frame v Smith* remains the leading authority on this issue and dismissed the action of a father who had been denied access and who sought damages for emotional distress for the tort of conspiracy, intentional infliction of mental suffering, unlawful interference with another's relationship, damages arising from breach of a court order, and breach of fiduciary duty.[23] Some commentators have supported the use of tort actions for access denial (Geismann, 1993: 606-608), but there does not seem to be any evidence that they are effective in re-establishing contact between the child and the non-custodial parent or in supporting the rights and bests interests of the child.

A more effective means of enforcing access while, at the same time, compensating the non-custodial parent is to allow non-custodial parents to bring summary claims for expenses incurred as a result of a wrongful access denial. As indicated in Appendix A, compensation for an expense relating to access denial is explicitly available under the statutes of Alberta, BC, Manitoba, Newfoundland, the Northwest Territories, Nunavut and Saskatchewan.

[20] See, e.g. *Penney v Gould*, 2011 ONCJ 84.
[21] *Frame v Smith*, [1987] 2 SCR 99.
[22] *Sturkenboom v Davies*, [1993] 7 WWR 32.
[23] *Curle v Lowe*, 2004 CanLII 22947 (ON SC).

Courts should be given the explicit jurisdiction to award compensation in summary proceedings for expenses incurred in attempting to obtain access or for wasted expenses (for example the cost of unused baseball tickets purchased for the access visit) when wrongful denial of access is proven on the balance of probabilities.

c) Apprehension Orders

When unjustified access denial persists after preventive, alternative and compensatory measures have been taken, more coercive and punitive measures may be called for to protect the best interests of the child.

As indicated in Appendix A, many provinces and territories explicitly authorize courts to order apprehension by police in cases of wrongful access denial. Although an apprehension order is an intrusive and potentially frightening method of enforcing access orders, such an order may be appropriate in some circumstances, when other methods have failed. When unjustified access denial persists after the court has ordered persuasive, educational and compensatory measures, the child's interest in maintaining a relationship with the non-custodial parent may outweigh the risks involved in using this coercive measure in some cases. Orders for apprehension of a child by a law enforcement officer are made only as a last resort. One judge commented

> Courts must make such orders sparingly and in the most exceptional circumstances. It is an order that can only be made once a court is satisfied that a party is unlawfully withholding a child from a person entitled to custody of or access to the child. It is a finding that can be based on either a single incident of withholding or on a pattern of withholding even where that pattern has been interrupted by some resumed access … Ideally, the making of the order should be effective enough to persuade the wrongdoer to co-operate. However, that is not always the case and the aggrieved party must call upon the police.[24]

Law enforcement officers have expressed concerns about enforcing access orders.[25] It has been pointed out that notice of an application for an apprehension order should be given to any third parties, including law enforcement officers, who may be granted rights or have obligations imposed on them. Such notice "can act as a safeguard in cases where, if the court had information in the hands of the peace officers, police departments and/or child protection agencies, there might be concerns about granting an order..." (MacPhail, 1999: 14). In *Allen v Grenier*, the police moved to set aside a police apprehension order obtained by the non-custodial father, arguing that "the order contained insufficient information for enforcement purposes, that it did not specify particular police measures to be used, that it lacked an expiry date, and that it was a drain on resources." The court ruled that when a police officer is directed to apprehend a child, the officer must make reasonable efforts to carry out the order or, when the order requires explanation, the officer must immediately bring a motion before the court for directions and then act on

[24] *Allen v Grenier*, [1997] 145 DLR (4th) 286 at para 38.
[25] *Re Leponiemi and Leponiemi* (1982), 35 OR (2d) 440.

those directions. The court rejected the argument relating to resources on the basis of the statutory authority to make an apprehension order.[26] The case points to the need for clear access and apprehension orders. Standardized orders clearly setting out the necessary information alleviate problems. The case also suggests that there is a need for adequate funding for officers to receive training and be available for apprehension of children who are being wrongfully withheld.

Vince Westwick, representing the Canadian Association of Chiefs of Police, testified before the Special Joint Committee about "doorstep problems" (i.e. difficulties that arise when an officer tries to resolve a volatile access dispute situation at the doorstep). To avoid disputes about the meaning of orders, he requested that access orders be clarified and written in non-legal language with the dates of access clearly spelled out. As well, he recommended that there be legislative provision for professionals and police to have access to the complete file relating to the case off-hours (Canada, 1998b).

Courts increasingly have expressed concern about apprehension orders. One judge made the comment: "When parties involve police in their access disputes, they might as well climb onto the roof of their house, straddle the peak, and, with outreached arms, proclaim to the heavens that they have failed as parents and as human beings."[27] The issue of police apprehension was extensively review in *Patterson v Powell*.[28] In that case, the judge refused to "rubber stamp" the standard police apprehension order, in part because no evidence had been submitted as to how such an order would serve the best interests of the child. The judge asserted that "courts have a responsibility to anticipate problems and build-in dispute resolution mechanisms – rather than hand the mess over to police to sort it out" and made the important point that "[h]igh conflict files need to be identified and given special attention." [29]

d) Contempt Proceedings

The *Criminal Code*, s 127(1) imposes a penalty for criminal contempt "unless a punishment or other mode of proceeding is expressly provided by law." In *R v Clement*, the Supreme Court of Canada ruled that section 127(1) could be applied when court orders have not been obeyed, and that the inherent power of a superior court to punish contempt does not constitute another "mode of proceeding" that was "expressly provided by law," so as to negate the availability of a criminal contempt charge.[30] The Supreme Court said that section 127(1) was "available as the basis for a charge for disobedience of a lawful court whenever statute law (including regulation) does not expressly provide a punishment or penalty or other mode of proceeding, and not otherwise."[31] The Supreme Court of Canada confirmed this approach in 2012, and ruled that procedural rules applicable to contempt proceedings are insufficient to trigger the exception in s 127(1).[32]

[26] *Allen v Grenier*, [1997] 145 DLR (4th) 286.
[27] *Stirling v Blake*, 2013 ONSC 5216, footnote 14.
[28] *Patterson v Powell*, 2014 ONSC 1419.
[29] *Patterson v Powell*, 2014 ONSC 1419 at para 77.
[30] *R v Clement*, [1981] 2 SCR 468.
[31] *R v Clement*, [1981] 2 SCR 468 at 477.
[32] *R v Gibbons*, [2012] 2 SCR 92.

If punishment for contempt of an order is provided for by statute, the exception in the *Criminal Code*, s 127(1) is triggered.[33] The legislation in many provinces expressly provides for punishment for contempt of access orders, as detailed in Appendix A. When access orders are obtained from courts whose jurisdiction derives from provincial or territorial legislation that expressly provides for punishment for contempt, a charge under s 127 of the *Criminal Code* is unavailable (Wilton & Miyauchi, 1989: 2-25, 2-26). For example, a charge under s 127 could not be laid in Ontario for contempt of an access order made by the Ontario Court of Justice because s 38 of the *Children's Law Reform Act* expressly provides a penalty. However, a charge under s 127 might be available for non-compliance with an access order made by the Superior Court of Justice under the *Divorce Act*.

Because the civil contempt remedy is a quasi-criminal remedy, punishable by fine or imprisonment, the standard of proof is beyond a reasonable doubt.[34] Courts may be reluctant to punish a custodial parent by fine or imprisonment when it is clear that such sanctions will not address the underlying problems and that counselling is needed.[35]

None of the statutes or regulations addressing the court's power to punish for contempt requires that the best interests of the child be a primary consideration. Nevertheless, many courts emphasize the need for caution, in part because of concerns about the interests of the child. The Ontario Superior Court noted that

> Contempt proceedings involving alleged breaches of orders relating to children raise unique challenges for judges. …The courts have struggled in the context of contempt proceedings relating to custody and access orders to achieve a balance between the importance of enforcing court orders and encouraging contact with both parents on the one hand, and considerations respecting the wishes of children and the need to ensure their safety and well-being on the other hand.[36]

Because of concerns about the interests of the child, courts only rarely fine or imprison a custodial parent for contempt. Courts have refused to order fines for contempt when this would undermine the best interests of the child.[37] Punishment may increase animosity between the parents and exacerbate access disputes (McLeod, 1987: 458). Punishment for contempt should remain an option but be imposed only as a last resort, after persuasive and compensatory methods have failed, and not when the punishment would undermine rather than protect the child's interests.[38] The Ontario Superior Court made the point that

> For contempt proceedings to be an effective deterrent, however, a fine or imprisonment should be imposed for persistent non-compliance, subject to the

[33] *R v EFD* (1995), 100 CCC (3d) 123 (NSCA).
[34] *JT v CTh*, 2004 ONCJ 278; *Jackson v Jackson*, 2016 ONSC 3466.
[35] *Reithofer v Dingley*, [2000] OJ No 1132 (Sup Ct Just).
[36] *Jackson v Jackson*, 2016 ONSC 3466 at para 62.
[37] See, e.g. *Prekaski v Prekaski*, 2015 SKQB 76.
[38] *Prekaski v Prekaski*, 2015 SKQB 76.

> best interests of the child. Despite the need for caution in resorting to the contempt remedy, contempt nonetheless remains a critically important tool in the judicial toolbox in family law litigation in appropriate circumstances, as a means of reinforcing that compliance with a court order is "neither an option nor a bargaining chip."[39]

e) Suspension of Child Support and Variation of Custody

Two methods of access enforcement that arguably violate the best interests and the rights of the child are suspension of child support and variation of custody.

No provincial or territorial statutes explicitly authorize courts to suspend child support to enforce an access order. However, some courts have suspended child support payments pending resumption of access.[40] The Appeal Division of the Supreme Court of Prince Edward Island stated that cancellation of child support was a measure the court could take if a custodial parent failed to adequately facilitate access.[41] Most courts, however, have rejected this approach, including British Columbia's Court of Appeal, which adopted the following reasoning in *Lee v Lee*:

> I do not consider that even this custodial parent's reprehensible conduct, in pursuing her personal objective, contrary to the best interests of the child, justifies a diminution of the responsibility of the non-custodial parent for the proper maintenance of the child of the marriage. Accordingly, in my view, the misconduct of the custodial parent does not provide a proper reason for directing that the non-custodial parent pay less than the appropriate amount of maintenance for his child.[42]

A judge of the Ontario Court of Justice elaborated on this point, saying:

> In the absence of binding authority, I am unable to accede to the proposition advanced by some courts that the child should be penalized for the improper conduct of his or her custodial parent. Although it is doubtful that *any* court in Canada would make an order that would have the effect of depriving a child of the most basic necessities of life — food, shelter and clothing — it takes much more than those basic necessities to enable a child to thrive and to fully develop to his or her potential. The soul requires nourishment beyond simply three squares a day. And by making orders for reduced child support owing to the improper conduct of a parent, no matter how well-intentioned the court may be, no matter how well-grounded in "fairness" that order may sound, it is the child who will bear much of the brunt of the diminished child support.[43]

---

[39] *Jackson v Jackson*, 2016 ONSC 3466 at para 61.
[40] The authorities are canvassed in *Ferguson v Charlton*, 2008 ONCJ 1.
[41] *Paynter v Reynolds* (1997), 157 Nfld & PEIR 336.
[42] *Lee v Lee* (1990), 29 RFL (3d) 417 (BC CA).
[43] *Ferguson v Charlton*, 2008 ONCJ 1 at para 94. See also *Prekaski v Prekaski*, 2015 SKQB 76, where the court stated that the best interests of the child must be the overriding consideration.

Suspension of child support is inconsistent with the best interests of the child principle and should not be ordered as a remedy for wrongful access denial (at the same time, suspension of access should not be ordered as a remedy for failure to pay child support). It results in a violation of the child's right to access *and* to support, and implies that the custodial parent may bargain away the child's rights in order to purchase freedom from an ex-spouse, that a parent's right to be let alone outweighs the child's rights. The Supreme Court of Canada has made clear that "child maintenance, like access, is the right of the child."[44] If financial sanctions are deemed appropriate for wrongful denial of access, the court should impose a fine for contempt or order the custodial parent to give security for performance of the obligation to provide access rather than allow the custodial parent, in effect, to bargain away the child's right to support.

In regard to variation of custody, only Saskatchewan's statute expressly provides that variation is a remedy for wrongful access denial. *The Children's Law Act* expressly provides that in the case of wrongful denial of access the court may vary a custody or access order, provided the court "is of the opinion that it is in the best interests of the child." The reference to the best interests of the child is important. Transfer of custody may be appropriate in the circumstances, but should never be ordered as a punishment for denial of access.

In many cases, a transfer of custody will not be an option because the non-custodial parent does not want or is unable to take custody. Even when the non-custodial parent does seek a transfer of custody, it may not be appropriate. If there is persistent wrongful denial of access, or other cause for concern, the non-custodial parent may apply for a transfer of custody. The judge would then have to decide whether a variation was in the best interests of the child given all the circumstances.

As in any application to vary a custody or access order, the non-custodial parent would have to prove "1) a change in the condition, means, needs or circumstances of the child and/or the ability of the parents to meet the needs of the child; 2) which materially affects the child; and 3) which was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order."[45] If this threshold is met, the court must then consider afresh what is in the best interests of the child, taking into account *all* relevant circumstances. Several judges have correctly ruled that applications to vary custody in the context of access denial should be governed by the principles set out in the Supreme Court of Canada decision in *Gordon v Goertz*.[46]

The statutory best interests of the child test, the current law of Canada on variation of custody and access orders, and the UN *Convention on the Rights of Child* do not support transfer of custody as an appropriate remedy for wrongful access denial. That a parent has wrongfully denied access is certainly an important factor to consider, along with all other

[44] *Richardson v Richardson*, [1987] 1 SCR 857, at 869-70.
[45] *Gordon v Goertz*, [1996] 2 SCR 27.
[46] See, e.g. *Gilmaine v Gilmaine*, 1999 CanLII 6348 (BC SC).

relevant circumstances, on any variation application but alone is not a sufficient basis on which to order a transfer of custody.

5) Remedies for Abduction

Remedies for parental abduction are considered separately in this report because parental abduction calls for distinct approaches. The focus of interventions is on location and return of the child. There are separate criminal sanctions for abduction and international organizations are involved in some cases.

a) Notice of a Proposed Move

Most jurisdictions in Canada have enacted measures aimed at preventing a custodial parent from removing the child from the jurisdiction without notice. These measures, as detailed in Appendix A, provide that notice of a proposed move be given to the non-custodial parent.

Even in the absence of explicit statutory authority, courts have ordered custodial parents to give notice of a move and information on the new address, using their general powers to order custody and access subject to such terms and conditions as are in the best interests of the child.

b) Orders of Return

Most provinces and territories have enacted legislation specifically authorizing the courts to order the return home of a child who has been wrongfully removed to or retained in that province or territory, or when the court does not have jurisdiction. These statutory provisions may be applied in cases that are not governed by the Hague *Convention on the Civil Aspects of International Child Abduction*, including cases from within Canada. Quebec's legislation, by its terms, applies within Canada but is not currently in effect for cases involving other Canadian jurisdictions.

Canada is a party to the Hague *Convention on the Civil Aspects of International Child Abduction*, and it has been implemented by legislation across Canada. Each province and territory has its own Central Authority. The Central Authority deals with abduction applications in the province or territory to which or from which a child has been abducted. As well, there is a federal Central Authority, who deals less directly with cases, and oversees and facilitates the operation of the Hague Convention, collects statistics for special commissions, and provides assistance as needed. The Convention applies to international abductions of children under the age of 16 between contracting states, when the abduction took place after the Convention came into force in the relevant states. The Convention does not apply to interprovincial abductions.

Article 12 provides that when a child has been "wrongfully" removed to or retained in a contracting state, an order will be made for return of the child to the country of their habitual residence, unless the application for return has been brought more than a year

after the wrongful removal or retention and the child is now settled in their new environment. Further exceptions to the rule of automatic return are set out in articles 13 and 20. Article 20 provides: "The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested state relating to the protection of human rights and fundamental freedoms." Although the Convention protects rights of custody *and* access, it provides for return of the child only when there has been a "wrongful" removal or retention, and a removal or retention is "wrongful" only when it breaches "rights of custody." Access rights are not given the same level of protection, and a parent who has only access rights may not use the Convention to obtain a return of the child who has been removed by the custodial parent.

Access rights are not defined in the Convention, but article 5(b) does provide that "'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence." A parent who has only the right to visit and be visited by the child is not entitled to an order for return, but is entitled to assistance from the Central Authority under article 21, as follows:

> An application to make arrangements for organizing or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child. The Central Authorities are bound by the obligations of co-operation, which are set forth in Article 7 to promote the peaceful enjoyment of access rights and the fulfilment of any conditions to which the exercise of those rights may be subject. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights. The Central Authorities, either directly or through intermediaries, may initiate or assist the institution of proceedings with a view to organizing or protecting these rights and securing respect for the conditions to which the exercise of these rights may be subject. Because this provision does not impose any mandatory duties on the Central Authority to enforce access rights, only an obligation to promote co-operation, the Convention has not been an effective tool of access enforcement (Hague Conference on Private International Law, 2008: 20).

Most Canadian Central Authorities are not involved in access enforcement beyond referring parties to lawyers.

The Central Authority for BC reports that the BC government provides free mediation services to parents on incoming Hague access files through its Justice Services Branch, Ministry of Justice. Trained mediators provide services to over the phone, using interpreters where necessary. Both parties must be willing to take part in mediation. If the mediation is not successful, or if both parties do not want to take part in mediation, the applicant parent must obtain legal counsel in BC to apply to the court for an access order. Legal aid is available to those parents who qualify financially. The central authority assists the applicant with applying for legal aid and retaining counsel, privately or through legal aid. The Central Authority can also provide general information about

the law in BC concerning access (Lipsack).

The Central Authority for Manitoba reports that it attempts to reach out to parent in Manitoba to advise of the availability of mediation through Family Conciliation (a government mediation service). Family Conciliation is prepared to do access mediation in international cases over the telephone and has been able to offer services in English, French and Spanish. If the left-behind parent needs to establish access rights in Manitoba, the Central Authority provides general information about that process and assists in retaining counsel. When proceedings are commenced in Manitoba, the Central Authority may play a role as "friend of the court" to assist the Manitoba Court (Sigurdson).

The Central Authority for Prince Edward Island reports that it will attempt to facilitate access for the left-behind parent and that it has tried to negotiate the voluntary return arrangements for left-behind parents (Zimmerman).

The Central Authority for Quebec reports that it first confirms the location of the child. Once the child's location is confirmed, it determines whether any proceedings relating to the child have been commenced in Quebec. The Central Authority provides information for the left-behind parent about obtaining a lawyer in Quebec and about legal aid. If the parent qualifies for legal aid, a lawyer is appointed to represent the parent in proceedings to have the access order recognized. Otherwise, the parent must arrange for their own lawyer. If the foreign judgment is not enforceable, the Central Authority encourages negotiation and offers mediation. If negotiation and mediation are not possible, then proceedings must be introduced in court to obtain rights of access (Rémillard).

The Central Authority for Alberta reports that: 1) with incoming applications they assist the left-behind parent in obtaining counsel to represent them before the courts, referring the parent to legal aid if the parent lacks the financial ability to retain counsel privately; and 2) with outgoing applications they assist the left-behind parent in completing the Hague application and provide the application to the Central Authority in the reciprocating jurisdiction, requesting assistance in having the matter brought before the courts (Nicholson).

There are few reported cases on the Hague Convention's access provision and relatively little attention has been given to it.

The enforcement of rights of access under the Convention could be improved if legal aid were available for non-custodial parents trying to enforce their access rights in Canada. Governments should consider extending legal aid for such cases. Some provinces provide legal aid to foreign parents in access enforcement cases, depending on financial eligibility and the merits of the case. Beyond this, the Hague Conference on Private International Law has recommended a more active role for Central Authorities in facilitating access in cross-border cases and has provided a *Guide to Good Practice* (Hague Conference on Private International Law, 2008). These recommendations should be considered.

In some cases, a non-custodial parent (or parent who does not live with the child) may be considered to have "rights of custody" within the meaning of the Convention. Article 5(a) of the Convention provides that "'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." When the non-custodial parent has more than the right to visit the child and shares the right to determine the child's place of residence, then they may have "rights of custody" within the meaning of the Convention and may be entitled to an order for return of the child.[47]

c) Criminal Charges

The *Criminal Code* contains provisions on parental child abduction that may apply to abductions that interfere with rights of access. For example, In *R v Petropoulos*[48] the mother had access for three days each week, and the custodial father was found guilty of parental child abduction when he took the child from British Columbia to Ontario without the mother's consent. The court reasoned that the mother's access was so extensive as to amount to joint custody, which triggered the *Criminal Code* abduction provision.

The relevant *Criminal Code* provisions are

> 282(1) Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, in contravention of the custody provisions of a custody order in relation to that person made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
>
> (b) an offence punishable on summary conviction.
>
> 283 (1) Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, whether or not there is a custody order in relation to that person made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person, is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
>
> (b) an offence punishable on summary conviction.

Criminal charges are not appropriate in all cases of parental child abduction, and prosecutorial discretion is exercised carefully. Crown counsel must consult with their

[47] *Abbott v Abbott*, 560 US 1 (2010).
[48] *R v Petropoulos* (1990), 29 RFL (3d) 289 (BCCA).

Chief Federal Prosecutor before proceeding, and the *Criminal Code* requires that the consent of the Attorney General be obtained before commencing proceedings under section 283. A directive of the Public Prosecution Service of Canada provides as follows:

> Not all cases of parental child abduction will warrant criminal charges. As with any decision to prosecute, in addition to assessing the reasonable prospect of conviction, Crown counsel must consider whether a prosecution is in the public interest. Civil enforcement is another route that can be used as an alternative to the criminal response when criminal charges are not appropriate.
> The federal *Family Orders and Agreements Enforcement Assistance Act* establishes procedures to ascertain the addresses of parents and children residing in Canada from federal information banks to facilitate the enforcement of custody orders. The *Hague Convention on the Civil Aspects of International Child Abduction* (the *Hague Convention*), which has been adopted by all Canadian jurisdictions, is the main international treaty that can assist parents whose children have been abducted to another country. (Public Prosecution, 2014)

The number one factor weighing against prosecution that is identified in the directive is that "a less onerous civil remedy is available and would be more appropriate in the circumstances." Thus, prosecutors in Canada are explicitly charged with considering civil enforcement using the Hague Convention as an alternative to criminal proceedings. This addresses the problem of criminal charges hindering successful return of a child, the problem repeatedly identified by the Hague Conference on Private International Law.

6) Enforcement of Foreign Access Orders

At common law, it is not possible to enforce a foreign custody or access order, not even an order made in another Canadian jurisdiction.[49] A court would consider such an order only as one factor to be considered in a proceeding to determine custody or access. However, statutes that recognize and allow enforcement of foreign access orders have superseded the common law. This is important because such statutes address the problem of non-custodial parents being forced to obtain a new order for access in the jurisdiction to which the custodial parent has moved before proceeding with enforcement. It is necessary for the non-custodial parent to apply to have the order recognized and enforced, but not to re-apply for access. Although the recognizing court may vary or supersede the access in accordance with the statutes of each province or territory, the court's starting point will be the existence of an enforceable access order in favour of the non-custodial parent. The measures to enforce foreign access orders will not exceed those available to enforce domestic orders.

The *Divorce Act*, s 20 provides that an access order made under the federal *Divorce Act* has legal effect throughout Canada and may be enforced throughout Canada. Under section 20(1), the definition of court for the purpose of this section may be expanded by each province to include a provincial court, thus making it possible to use the quicker and less expensive enforcement procedures available in provincial courts.

[49] *McKee v McKee*, [1951] AC 352 (PC).

Every province and territory except Nova Scotia allows unilateral recognition and enforcement of foreign and extra-provincial access orders. All jurisdictions allow courts to supersede or vary such orders as appropriate, but details of these parts of the provincial and territorial legislation are not given here.

7) Enforcement against the Non-custodial Parent

As detailed in Appendix A, some provincial and territorial statutes provide for sanctions against a non-custodial parent who fails to exercise access. The most common statutory remedy is an order to reimburse the custodial parent for expenses resulting from the failure to exercise access.

Canadian Access Enforcement Services

The statutes and regulations of Canada and all the provinces and territories are available free online. As well, all provinces and the Northwest Territories and the Yukon provide online information about laws, procedures or services available for parties. These sites, often aimed at non-represented litigants, generally encourage focus on the best interests of the child and non-adversarial resolution of disputes. Many provide access to on-line parental education programs. See:

Canada:
http://laws.justice.gc.ca/eng/

Alberta:
http://www.canlii.org/en/ab/laws/index.html
https://www.alberta.ca/family-court-assistance.aspx

British Columbia:
http://www.bclaws.ca/civix/content/complete/statreg/?xsl=/templates/browse.xsl
http://www2.gov.bc.ca/gov/content/life-events/divorce/family-justice

Manitoba:
http://web2.gov.mb.ca/laws/index.php
https://www.gov.mb.ca/justice/family/law/index.html

New Brunswick:
http://www2.gnb.ca/content/gnb/en/departments/attorney_general/acts_regulations.html
http://www.familylawnb.ca/english/

Newfoundland:
http://www.assembly.nl.ca/legislation/
http://www.court.nl.ca/supreme/family/fjs.html

Northwest Territories:
https://www.justice.gov.nt.ca/en/legislation/
https://www.justice.gov.nt.ca/en/browse/children-and-families/

Nova Scotia:
http://nslegislature.ca/legc/sol_m.htm

Nunavut:
http://www.gov.nu.ca/justice/consolidated-law

Ontario:
https://www.ontario.ca/laws

https://www.attorneygeneral.jus.gov.on.ca/english/family/family_justice_services.php

Prince Edward Island:
https://www.princeedwardisland.ca/en/legislation/all/all/a
http://www.gov.pe.ca/jps/index.php3?number=20159&lang=E

Quebec:
http://www.legisquebec.gouv.qc.ca/en/
http://www.justice.gouv.qc.ca/english/programmes/mediation/accueil-a.htm

Saskatchewan:
http://www.publications.gov.sk.ca/deplist.cfm?d=1&c=42
http://www.sasklawcourts.ca/home/court-of-queen-s-bench/family

http://www.sasklawcourts.ca/home/court-of-queen-s-bench/family

Yukon:
http://www.gov.yk.ca/legislation/legislation/page_a.html
http://www.yukonflic.ca/index.html

Two decades ago, the Special Joint Committee recommended that the federal, provincial and territorial governments work together to ensure that supervised access facilities are available in every part of Canada (Canada, 1998b: Recommendation 34). Since then, there has been significant expansion of supervised access and other government services to assist parties with parenting conflicts and other family law matters. This is particularly important because of the rise of self-represented parties in family court.

Manitoba is an example of a province that primarily provides information. Its Family Justice Resource Centre assists parties with their family justice related questions. Most parties using the service are self-represented parties in family court matters or people who are experiencing family breakdown and don't know where to start dealing with legal issues. The staff give parties information about court processes and forms, alternatives to the court process such as mediation, the parenting program *For the Sake of the Children* and other programs offered by Family Conciliation Branch, and other resources such as the lawyer referral program, family law and child support publications, the Manitoba Courts website, and the Manitoba Family Justice web page and links. In Winnipeg, the FJRC staff will also prepare orders when requested by self-represented litigants, and review divorce judgments prior to filing to ensure compliance with rules of form and content.

Ontario is an example of a province with an excellent web site that includes legal information, information about available services and an online parenting education program. In 2012, Ontario expanded the family justice services available in the Family

Court of the Superior Court of Justice to all court locations that hear family matters. As a result, families in all regions of Ontario now have access to on-site and off-site mediation services provided by court-connected service providers, as well as Family Law Information Centres and Information Referral Coordinators.

Ontario now requires parties in the majority of cases to participate in a Mandatory Information Program that provides information about separation/divorce and the legal process, including

1) The effects of separation and divorce on adults and children
2) Alternatives to litigation
3) Family law issues
4) The Family Court process
5) Local resources and programs for families facing separation and/or divorce.

Ontario's Supervised Access Program has been developing strategies for working with long-term clients in supervised access. Ontario's program does not have a time limit on service, and currently 26% of the program's families have been with them for two or more years. As well, the Supervised Access Program has been doing work in the area of Virtual Visitation – supervised access over large distances with the use of supporting technology, for example, Skype visits). Many of the Supervised Access Centres are offering this service as a means to address some of the physical challenges that come with being a province-wide service in Ontario, but also as a new opportunity for families where the child is local and the non-custodial parent lives out of the province.

Ontario's Supervised Access Program has been running for 25 years. It is one of the longest-running programs in the world.

Although governments are involved in access enforcement, as outlined above, and provide services relating to access disputes, the enforcement of access orders is largely the responsibility of individual parents. Except in the case of criminal proceedings, individual parents must retain their own lawyers or act for themselves and initiate enforcement proceedings. In general, preliminary screening of custody and access disputes to identify the particular interventions that are appropriate is not widely available. When an assessment is needed, parents must seek an agreement or order for the assessment and often arrange and pay for it themselves, or do without. When they do not live in an area where mediation and supervised access services are provided, they often must do without or arrange and pay for mediation and organize supervision of access themselves.

An important question is whether or not governments can ensure that important services such as parental education, evaluations, mediation and supervised access are available to all, and the extent to which governments are willing to fund such services. As well, in some provinces and territories, civil legal aid may be available to parents to enforce access orders, depending on the merits of the case and financial eligibility.

Provinces and territories could each establish an office with responsibility for providing these services and for enforcing access orders when preventive and alternative measures fail. Currently, no province or territory provides a government agency to enforce access orders. Although governments in Canada have drawn back from this sort of responsibility – at one time Ontario's Director of the Family Responsibility Office and the Yukon's Director of Maintenance and Custody Enforcement had responsibility for enforcing custody orders, but statutory amendments have eliminated this responsibility – it may be worth further consideration. A model for such an office is Michigan's Friend of the Court program, discussed in the next part of this report, which is mandated to provide all these services and to enforce access orders.

Effective Access Enforcement Laws and Programs in other Countries

Australia, the UK and the US have legal cultures and socio-economic conditions that are similar to Canada's. Canadian law and policy-makers can learn from or use as models the laws and processes used in these countries to deal with access enforcement. Australia and Connecticut are particularly helpful models in regard to early screening and provision of services. The efforts in England and Wales to improve access enforcement by introducing new sanctions point to the limits of punitive measures and the importance of preventive and alternative measures. Michigan provides a model of a state that provides full-service government enforcement of access orders.

1) Australia

Australia has long recognized the need for early identification of particularly problematic parenting issues in order to provide appropriate services (Australia, 1995). Recent efforts have focused on improving early identification of serious problems at an early stage. After a successful pilot project, a mandatory Notice of Risk form was introduced in 2015 (Australia, 2015). All parties bringing parenting disputes to the courts must complete the Notice of Risk form, indicating whether there are any allegations of risks to children related to child abuse, neglect, substance abuse, mental health problems, or parenting incapacities.

Further screening is provided in the Family Court of Australia through case assessment conferences, which are generally the first court event. Courts provide additional screening when matters are referred to in-house family consultants for child dispute conferences, child inclusive conferences, the child responsive program and the preparation of family reports.

Australia provides helpful sites with information about laws and procedures relating to access: http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/parenting/; and family law services http://www.familyrelationships.gov.au/Services/FamilyLawServices/Pages/default.aspx.

Australia encourages settlement of access disputes and funds a range of services to assist families, including:

1) Children's Contact Services, which provide supervised access services.
2) Family Law Counselling, which helps people with relationship difficulties manage their issues to do with children and family during marriage, separation and divorce.
3) Family Dispute Resolution Services, including mediation aimed at helping couples to resolve family disputes.
4) Post Separation Co-operative Parenting Services, which help separated or divorced families who are in high conflict to work out parenting arrangements in a manner which encourages consideration of what is in a child's best interests in

establishing or maintaining relationships, while at the same time ensuring the safety of all parties.
5) Supporting Children after Separation Program, which supports children from separated or separating families who are experiencing issues with difficult family relationships.

In regard to issues relating to supervised access, Australia created guidelines to enhance the relationship between the Family Law Courts and Children's Contact Services with a view to facilitating the appropriate use of Children's Contact Services by the Family Law Courts (Australia, 2007). The paramount consideration underpinning the guidelines is the best interests of the child. The guidelines include a checklist of factors for judges to consider when ordering supervised access, and provide that the Children's Contract Services should consider whether the supervised access arrangement is in the best interests of the child or instead requires a variation. These guidelines may prevent supervised orders being made or continuing when they are not in the best interests of the child.

Australia provides online information about complying with access orders. http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/parenting/complying-with-orders-about-children/complying-with-orders-about-children. The site includes a step-by-step guide for parties wanting to enforce access orders and clear information about the sanctions for failure to comply with an access order.

Pursuant to Australia's *Family Law Act*, Division 13A, if there has been a failure to comply with an access order a court may:

1) vary the primary order;
2) order attendance at a post separation parenting program;
3) order compensatory access;
4) require the party who has not complied to enter into a bond;
5) order payment all of the legal costs of the other party;
6) order compensation for reasonable expenses lost as a result of the contravention;
7) require participation in community service;
8) impose a fine; or
9) order imprisonment.

Although Australia provides this full range of sanctions for failure to comply with an access order, its system places more emphasis on early screening to identify risks and provision of preventive and alternative services.

2) England and Wales

The UK's *Children and Adoption Act* of 2006 amended the 1989 *Children Act* and introduced new powers for the courts in relation to enforcement of access orders. The new access enforcement measures were introduced because of concerns among policy-

makers and fathers' rights groups that courts were not doing enough to enforce access orders (Trinder el al, 2013). The challenge for courts was that the existing remedies for denial of access – fines or imprisonment or a change of custody – were impractical or inconsistent with the best interests of the child.[50]

Under the new rules, access orders now contain a warning notice to the other party about the consequences of non-compliance with the order. Courts must determine the cause of the alleged failure to comply and can order sanctions only if the breach of the access order was without reasonable excuse. If the access order has been breached without reasonable excuse, the court may refer the parties to a parental education program or mediation, vary the custody and access order, order the defaulting party to perform unpaid work (community service), order that the party in default compensate the other for wasted expenses, or order a fine against the defaulting party.

Under the new rules, courts retain the power to transfer custody in cases of access denial, but they do so only when this is in the best interests of the child. In the case of *Re: K (contact: committal order)*, Hale LJ made clear that "any decision to change a child's residence in the context of difficulties over contact must be fully justified by affording paramount consideration to the child's welfare, and is not to be imposed as a form of punishment to a parent."[51] There are cases of access denial where a transfer of custody has been found to be in the best interests of the child. In the case of *Re: Y (Private Law: interim change of residence)* [2014] EWHC 1068 (Fam), [2014] All ER (D) 106 (Apr), Pauffley J transferred interim residence of a 22-month-old child from the mother to the father based on the mother's inability to support contact with the father.[52] The mother's allegations that the child had been abused by the father were disproved at a fact finding hearing and there were concerns about the mother's obsessional anxiety.

In 2012, the government considered possible new sanctions, including the withdrawal of passports and drivers licences, but decided against proceeding with these measures (Trinder et al, 2013).

The first empirical study of access enforcement since the new enforcement measures were introduced in 2013 (Trinder et al, 2013). Trinder and her colleagues noted that in England and Wales, substantial public attention has been given to cases of implacably hostile custodial parents who unreasonably deny access. The researchers found, however, that cases of implacable hostility to access were a small minority, and that courts tended to use punitive sanctions in such cases. For the more typical cases involving high-conflict families, safety concerns, or older children who wanted to reduce or stop access, courts tended to focus on settlement rather than adjudication and on problem-solving rather than identifying whether or not a breach has occurred and sanctions needed. High-conflict cases were dealt with by a new contact timetable or by efforts to address the conflict and

[50] UK Department of Constitutional Affairs and Department for Education and Skills, *Parental Separation: Children's Needs and Parents' Responsibilities*, July 2004 Cm 6273.

[51] *Re: K (contact: committal order)* [2002] EWCA Civ 1559, [2002] All ER (D) 312.
[52] *Re: Y (Private Law: interim change of residence)* [2014] EWHC 1068 (Fam), [2014] All ER (D) 106.

to support cooperative co-parenting. Cases involving safety concerns were handled by a protective approach based on risk assessment and management. Where older children wanted to limit contact, courts made efforts to elicit and typically respond to the children's wishes and feelings. Punitive sanctions typically were reserved for the few cases of implacable hostility, where the custodial parent was unreasonably and systematically blocking contact (Trinder el al, 2013).

Trinder and her colleagues found that the courts acted appropriately in the great majority of cases by focusing on facilitating co-parenting, implementing protective measures or heeding the views of older children. In only a handful of cases were the courts insufficiently robust in handling implacably hostile parents, and those cases were outweighed by the cases where the court was too robust in imposing punitive sanctions in domestic violence cases (Trinder et al, 2013).

Though generally positive about the handing of cases, the researchers found that there was a tendency to give too much focus to rapid case processing at the expense of addressing the underlying issues giving rise to the dispute. The researchers also pointed out that some of the high-conflict cases returned to court quickly. Other problems identified were insufficient support for children and inadequate risk assessment. The researchers suggested that there should be a refocus away from the relatively few implacably hostile cases requiring punitive sanctions and towards creating safe and child-centred solutions to the full range of enforcement cases (Trinder et al, 2013).

England's experience indicates that punitive measures may be appropriate primarily in the relatively small number of cases where the custodial parent is hostile to access. For high-conflict cases, cases involving safety concerns, and those involving older children who are dissatisfied with the access arrangements, more emphasis is given to problem-solving and to facilitating a workable plan for the future.

3) United States

a) Connecticut

Connecticut's family court has demonstrated a commitment to providing family litigants with expeditious and cost-effective resolution of disputes. It has piloted various new programs and continues to assess its services to identify ways to improve (Connecticut, 2015). Of particular interest to Canadian law and policy-makers is Connecticut's early screening system coupled with its provision of appropriate services.

Connecticut's Court Support Services Division has long offered mediation and comprehensive evaluation services. In 2005, two additional services were introduced: conflict resolution conferences and issue-focused evaluation. A conflict resolution conference is a blend of mediation and negotiation. The counselor's primary goal is to help the parties reach a resolution of their own making, but if the parties are unable to do so, the counselor may direct the process, obtain information and offer suggestions as well as recommendations. Lawyers may be present during the conference (Pruett & Durell, 2009).

Issue-focused evaluation is a process of assessing a limited issue impacting a family and/or a parenting plan. Issue-focused evaluation is not a comprehensive assessment of the family, however it is evaluative and it is not confidential. The goal is to define and explore the issue causing difficulties for the family, gather information regarding only this issue, and to provide a recommendation to the parents and the court regarding resolution of the dispute. It is limited in scope, involvement and duration (Pruett & Durell, 2009).

When the two new services were added, a new Family Civil Intake Screen began to be employed when families were referred for family services at the Court. Early screening and appropriate provision of services has been widely identified in the United States as a crucial component of family court services (Salem et al, 2007; Ostrom et al, 2014). The Connecticut Judicial Branch-CSSD Family Services Unit, in collaboration with the Association of Family and Conciliation Courts, developed a research-based screening instrument. The Family Civil Intake Screen is designed to match families with the service most appropriate in their case. When a dispute regarding custody or access is referred to Family Services, a family relations counsellor asks both parents a series of questions to identify the level of conflict and complexity of issues between the parents. The screening includes questions about current court orders, past and present parenting concerns and level of conflict between the parents. The screen helps Family Services determine if mediation, a conflict resolution conference, issue focused evaluation, or a comprehensive evaluation is the appropriate service to help the parents to resolve their conflict.

Evaluators of the new screen and services determined that these initiatives have undoubtedly made a positive impact on the quality of family court services provided in Connecticut. Parties were more likely to settle and less likely to return to court (Pruett & Durell, 2009).

Connecticut, with its early screening and provision of differentiated services appropriate to the nature of the access dispute, provides a good model for Canadian law and policy-makers.

b) Michigan

Michigan has long had a state program for access enforcement. The state's program was assessed in the 2001 Department of Justice Canada report *Overview and Assessment of Approaches to Access Enforcement*. This report will outline the program's practices and procedures.

Information about the relevant laws and the program is accessible online at http://courts.mi.gov/administration/scao/officesprograms/foc/Pages/default.aspx.

Michigan's program is "user-friendly." The procedures and available measures are spelled out clearly in the legislation and publicized. Because Michigan provides a friend of the court to enforce access, individual parents who have been denied access do not have to hire lawyers or represent themselves. Mediation is provided for all those who choose it.

In the paragraphs that follow is a modified summary of the information provided by Michigan about its program.

Under Michigan's *Friend of the Court Act* and the *Support and Parenting Time Enforcement Act*, the friend of the court is required to enforce access orders. The friend of the court office initiates enforcement by written notice to the person who is alleged to have violated the order, advising the person of the nature of the violation and the proposed action to be taken. The notice must inform the person of the availability of mediation and the right to seek modification of the order. After waiting 14 days, the friend of the court may do one or more of the following:

> 1. Schedule a joint meeting with the parties to discuss the allegations of failure to comply with an access order for the purpose of attempting to resolve the differences between the parties;
> 2. If the parties agree to mediation, refer the parties to meet with a domestic relations mediator;
> 3. If the parties are unable to resolve their differences, or, if it appears from a documented history of parenting time problems that enforcement under the *Friend of the Court Act* will not yield productive results, the friend of the court office may proceed under the *Support and Parenting Time Enforcement Act*.

Mediation is strictly voluntary but it is encouraged and provided for all who choose it. The *Friend of the Court Act* requires that

> 1) all parties be given a pamphlet that includes information on the availability of, and procedures used in, mediation;
> 2) all parties be informed of the availability of mediation for custody and parenting time (access) disputes;
> 3) mediation be provided "to assist parties in settling voluntarily a dispute concerning child custody or parenting time," and that parties should *not* be required to meet with a mediator; and
> 4) mediators have specific qualifications.

The *Friend of the Court Act* states that communications made within mediation are privileged and inadmissible as evidence.

Under the *Support and Parenting Time Enforcement Act*, the friend of the court may take one or more of the following actions:

> 1. Apply a makeup access policy;
> 2. Commence a civil contempt proceeding;
> 3. Petition the court for a modification of existing access provisions to ensure access.

The following specific remedies are also available:

Joint meetings: Joint meetings may be called by the friend of the court office. There is no requirement that a person attend a joint meeting absent a court order. The friend of the court office has no authority to impose a solution.

Mediation: Mediation may be statutory domestic relations mediation or alternative dispute resolution. Statutory mediation requires the parties to agree to have their case mediated pursuant to statute. No person may disclose what occurred during the mediation. If the parties reach an agreement, an order is prepared to enter their agreement.

Makeup access: Each circuit court is required to have a makeup access policy addressing the procedure by which missed access is made up by access in the future. The State Court Administrative Office has developed a model policy for makeup access that essentially calls for time to be made up by substituting identical time for that missed (for example, weekends for weekends, holidays for holidays, summers for summers). The time would be applied by contacting the person who is alleged to have violated the order and notifying that person that the makeup access policy will be applied unless the person replies within 7 days to oppose the makeup access. If a timely reply is made, a hearing is scheduled. Makeup access accounts are kept by the friend of the court.

Civil contempt: Civil contempt is initiated by the friend of the court office filing a motion and obtaining an order directed toward the person who is alleged to have violated the order to show cause why the person should not be found in contempt for disobeying the court order. A person cannot be punished for contempt without first being given a chance to comply with the order. Possible sanctions for violating an order are:

1. Jail of up to 45 days for a first offense and up to 90 days for a second offense.
2. A fine of up to $100.
3. Suspension of driver's, occupational, recreational or sporting licenses.

Motion to modify access: The friend of the court office may file a motion to modify access if the dispute has not voluntarily been resolved. If such a motion is filed, the statute requires the friend of the court to submit a report and recommendation with its motion. Changes that can be recommended include:

1. Division of the responsibility to transport a child(ren).
2. Division of the cost of transporting the child(ren).
3. Restrictions on the presence of third persons during access.
4. Requirements that the child be ready for access at a specific time.
5. Requirements that the parent pick-up and return the child(ren) at a specific time.
6. Requirements that the access occur in the presence of a third person or agency.
7. Requirements that a party post a bond to assure compliance with an access order.
8. Requirements of reasonable notice when access will not occur.

9. Any other reasonable condition appropriate in the particular case.

In response to a notice contained within a show cause order, a party may request a hearing on the issue of modification. If such a modification is requested, the hearing on the issue of modification of access is held at the same time as the issue of contempt.

As indicated by this description of Michigan's program, it is a comprehensive approach to access enforcement. The state takes on much of the burden of enforcing access. In 2009, Justice Milner of Nova Scotia's Family Court suggested that

> Perhaps there *should be* a "director of access enforcement" as the maintenance-paying-parents have suggested. Or, perhaps there should be an Office of Family Responsibility, with both a maintenance enforcement branch, and an access facilitation branch. It would be staffed with professionals trained in all aspects of parent-child relationships.[53]

For provinces interested in providing an access-enforcement service, Michigan provides a good model.

[53] *MG v CM, JG, DG, TM and CF*, 2009 NSFC 15 at para 64.

Conclusions

In most cases, access arrangements are generally complied with and parents are satisfied with the arrangements. Many custodial parents deny access occasionally for reasons such as illness of the child. As well, many non-custodial parents cancel access visits occasionally for various reasons. The cases that require most attention are those involving ongoing resistance to and denial of access, those where there is a high level of conflict between the parents and those where the non-custodial parents fail to exercise access or to maintain a positive relationship with their children.

Orders relating to access and access enforcement should be based on the best interests of the child. The best interests of the child should be determined on a case-by-case basis, without the application of presumptions. Although in most cases an order for access will be in the best interests of the child, research indicates that in some cases no access is in the best interests of the child. In determining the best interests of the child, the views of the child should be considered. Additional efforts could be made to ensure that capable children have an opportunity to have their views considered.

Early screening and provision of services appropriate to the nature of the problems identified results in more efficient and cost-effective dispute resolution. None of the provinces or territories provide by statute or otherwise for screening of all cases and provision of appropriate services, although some screening is carried out in some parts of the country. Australia and Connecticut provide models of early screening and provision of services that may be appropriate for Canada.

Preventive measures and services aimed at non-adversarial resolution of disputes are highly important. In recent years, provinces and territories have expanded services to facilitate conflict prevention and resolution of disputes. Ongoing efforts to improve and enhance parental education, mediation and assessment services, supervised access services and the provision of online information will make successful resolution and management of access disputes more likely.

Children have a right to maintain contact with the non-custodial parent, unless access is not in their best interests. Therefore, adequate remedies for access denial and for failure to exercise access are necessary to protect the rights and interests of children. All provinces and territories have statutory measures to sanction access denial. Only some have statutory sanctions for failure to exercise access. Those that do not have such sanctions may want to consider amendments add them.

Generally, the best interests of the child standard will support an incremental application of enforcement measures, under which alternative approaches are stressed and compensatory remedies are used initially. When access denial or failure to exercise access persists, remedies become more coercive and punitive. The use of coercive or punitive measures is problematic when there are good reasons for non-compliance. In such cases, it may be in the best interests of the child to vary the custody and access

order. Coercive and punitive measures often undermine the best interests of the child and are therefore considered appropriate only after other measures have failed.

Australia, the UK and the US have legal cultures and socio-economic conditions that are similar to Canada's. Canadian law and policy-makers can learn from or use as models the laws and processes used in these countries to deal with access enforcement. Australia and Connecticut are particularly helpful models in regard to early screening and provision of services. Recent efforts in England and Wales to improve access enforcement by introducing new statutory sanctions points to the limits of punitive measures and the importance of preventive and alternative measures. For provinces and territories interested in providing an access-enforcement service, Michigan provides a good model.

Appendix A

Summary of Federal, Provincial and Territorial Statutes

1) Best Interests of the Child

Every Canadian jurisdiction requires that access orders be based on the best interests of the child.

The *Divorce Act*, s 16(8) provides that, when making an access order, "the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child." Section 16(9) specifically provides that past conduct of an applicant shall not be considered as conduct relevant to the ability to parent. The only specific factor to be considered is set out in s 16(10): "the court shall give effect to the principle that a child... should have as much contact with each spouse as is consistent with the best interests of the child."

In Alberta, the *Family Law Act*, s 18 provides that when making orders relating to children, including access orders, a court shall consider only the best interests of the child, and further provides that in determining the best interests of the child the court shall

> (a) ensure the greatest possible protection of the child's physical, psychological and emotional safety, and
> (b) consider all the child's needs and circumstances, including
>> (i) the child's physical, psychological and emotional needs, including the child's need for stability, taking into consideration the child's age and stage of development,
>> (ii) the history of care for the child,
>> (iii) the child's cultural, linguistic, religious and spiritual upbringing and heritage,
>> (iv) the child's views and preferences, to the extent that it is appropriate to ascertain them,
>> (v) any plans proposed for the child's care and upbringing,
>> (vi) any family violence, including its impact on
>>> (A) the safety of the child and other family and household members,
>>> (B) the child's general well-being,
>>> (C) the ability of the person who engaged in the family violence to care for and meet the needs of the child, and
>>> (D) the appropriateness of making an order that would require the guardians to co-operate on issues affecting the child,
>> (vii) the nature, strength and stability of the relationship
>>> (A) between the child and each person residing in the child's household and any other significant person in the child's life, and
>>> (B) between the child and each person in respect of whom an order under this Part would apply,

(viii) the ability and willingness of each person in respect of whom an order under this Part would apply

(A) to care for and meet the needs of the child, and

(B) to communicate and co-operate on issues affecting the child,

(ix) taking into consideration the views of the child's current guardians, the benefit to the child of developing and maintaining meaningful relationships with each guardian or proposed guardian,

(x) the ability and willingness of each guardian or proposed guardian to exercise the powers, responsibilities and entitlements of guardianship, and

(xi) any civil or criminal proceedings that are relevant to the safety or well-being of the child.

In British Columbia, the *Family Law Act*, s 37 provides that courts must consider the best interests of the child only, and further requires that all of the child's needs and circumstances be considered, including

(a) the child's health and emotional well-being;

(b) the child's views, unless it would be inappropriate to consider them;

(c) the nature and strength of the relationships between the child and significant persons in the child's life;

(d) the history of the child's care;

(e) the child's need for stability, given the child's age and stage of development;

(f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;

(g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;

(h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;

(i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;

(j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

As well, the provision provides that a court may consider a person's conduct only if it substantially affects one of the listed factors and only to the extent that it affects that factor. Section 38 sets out factors that a court must consider when assessing family violence in the context of a best interests of the child determination.

In Manitoba, the *Family Maintenance Act*, s 2(1) provides that when determining access, the "best interests of the child shall be paramount." Under section 2(2), the court may consider the views and preferences of the child, when the court is satisfied that a child is able to understand the nature of the proceedings and the court considers that it would not

be harmful to the child. Section 39(2) says that the court may order that "the non-custodial parent have access, at such times and subject to such conditions as the court deems convenient and just, for the purpose of visiting the child and fostering a healthy relationship between parent and child."

In New Brunswick, the *Family Services Act*, s 129(3) provides that the court may make an order for access and that the order is "to be made on the basis of the best interests of the child." Under section 1, the "best interests of the child" is defined as "the best interests of the child under the circumstances" taking into consideration

> (a) the mental, emotional and physical health of the child and his need for appropriate care or treatment, or both;
> (b) the views and preferences of the child, where such views and preferences can be reasonably ascertained;
> (c) the effect upon the child of any disruption of the child's sense of continuity;
> (d) the love, affection and ties that exist between the child and each person... to whom access to the child is granted...; …
> (f) the need to provide a secure environment that would permit the child to become a useful and productive member of society through the achievement of his full potential according to his individual capacity; and
> (g) the child's cultural and religious heritage."

In Newfoundland, the *Children's Law Act*, s 31(1) provides that an application for access "shall be determined on the basis of the best interests of the child." Section 31(2) provides that when determining the best interests of the child in an application for access, the court "shall consider all the needs and circumstances of the child, including

> a) the love, affection and emotional ties between the child and,
> i) each person entitled to or claiming... access to the child;
> ii) other members of the child's family who live with the child; and
> iii) persons involved in the care and upbringing of the child;
> b) the views and preferences of the child, where the views and preferences can reasonably be ascertained;
> c) the length of time the child has lived in a stable environment;
> d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and the special needs of the child;
> e) the ability of each parent seeking the custody or access to act as a parent;
> f) plans proposed for the care and upbringing of the child;
> g) the permanence and stability of the family unit with which it is proposed that the child will live; and
> h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.

Under section 31(3), the court, when assessing a person's ability to act as a parent, "shall consider whether the person has ever acted in a violent manner towards: a) his or her spouse or child; b) his or her child's parent; or c) another member of the household, [and]

otherwise a person's past conduct shall only be considered if the court thinks it is relevant to the person's ability to act as a parent."

In the Northwest Territories, the *Children's Law Act*, s 17(1), and in Nunavut, the *Children's Law Act*, s 17(1) say that an application for access "shall be determined in accordance with the best interests of the child, with a recognition that differing cultural values and practices must be respected in that determination." Under section 17(2), when determining the best interests of the child on an application for access, the court must consider all the needs and circumstances of the child including

a) the love, affection and emotional ties between the child and
    (i) each person entitled to or seeking... access,
    (ii) other members of the child's family, and
    (iii) persons involved in the care and upbringing of the child;
b) the child's views and preferences if they can be reasonably ascertained;
c) the child's cultural, linguistic and spiritual or religious upbringing and ties;
d) the ability and willingness of each person seeking custody to, directly or indirectly, provide the child with guidance, education and necessities of life and provide for any special needs of the child;
e) the ability of each person seeking custody or access to act as a parent;
f) who, from among those persons entitled... access, has been primarily responsible for the care of the child, including care of the child's daily physical and social needs, arrangements for alternative care for the child where it is required, arrangements for the child's health care and interaction with the child through, among other things, teaching, playing, conversation, reading and discipline;
g) the effect a change of residence will have on the child;
h) the permanence and stability of the family unit within which it is proposed that the child live;
i) any plans proposed for the care and upbringing of the child;
j) the relationship, by blood or through adoption, between the child and each person seeking... access;
k) the willingness of each person seeking custody to facilitate access between the child and a parent of the child who is seeking custody or access."

Under section 17(3), the court, when determining the best interests of the child, "shall also consider any evidence that a person seeking... access has at any time committed an act of violence against his or her spouse, former spouse, child, child's parent or any other member of the person's household or family and any effect that such conduct had, is having or may have on the child." Section 17(4) provides that "a person's past conduct may be considered in an application [for access] only where the court is satisfied that it is relevant to the person's ability to act as a parent." Section 17(5) provides that "the economic circumstances of a person seeking... access are not relevant to the person's ability to act as a parent."

Nova Scotia enacted the *Parenting and Support Act* in 2015, but the new legislation is not yet in force. Still in place is the province's *Maintenance and Custody Act*, s 18(5), which

provides that when considering an application for access, court shall give paramount consideration to the best interests of the child. Subsection 18(6) provides that when determining the best interests of the child, the court shall consider all relevant circumstances, including

> (a) the child's physical, emotional, social and educational needs, including the child's need for stability and safety, taking into account the child's age and stage of development;
> (b) each parent's or guardian's willingness to support the development and maintenance of the child's relationship with the other parent or guardian;
> (c) the history of care for the child, having regard to the child's physical, emotional, social and educational needs;
> (d) the plans proposed for the child's care and upbringing, having regard to the child's physical, emotional, social and educational needs;
> (e) the child's cultural, linguistic, religious and spiritual upbringing and heritage;
> (f) the child's views and preferences, if the court considers it necessary and appropriate to ascertain them given the child's age and stage of development and if the views and preferences can reasonably be ascertained;
> (g) the nature, strength and stability of the relationship between the child and each parent or guardian;
> (h) the nature, strength and stability of the relationship between the child and each sibling, grandparent and other significant person in the child's life;
> (i) the ability of each parent, guardian or other person in respect of whom the order would apply to communicate and co-operate on issues affecting the child; and
> (j) the impact of any family violence, abuse or intimidation, regardless of whether the child has been directly exposed, including any impact on
>> (i) the ability of the person causing the family violence, abuse or intimidation to care for and meet the needs of the child, and
>> (ii) the appropriateness of an arrangement that would require co-operation on issues affecting the child, including whether requiring such co-operation would threaten the safety or security of the child or of any other person.

Subsection 18(7) sets out factors to consider when considering family violence, abuse or intimidation in the context of a best interests of the child determination. Section 20 provides that the court may order the child to be brought before the court at any time during the proceeding.

Ontario's *Children's Law Reform Act*, s 19(a) provides that one of the purposes of the custody and access provisions is to ensure that applications to the courts about access are determined on the basis of the best interests of the children. Pursuant to s 24 (1), the merits of an application for access "shall be determined on the basis of the best interests of the child." Section 24(2) provides that when determining the best interests of the child, "a court shall consider all the needs and circumstances of the child, including

> a) the love, affection and emotional ties between the child and
>> (i) each person entitled to or claiming... access to the child,
>> (ii) other members of the child's family who reside with the child, and

(iii) persons involved in the care and upbringing of the child;
b) the views and preferences of the child, where such views and preferences can reasonably be ascertained;
c) the length of time the child has lived in a stable home environment;...
e) any plans proposed for the care and upbringing of the child;...
g) the relationship by blood or through an adoption order between the child and each person who is party to the application."

Under s 24(3) the past conduct of a person is not relevant to a determination of access "unless the conduct is relevant to the ability of the person to act as a parent of a child."

Under s 24 (4), "in assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against, (a) his or her spouse; (b) a parent of the child to whom the application relates; (c) a member of the person's household; or (d) any child."

In Prince Edward Island, the *Custody Jurisdiction and Enforcement Act*, s 2 (a) provides that one purpose of the Act is "to ensure that applications to the court in respect of custody of, incidents of custody of and access to, children will be determined on the basis of the best interests of the child." Under section 8, the court, when considering an access application, "shall take into consideration the views and preferences of the child to the extent that the child is able to express them" and "may interview the child to determine the views and preferences of the child."

In Quebec, article 33 of the *Civil Code of Quebec* provides that "every decision concerning a child shall be taken in light of the child's interest and the respect of his rights. Consideration is given, in addition to the moral, intellectual, emotional and material needs of the child, to the child's age, health, personality and family environment, and to other aspects of his situation." Article 34 provides that "the court shall, in every application brought before it affecting the interest of a child, give the child an opportunity to be heard if his age and power of discernment permit it." Parents generally retain parental authority after separation, but article 606 provides that the court may, "for a grave reason and in the interest of the child," deprive a parent of parental authority or withdraw an attribute of parental authority. When both parents retain parental authority but have disagreements, then recourse may be had to article 604, which provides that "in the case of difficulties relating to the exercise of parental authority, the person having parental authority may refer the matter to the court, which will decide in the interest of the child after fostering the conciliation of the parties."

The *Code of Civil Procedure of Quebec*, article 816.3, provides for representation and hearing of children.

Saskatchewan's *The Children's Law Act*, s 8 provides that when making an access order, the court shall have regard only for the best interests of the child and for that purpose shall take into account

(i) the quality of the relationship that the child has with the person who is seeking access,
(ii) the personality, character and emotional needs of the child,
(iii) the capacity of the person who is seeking access to care for the child during the times that the child is in his or her care, and
(iv) the wishes of the child, to the extent the court considers appropriate, having regard to the age and maturity of the child.

The provision further provides that the court is not to consider the past conduct of any person unless the conduct is relevant to the ability of that person to care for the child. Under s 6(5), the court, when making an order for custody or access, must "give effect to the principle that a child should have as much contact with each parent as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person seeking custody to facilitate that contact."

Yukon's *Children's Law Act*, s 1 provides that "this Act shall be construed so that in matters arising under it the interests of the child affected by the proceeding shall be the paramount consideration, and where the rights or wishes of a parent or other person and the child conflict the best interests of the child shall prevail." Section 29 states that one of the purposes of the custody and access provisions is to ensure that applications are determined in accordance with the best interests of the child. Section 30 (1) provides that when determining the best interests of the child in an access application, the court shall consider all the needs and circumstances of the child including:

a) the bonding, love, affection and emotional ties between the child and,
(i) each person entitled to or claiming custody of or access to the child,
(ii) other members of the child's family who reside with the child, and
(iii) persons involved in the care and upbringing of the child;
b) the views and preferences of the child, where such views and preferences can be reasonably ascertained,
c) the length of time, having regard to the child's sense of time, that the child has lived in a stable environment,
d) the ability and willingness of each person applying for custody of the child to provide the child with guidance, education, the necessaries of life and any special needs of the child,
e) any plans proposed for the care and upbringing of the child,
f) the permanence and stability of the family unit with which it is proposed that the child will live, and
g) the effect that awarding custody or care of the child to one party would have on the ability of the other party to have reasonable access to the child.

Section 30 (2) provides that the past conduct of a person is not relevant to a determination of an application for access "unless the conduct is relevant to the ability of the person to have the care or custody of the child." Section 30 (3) provides that there is no presumption that the best interests of the child are best served by placing the child with a female person rather than a male person nor the opposite.

Only the statutes of Alberta, Quebec, Manitoba and Saskatchewan provide that the best interests of the child are a consideration in regard to access enforcement orders.

Alberta's *Family Law Act*, s 18 provides that when making orders relating to children, including access enforcement orders, a court shall consider only the best interests of the child. In Quebec, article 33 of the *Civil Code of Quebec*, provides that every decision concerning a child, which would include access enforcement decisions, shall be taken in light of the child's interest and the respect of his rights. Manitoba's *The Child Custody Enforcement Act*, s 14.1 provides that the court may order compensation for expenses or supervision of access in cases of wrongful access denial or wrongful failure to exercise access, "taking into account the best interests of the child." Apprehension of the child and punishment for contempt are provided for in subsections 9 and 14, but these remedies are not subject to consideration of the best interests of the child.

Saskatchewan's *The Children's Law Act*, s 26 provides for remedies for wrongful denial of access and for wrongful failure to exercise the right of access, which may be ordered by the court when it is "of the opinion that it is in the best interests of the child." Apprehension of the child and punishment for contempt are provided for in subsections 24 and 29, but these remedies are not subject to consideration of the best interests of the child.

2) Preventive and Alternative Measures

a) Parental Education

Parental education programs are now widely available, and in some provinces completion of a parental education program is mandatory.

Pursuant to Alberta's *Family Law Act*, s 98 and *Family Law Act General Regulation*, s 5, a court may require the parties to attend the Parenting After Separation Seminar, and the seminar is required before parties file for a divorce.

Under BC's *Provincial Court Practice Directions*, the Chief Judge of the Provincial Court "may give directions requiring parties in proceedings to attend parenting programs operated by the Ministry of Justice." BC's *Family Law Act*, s 61(2)(b) provides that in cases of wrongful denial of access, a court may "require one or more parties or, without the consent of the child's guardian, the child, to attend counselling, specified services or programs."

Under Manitoba's *Court of Queen's Bench Rules*, Man Reg 553/88, Rule 70.24(29)3, a case conference judge may on their own motion or on request of a party order a party to attend Manitoba's parental education program.

Pursuant to Rule 59.17 of Nova Scotia's *Civil Procedure Rules* and Rule 6.25 of the *Family Court Rules*: "A party to a proceeding that involves a child must attend the court's parent information program, unless the party is exempted from attending..." Parties may

be exempted from attending if the case is not contested, they have already attended the program within the past year, or in other exceptional circumstances.

Pursuant to Rule 8.1 of the *Family Law Rules*, Ontario now requires parties in the majority of cases to participate in a Mandatory Information Program that provides information about separation/divorce and the legal process, including

1) The effects of separation and divorce on adults and children;
2) Alternatives to litigation;
3) Family law issues;
4) The Family Court process;
5) Local resources and programs for families facing separation and/or divorce.

In the Yukon, the Supreme Court has issued *Practice Direction Family-2 Parenting After Separation*, which requires parents involved in contested cases involving children under the age of 16 to complete a parental education program, unless they do not live within a 30-kilometre radius of Whitehorse.

b) Mediation

Most Canadian jurisdictions provide for court-ordered mediation, and some provide free or government-subsidized mediation. Quebec requires parties to attend an information session on mediation prior to the hearing of any contested custody application. Ontario and Yukon allow court-ordered mediation only "at the request of the parties." Only Newfoundland, the Northwest Territories and Nunavut explicitly authorize courts to order mediation in the case of wrongful access denial or wrongful failure to exercise access.

The *Divorce Act*, ss 9(2) requires lawyers acting for a party to a divorce proceeding to discuss with their clients on the advisability of negotiating support, custody or access and to tell them about mediation facilities that might be able to help negotiate those matters. Alberta's *Family Law Act*, s 5, Saskatchewan's *The Children's Law Act*, s 11 and BC's *Family Law Act*, s 8(2) have similar provisions. Alberta's *Family Law Act*, s 97 also provides that a court may appoint a mediator to assist the parties in resolving the matters in issue. BC's *Family Law Act*, s 10 also provides for "family justice counsellors" appointed by the province, who may assist the parties in working out parenting arrangements and other issues.

Manitoba's *Court of Queen's Bench Act*, s 47 provides "[w]here a judge or master is of the opinion that an effort should be made to resolve an issue otherwise than at a formal trial, the judge or master may, at any stage of the proceeding, refer the issue to a designated mediator."

New Brunswick's *Family Services Act*, s 131 provides "[i]n any custody proceeding brought under this Part or in any other proceeding brought under this Part, if the court is of the opinion that any question arising might reasonably be the subject of conciliation, and that it would be in the best interests of the family to attempt to resolve the question

through conciliation, the court may make an order requiring the Minister of Families and Children to make conciliation services available to the parties and may adjourn the proceeding for a reasonable time."

Newfoundland's *Children's Law Act,* s 37 provides that, in an application for custody or access, "the court, at the request of the parties, by order may appoint a person selected by the parties to mediate a matter specified in the order," and that the court must only appoint a mediator who has consented to act. Under ss 41(2)(d) and 41(6)(c), the court may order the appointment of a mediator in accordance with section 37 for wrongful denial of access or failure to exercise access without reasonable notice or excuse.

In the Northwest Territories and Nunavut, the *Children's Law Act*, s 71 provides that on an application for custody or access a court may appoint "a person selected by the parties to mediate any matter that the court specifies." Under ss 30(2)(d) and 30(4)(c) the court may appoint a mediator in cases of wrongful denial of access or failure to exercise access without reasonable notice or excuse.

Nova Scotia's *Parenting and Support Act* is not yet in force. Under s 40(5)(a) of the new statute, in cases of wrongful access denial a court may an order providing that any of the parties to the application or the child attend counselling or a specified program or obtain a specified service, and which parties must pay for the counselling, program or service.

Ontario's *Children's Law Reform Act*, s 31 provides that, at the request of the parties, the court may make an order appointing a person to mediate any matter.

The *Code of Civil Procedure of Quebec*, articles 814.3-815.2, set out the following. First, the parties are required to attend an information session on the mediation process before the hearing of a disputed custody or access application in court. At the end of the information session, the couple must choose between mediation and court proceedings. At any time, either party may terminate mediation without having to give reasons and the mediator is required to terminate mediation when they consider pursuing it to be ill advised. The Family Mediation Service of the Superior Court must pay the mediator's fees up to the prescribed number of sessions. The court, at any time before judgment, may adjourn the hearing of an application, with a view to either reconciliation of the parties or their conciliation, in particular through mediation. The court may adjourn the hearing and refer the parties to mediation, each party bearing the proportion of the mediator's fees determined by the court.

Saskatchewan's *The Children's Law Act*, s 10 provides that a court may order mediation on application of one of the parties, but that either party, at any time after the first mediation session, may discontinue the mediation and proceed to have court resolve the matters at issue.

Yukon's *Children's Act*, s 42 allows the court in an application for custody or access to, at the request of the parties, appoint a person selected by the parties to mediate.

c) Supervised Access

Statutes that explicitly address the court's ability to specify that access be supervised are found in Newfoundland (*Children's Law Act,* s 40); the Northwest Territories and Nunavut (*Children's Law Act*, s 23); Ontario (*Children's Law Reform Act*, s 34); and the Yukon (*Children's Act*, s 35). Saskatchewan's legislation implies that courts may order supervised access, because it explicitly provides that when supervised access is ordered, the court may specify how much each party will pay: *The Children's Law Act, 1997*, s 6(8).

Statues that explicitly allow a court to order that access be supervised in cases of wrongful denial of access or wrongful failure to exercise access are found in Manitoba, (*Child Custody Enforcement Act*, s 14.1); Newfoundland, (*Children's Law Act,* ss 41(2)(a) and 41(6)(a)); the Northwest Territories and Nunavut (*Children's Law Act*, ss 30(2)(b) and 30(4)(a)); and Saskatchewan (*The Children's Law Act, 1997*, ss 26(1)(b) and (2)(a)). In cases of wrongful access denial, BC's *Family Law Act*, s 61(2)(e) provides that a court may "require that the transfer of the child from one party to another be supervised by another person." Nova Scotia's *Parenting and Support Act* is not yet in force. Under ss 40(5)(d) and (e) of the new legislation, in cases of wrongful access denial a court may make an order that the transfer of the child for access be supervised, and which parties must pay for the costs associated with the supervision, or that access be supervised, and which parties must pay for the costs associated with the supervision.

4) Remedies for Access Denial

a) Justified Access Denial

Some provinces explicitly address justified access denial and provide for remedies only if the denial is wrongful or limit remedies available for justified access denial.

Alberta's *Family Law Act*, s 40 provides that a court may refuse to enforce an access order if the court is of the opinion that denial of access was "excusable." The statute does not specify when denial of access is excusable.

BC's *Family Law Act*, s 62 provides

> (1) For the purposes of section 61 *[denial of parenting time or contact]*, a denial of parenting time or contact with a child is not wrongful in any of the following circumstances:
>
> (a) the guardian reasonably believed the child might suffer family violence if the parenting time or contact with the child were exercised;
>
> (b) the guardian reasonably believed the applicant was impaired by drugs or alcohol at the time the parenting time or contact with the child was to be exercised;
>
> (c) the child was suffering from an illness when the parenting time or contact with the child was to be exercised and the guardian has a written

statement, by a medical practitioner or nurse practitioner, indicating that it was not appropriate that the parenting time or contact with the child be exercised;

(d) in the 12-month period before the denial, the applicant failed repeatedly and without reasonable notice or excuse to exercise parenting time or contact with the child;

(e) the applicant

(i) informed the guardian, before the parenting time or contact with the child was to be exercised, that it was not going to be exercised, and

(ii) did not subsequently give reasonable notice to the guardian that the applicant intended to exercise the parenting time or contact with the child after all;

(f) other circumstances the court considers to be sufficient justification for the denial.

(2) If, on an application under section 61, the court finds that parenting time or contact with a child was denied, but was not wrongfully denied, the court may make an order specifying a period of time during which the applicant may exercise compensatory parenting time or contact with the child.

Newfoundland's *Children's Law Act*, s 41(4) provides that a remedy is available only when denial of access is "wrongful," and provides that denial of access is not wrongful in the following circumstances:

a) when the respondent believes on reasonable grounds that the child will suffer physical or emotional harm if access is exercised;

b) when the respondent believes on reasonable grounds that he or she might suffer physical harm if access is exercised;

c) when the respondent believes on reasonable grounds that the applicant is impaired by alcohol or a drug at the time of access;

d) when the applicant fails to present himself or herself to exercise the right of access within one hour of the time specified in the order or the time otherwise agreed on by the parties;

e) when the respondent believes on reasonable grounds that the child is suffering from an illness of such a nature that it is not appropriate to allow access be exercised;

f) when the applicant does not satisfy written conditions that were agreed on by the parties or that are part of the order for access;

g) when, on numerous occasions during the preceding 12 months, the applicant had, without reasonable notice and excuse, failed to exercise the right of access;

h) when the applicant had informed the respondent that he or she would not seek to exercise the right of access on the occasion in question;

i) when the court thinks that the withholding of the access is, in the circumstances, justified.

The Northwest Territories' and Nunavut's *Children's Law Act*, s 30 and Saskatchewan's *The Children's Law Act*, s 26(1) provide for enforcement of access orders when access has been "wrongfully denied" but do not define this term.

Nova Scotia's *Parenting and Support Act* is not yet in force. Pursuant to s 40(3) of the new statute, the first step for the court is to determine whether access denial was "wrongful," taking into account all the relevant circumstances, including whether there was

> (a) a reasonable belief that the child would suffer family violence, abuse or intimidation if the parenting time, contact time or interaction was to be exercised;
> (b) a reasonable belief that the applicant was impaired by drugs or alcohol at the time the parenting time, contact time or interaction was to be exercised;
> (c) repeated failure, without reasonable notice or excuse, by the applicant to exercise parenting time, contact time or interaction in the twelve months immediately prior to the denial; or
> (d) a failure by the applicant to give notice of when parenting time, contact time or interaction would be reinstated following advance notice that the time would not be exercised.

If the court finds that access was denied but not wrongfully denied, pursuant to s 40(4) the court may order that the applicant have compensatory access, but other remedies are not available.

b) Compensatory Access and Compensation for Expenses

Compensatory access and compensation for expenses incurred as a result of access denial is explicitly provided for in some provincial and territorial statutes.

Alberta's *Family Law* Act, s 40(2)(a) explicitly provides that a court may order compensatory access, and s 40(2)(c) provides that a court may order reimbursement of expenses actually incurred as a result of the denial of access.

BC's *Family Law*, s 61(2) provides that in cases of wrongful access denial a court may

> (c) specify a period of time during which the applicant may exercise compensatory parenting time or contact with the child;
> (d) require the guardian to reimburse the applicant for expenses reasonably and necessarily incurred by the applicant as a result of the denial, including travel expenses, lost wages and child care expenses.
> (g)(i) [require payment of] an amount not exceeding $5 000 to or for the benefit of the applicant or a child whose interests were affected by the denial.

Manitoba's *Child Custody Enforcement Act* does not expressly provide for compensatory access, but s 7 does allow the court to make other orders to give effect to a recognized order, which could include compensatory access. Section 14.1(1)(a) allows a court to

order the custodial parent to provide reimbursement "for any reasonable expenses actually incurred as a result of wrongful denial of access."

Newfoundland's *Children's Law Act*, s 41(2)(a) provides that "where the court is satisfied that access is being wrongfully denied to the applicant, the court may order the respondent to give the applicant compensatory access to the child for a period agreed on by the parties, or where the parties do not agree for a period that the court considers appropriate." Under section 41(3), "compensatory access shall not be longer than the access that was wrongfully denied."

In the Northwest Territories and in Nunavut, the *Children's Law Act*, s 30(2) says that, when a court is satisfied that the applicant has been wrongfully denied access, the court may "make such orders as it considers appropriate, including any one or more of the following orders: a) requiring the respondent to give the applicant compensatory access to the child for the period agree to by the parties, or, if the parties do not agree, for the period the court considers appropriate;... c) requiring the respondent to reimburse the applicant for any reasonable expenses actually incurred as a result of wrongful denial of access."

Nova Scotia's *Parenting and Support Act* is not yet in force. Under s 40(4) of the new statute, if the court finds that access was denied but not wrongfully denied, the court may order that the applicant have compensatory access. Under s 40(5)(b), compensatory access also may be ordered when denial of access was wrongful. Under s 40(5)(c) compensation for expenses incurred as a result of access denial may be ordered.

Saskatchewan's *The Children's Law Act*, s 26(1)(a) provides that when a court is satisfied that a person has been wrongfully denied access it may "require the respondent to give the applicant compensatory access to the child for the period: (i) agreed to by the parties; or (ii) that the court considers appropriate if the parties do not agree." Under section 27, in an application for enforcement of access under the Act or in an application under *The International Child Abduction Act, 1996*, "a court may order the respondent to pay necessary expenses incurred or to be incurred by the applicant, including: a) travel expenses; b) the costs of locating and returning the child; c) lost wages;... e) legal fees; and f) any other expenses the court may allow."

c) Apprehension Orders

The following provinces and territories have given statutory power to courts to make an order authorizing a person entitled to access or someone on that person's behalf to apprehend the child in order to give effect to the access order: Manitoba, in *The Child Custody Enforcement Act*, s 9, and the *Family Maintenance Act*, s 11; New Brunswick, in the *Family Services Act*, s 132.1; Newfoundland, in the *Children's Law Act*, s 43; Northwest Territories and Nunavut, in *Children's Law Act*, s 31; Ontario, in the *Children's Law Reform Act*, s 36; Prince Edward Island, in the *Custody Jurisdiction and Enforcement Act*, s 21; and Yukon, in the *Children's Act*, s 46. These same jurisdictions, along with Alberta in its *Family Law Act*, s 44 and Saskatchewan, in *The Children's Law*

Act, s 24, empower courts to direct a law enforcement officer to apprehend and deliver the child to the person entitled to access.

d) Contempt Proceedings

In Alberta, the *Provincial Court Act*, s 9.61 provides that contempt of a court order may be punished by a fine of up to $25,000 or imprisonment for up to two years.

BC's *Family Law Act*, s 61(2)(g)(ii) provides that in cases of wrongful access denial a court may impose a fine of up to $5,000.

Manitoba's *Child Custody Enforcement Act*, s 14(1) provides that contempt of court orders for access may be punished by a fine of no more than $500, or prison for no more than six months, or both. The *Family Maintenance Act*, s 50(1) provides that a person who fails to comply with an order made under the Act is guilty of an offence and liable on summary conviction to fine of not more than $500 or to imprisonment for not more than six months or to both.

New Brunswick's *Family Services Act*, s 130.7(1) provides that "in addition to his powers in respect of contempt, every judge of the Provincial Court may punish by fine or imprisonment, or both, any wilful contempt of or resistance to the process or orders of the Court in respect of custody of or access to a child, but the fine shall not in any case exceed one thousand dollars nor shall the imprisonment exceed ninety days."

Newfoundland's *Children's Law Act*, s 46 provides that "in addition to its powers in respect of contempt, a Provincial Court judge may punish by fine or imprisonment, or both, a wilful breach of or resistance to its process or orders in respect of custody or access to a child, but the fine shall not exceed $1000 nor shall the imprisonment exceed 90 days."

In the Northwest Territories and Nunavut, the *Children's Law Act*, s 73 provides that "in addition to its powers in respect of contempt, the Territorial court may punish a person for any wilful contempt of or resistance to its process or orders under this Act by imposing on the person a fine not exceeding $5,000, a term of imprisonment not exceeding 90 days or both."

Nova Scotia's *Maintenance and Custody Act*, s 41 provides that the court make an order for contempt, which may include imprisonment continuously or intermittently for not more than six months.

Ontario's *Children's Law Reform Act*, s 38 provides that a court may punish contempt with a fine of up to $5,000 or imprisonment up to 90 days.

Articles 49 and 50 of the *Code of Civil Procedure of Quebec* allow a court to condemn a person who is guilty of contempt of a court order. Article 51 provides that a person guilty of contempt of court is liable to a fine of up to $5,000 or to imprisonment for not more

than one year. Imprisonment for refusal to obey an order may be repeated until the person obeys.

Saskatchewan's *The Children's Law Act*, s 29(1) provides that a court that is satisfied that a person has displayed "wilful contempt of orders or resistance to its process or orders with respect to custody of or access to a child" may impose: "a) in the case of a first finding of contempt: (i) a fine of not more than $5,000; (ii) imprisonment for a term of not more than 90 days; or (iii) both that fine and imprisonment; and b) in the case of a second or subsequent finding of contempt: (i) a fine of not more than $10,000; (ii) imprisonment for a term of not more than two years; or (iii) both that fine and imprisonment."

e) Variation of Custody

Saskatchewan expressly provides that variation is a remedy for wrongful access denial. *The Children's Law Act*, s 26(1)(e) provides that, in the case of wrongful denial of access, the court may vary a custody or access order, provided the court "is of the opinion that it is in the best interests of the child." Nova Scotia's *Parenting and Support Act* is not yet in force. Under s 40(6) of the new statute, a finding that access was wrongfully denied constitutes a material change in circumstances for the purpose of a variation order regarding custody or access.

4) Remedies for Abduction

a) Notice of a Proposed Move

The *Divorce Act*, s 16(7) authorizes a court to order that a custodial parent must provide at least 30 days' notice of a move as well as information on the date of the move and the child's new place of residence.

Alberta's *Family Law Act*, s 33(2) provides that "the court may include in a parenting order a term requiring a guardian who intends to change his or her place of residence or that of the child to notify the other guardian or guardians, at least 60 days before the change or within such other period before the change as the court may specify, of the change, the date on which the change will be made, and the new place of residence for the guardian or the child, as the case may be."

BC's *Family Law Act*, s 66 requires 60 days' notice of a proposed relocation that includes the date of the relocation and the new location. Importantly, the court may grant an exemption to this requirement where it may create a risk of family violence or where there is no relationship between the child and the access parent.

b) Orders of Return

Most provinces and territories provide by statute that a court may order the return of a child. For example, Ontario's *Children's Law Reform Act*, s 40 provides

> Upon application, a court,
> (a) that is satisfied that a child has been wrongfully removed to or is being wrongfully retained in Ontario; or
> (b) that may not exercise jurisdiction … or that has declined jurisdiction … may do any one or more of the following:
>
> 1. Make such interim order in respect of the custody or access as the court considers is in the best interests of the child.
> 2. Stay the application subject to,
>
> i. the condition that a party to the application promptly commence a similar proceeding before an extra-provincial tribunal, or
> ii. such other conditions as the court considers appropriate.
>
> 3. Order a party to return the child to such place as the court considers appropriate and, in the discretion of the court, order payment of the cost of the reasonable travel and other expenses of the child and any parties to or witnesses at the hearing of the application.

As well, all provinces and territories have implemented by statue the Hague *Convention on the Civil Aspects of International Child Abduction*. See, for example, Ontario's *Children's Law Reform Act*, s 46.

c) Criminal Charges

Criminal Code provisions relating to parental child abduction are

> 282(1) Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, in contravention of the custody provisions of a custody order in relation to that person made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or (b) an offence punishable on summary conviction.
>
> 283 (1) Every one who, being the parent, guardian or person having the lawful care or charge of a person under the age of fourteen years, takes, entices away, conceals, detains, receives or harbours that person, whether or not there is a custody order in relation to that person made by a court anywhere in Canada, with intent to deprive a parent or guardian, or any other person who has the lawful care or charge of that person, of the possession of that person, is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or (b) an offence punishable on summary conviction.

5) Enforcement of Foreign Access Orders

Most provinces and territories provide for unilateral recognition of foreign access orders. For example, Ontario's *Children's Law Reform Act*, s 41 provides

(1) Upon application by any person in whose favour an order for the custody of or access to a child has been made by an extra-provincial tribunal, a court shall recognize the order unless the court is satisfied,

(a) that the respondent was not given reasonable notice of the commencement of the proceeding in which the order was made;
(b) that the respondent was not given an opportunity to be heard by the extra-provincial tribunal before the order was made;
(c) that the law of the place in which the order was made did not require the extra-provincial tribunal to have regard for the best interests of the child;
(d) that the order of the extra-provincial tribunal is contrary to public policy in Ontario; or
(e) that …the extra-provincial tribunal would not have jurisdiction if it were a court in Ontario.

(2) An order made by an extra-provincial tribunal that is recognized by a court shall be deemed to be an order of the court and enforceable as such.

6) Enforcement Against the Non-custodial Parent

Some provinces provide statutory remedies for failure to exercise access.

Alberta's *Family Law Act*, s 41 provides

> Where a person who has a right under a time with a child clause fails to exercise that right without reasonable notice to a guardian, the court may, on application by that guardian, make an order requiring the person to reimburse the guardian for any necessary expenses actually incurred by that guardian as a result of the failure to exercise that right.

BC's *Family Law Act*, s 63(1) provides that in cases of repeated failure to exercise access, whether or not reasonable notice was given, a court may order that the parties participate in family dispute resolution; that one or more parties to attend counselling, that the transfer of the child from one party to another be supervised, or that the custodial parent be reimbursed for expenses "reasonably and necessarily incurred" as a result of the failure to exercise access, including travel expenses, lost wages and child care expenses.

Manitoba's *Child Custody Enforcement Act*, s. 14.1, provides

> Where the court, upon application, is satisfied that a person in whose favour an order has been made for access to a child at specific times or on specific days has wrongfully failed to exercise the right of access or to return the child as the order requires, the court may make one or both of the following orders, taking into account the best interests of the child:

(a) require the respondent to reimburse the applicant for any reasonable expenses actually incurred as a result of the failure to exercise the right of access or to return the child as the order requires;
(b) require supervision of the access where the court is satisfied that a person or agency is willing and able to provide proper supervision.

Newfoundland's *Children's Law Act*, s 41(6) provides

> Where the court is satisfied that the respondent without reasonable notice and excuse, failed to exercise the right to access or did not return the child as the order requires, the court may order
> (a) supervision;
> (b) the respondent to reimburse the applicant for reasonable expenses actually incurred as a result of the failure to exercise the right to access or to return the child as the order requires; and
> (c) the appointment of a mediator.

In the Northwest Territories and in Nunavut the *Children's Act*, s 30(4) applies to failure to exercise access without reasonable notice or excuse. It allows a court to order supervision of access, reimbursement of the custodial parent for any reasonable expenses actually incurred as a result of failure to exercise access, appointment of a mediator, or that the access parent provide an address and telephone number.

Nova Scotia's *Parenting and Support* Act is not yet in force. Under s 40A of the new statute, if a court determines that there has been failure to exercise access without reasonable excuse, the court may make and order that

(a) that any of the parties to the application or the child attend counselling or a specified program or obtain a specified service, and which parties must pay for the counselling, program or service;
(b) that the respondent exercise compensatory parenting time, contact time or interaction;
(c) that the respondent reimburse the applicant for expenses incurred as a result of the respondent's failure to exercise the parenting time, contact time or interaction;
(d) that the transfer of the child for parenting time or contact time be supervised, and which parties must pay for the costs associated with the supervision;
(e) that parenting time, contact time or interaction be supervised, and which parties must pay for the costs associated with the supervision;
(f) the payment of costs for the application by one or more of the parties;
(g) that the parties appear for the making of an additional order; and(h) the payment of no more than five thousand dollars to the applicant or to the applicant in trust for the child.

As well, under s 40A(4), failure to exercise access without reasonable excuse, constitutes a material change in circumstances for the purpose of a variation order regarding custody or access.

In Saskatchewan, *The Children's Law Act*, s 26(2) allows a court to order the non-custodial parent to give security for performance of the obligation or provide their address and telephone number.

Bibliography

Australia. 2007 *A Guideline for Family Law Courts and Children's Contact Services*.

Australia. Federal Circuit Court of Australia. n.d. Instructions for Completion of Notice of Risk.

Australia. Australia Institute of Family Studies. Rachel Carson and Jessie Dunstan. June 2015 *Family Law Update*.

Australia. Family Court of Australia. 2014-2016 *Family Violence Plan*.

Australian Law Reform Commission. 1995b *For the Sake of the Kids--Complex Contact Cases and the Family Court*, Paper no. 73. Sydney.

Bailey, Martha. 1999 "Supervised Access: A Long-term Solution?" *Family and Conciliation Courts Review* 37: 478-486.

Bala, Nicholas & Nicole Bailey. 2004/2005 "Enforcement of Access and Alienation of Children: Conflict Reduction Strategies & Responses." *Canadian Family Law Quarterly* 23:1-61.

Bala, Nicholas, Rachel Birnbaum, Francine Cyr & Denise McColley. 2013 "Children's Voices in Family Court: Guidelines for Judges Meeting Children." *Family Law Quarterly*. 47: 379-408.

Bertrand, Lorne D., Nicholas Bala, Rachel Birnbaum & Joanne J. Paetsch. 2012 *Hearing the Voices of Children in Alberta Family Proceedings: The Role of Children's Lawyers and Judicial* Interviews. Canadian Research Institute for Law and the Family.

Birnbaum, Rachel & Nicholas Bala. 2010 "Towards a Differentiation of 'High Conflict' Families: An Analysis of Social Science and Canadian Case Law." *Family Court Review*. 48:403.

Birnbaum, Rachel & Stephanie Chipeur. 2010 "Supervised Visitation in Custody and Access Disputes: Finding Legal Solutions for Complex Family Problems." *Canadian Family Law Quarterly*. 29:79-94.

Birnbaum, Rachel & Helen Radovanovic. 1999 "Brief Intervention Model for Access-based Postseparation Disputes." *Family Court Review*. 4:504-513.

Block, Jeanne, Jack Block & F. Gjerde. 1986 "The Personality of Children Prior to Divorce." *Child Development*. 57: 827.

Canada. Department of Justice, Research and Statistics Division. 2016 *Self-Represented Litigants in Family Law*.

Canada. Statistics Canada. Maire Sinha. 2014 *Parenting and Child Support After Separation or Divorce*. February 2014.

Canada. Family, Children and Youth Section, Department of Justice. 2005 *High-conflict Separation and Divorce: Options for Consideration*.

Canada. Federal/Provincial/Territorial Family Law Committee. 2000 *An Inventory of Government-Based Services That Support the Making and Enforcement of Custody and Access Decisions*. February 22, 2000.

Canada. 1999a *Government of Canada's Response to the Report of the Special Joint Committee on Child Custody and Access* April 15, 2000. Ottawa.

Canada. Department of Justice Canada, Child Support Team. 1999b *Custody, Access and Child Support: Findings From the National Longitudinal Survey of Children and Youth*. Ottawa.

Canada. Department of Justice Canada. 1998a *Government's Response to the Fourth Report of the Standing Committee on Foreign Affairs and International Trade (International Child Abduction: Issues for Reform)*. Ottawa.

Canada. Department of Justice Canada. 2001 *Overview and Assessment of Approaches to Access Enforcement*. Ottawa. < http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/2001_8/toc-tdm.html>.

Canada. Special Joint Committee on Child Custody and Access. 1998b *For the Sake of the Children, Final Report*. Ottawa: Public Works and Government Services Canada.

Canada. Statistics Canada. 1996 *Growing Up in Canada: National Longitudinal Survey of Children and Youth*. Ottawa.

Connecticut. 2015 *Update on the Judicial Branch Family Court Initiatives*.

Cossman, Brenda, & Roxanne Myktiuk. 1998 "Child Custody and Access--Discussion Paper." *Canadian Journal of Family Law*. 15: 1: 13-78.

Dale, Milfred D. 2014. "Don't Forget the Children: Court Protection from Parental Conflict is in the Best Interests of Children." *Family Court Review*. 52: 648.

Fidler, Barbara Jo & Nicholas Bala. 2010 "Children Resisting Postseparation Contact with a Parent: Concepts, Controversies, and Conundrums." Family Court Review. 48:10–47.

Geismann, Greg. 1993 "Strengthening the Weak Link in the Family Law Chain: Child Support and Visitation as Complementary Activities." *South Dakota Law Review.* 38: 568-608.

Gross, Beatrice, and Ronald Gross (eds.). 1999 *The Children's Rights Movement: Overcoming the Oppression of Young People.* New York: Anchor/Doubleday.

Hague Conference on Private International Law. 1997 *Report of the third Special Commission meeting to review the operation of the Hague Convention on the Civil Aspects of International Child Abduction*. The Hague.

Hague Conference on Private International Law. 2008 *Transfrontier Contact Concerning Children: General Principles and a Guide to Good Practice*. The Hague.

Kelly, Fiona. 2011 "Enforcing a Parent/Child Relationship at All Cost?: Supervised Access Orders in the Canadian Courts." *Osgoode Hall Law Journal*. 49:277-309.

Kruk, Edward. 2008. Father Involvement Research Alliance. *Child Custody, Access and Parental Responsibility: The Search for a Just and Equitable Standard*.

MacPhail, Joan A. 1999 *Enforcement Options for Custody and Access Breaches*. Manitoba Department of Justice. Unpublished, on file with the author.

McIsaac, Hugh, & Charlotte Finn. 1999 "Parents Beyond Conflict: A Cognitive Restructuring Model for High-conflict Families in Divorce." *Family and Conciliation Courts Review*. 37: 74-82.

McLeod, J.G. 1992 *Child Custody Law and Practice*. Toronto: Carswell (looseleaf service).

McLeod, James G. 1987 "Annotation to *Rutherford v Rutherford*." *Reports on Family Law*. 4: 457.

Ontario, Ministry of the Attorney General, Office of the Children's Lawyer. 2016 Intake Form.

Ostrom, Brian J., Shannon Roth & Alicia Davis. *The High Performance Court and Divorce Case Triage: Final Report* (National Center for State Courts, December 2014),

Patrician, M. 1984 "Child Custody Terms: Potential Contributors to Custody Dissatisfaction and Conflict." *Mediation Quarterly*. 3: 41.

Pearson, Jessica, & Nancy Thoennes. 2000 "Supervised Visitation: The Families and Their Experiences." *Family and Conciliation Courts Review*. 38: 123-142.

Pruett, Marsha Kline & Megan Durell. 2009 *Family Civil Intake Screen and Services Evaluation: Final Outcomes Report*. Connecticut Judicial Branch Court Support Services

Division.

Public Prosecution Service of Canada, Public Prosecution Service of Canada Deskbook, 5.10 Parental Child Abduction, 2 Statement of Policy (1 March 2014).

Salem, Peter, Debra Kulak & Robin M. Deutsch. 2007 "Triaging Family Court Services: The Connecticut Judicial Branch's Family Civil Intake Screen." *Pace Law Review*. 27: 741.

Semple, Noel. 2010 "Whose Best Interests? Custody and Access Law and Procedure." *Osgoode Hall Law Journal*. 48: 287-336.

Trinder, Liz, Joan Hunt, Alison Macleod, Julia Pearce & Hilary Woodward. 2013 *Enforcing Contact Orders: Problem-solving or Punishment?* Nuffield Foundation.

Wilton, Ann, & Judy S. Miyauchi. 1989 *Enforcement of Family Law Orders and Agreements: Law and Practice*. Toronto: Carswell.

UK Department of Constitutional Affairs and Department for Education and Skills, *Parental Separation: Children's Needs and Parents' Responsibilities*, July 2004 Cm 6273.

Table of Statutes

CANADA

Federal

Convention on the Rights of the Child, General Assembly of the United Nations, New York, November 20, 1989, in force September 2, 1990, ratified by Canada December 11, 1991

Hague Convention on the Civil Aspects of International Child Abduction, Can. T.S. 1983, No. 35, 19 I.L.M. 1501

An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Division Act and the Canada Shipping Act, S.C. 1997, c 1

Constitution Act 1867, (U.K.), 30 & 31 Vict. c 3, reprinted in RSC 1985, Appendix II, No. 5

Criminal Code, RSC 1985, c C-46

Divorce Act, RSC 1985 c 3 (2nd Supp.)

Family Orders and Agreements Enforcement Assistance Act, RSC 1985, c 4 (2nd Supp)

Alberta

International Child Abduction Act, RSA 2000, c I-4

Family Law Act, SA 2003, c F-4.5

Extra-provincial Enforcement of Custody Orders Act, RSA 2000, c E-14

Family Law Statutes Amendment Act, 2010, SA 2010, c 16

Provincial Court Act, RSA 2000, c P-31

Family Law Act General Regulation, Alta Reg 148/2005

British Columbia

Family Law Act, SBC 2011, c 25

Provincial Court Practice Directions, BC Reg 188/98 OC 690/98

Manitoba

The Child Custody Enforcement Act, RSM 1987, c C360

Court of Queen's Bench Act, SM 1988-89, c 4

Family Maintenance Act, RSM 1987, c F20

Court of Queen's Bench Rules, Man Reg 553/88

New Brunswick

Family Services Act, SNB 1980, c F-2.2

Foreign Judgments Act, RSNB 2011, c 162

International Child Abduction Act, RSNB 2011, c 175

Newfoundland

Children's Law Act, RSNL 1990, c C-13

Northwest Territories

Children's Law Act, SNWT 1997, c 14

International Child Abduction Act, RSNWT 1988, c I-5

Nova Scotia

Child Abduction Act, RSNS 1989, c 67

Maintenance and Custody Act, RSNS 1989, c 160

Parenting and Support Act, SNS 2015, c 44 (not yet in force)

Family Orders Information Release Act, RSNS 1989, c 161

Reciprocal Enforcement of Custody Orders Enforcement Act, RSNS 1989, c 387

Civil Procedure Rules, Royal Gaz Nov 19, 2008

Family Court Rules, NS Reg 20/93

Nunavut

Children's Law Act, SNWT (Nu) 1997, c 14

Family Support Orders Enforcement Act, SNu 2012, c 16

International Child Abduction Act, RSNWT (Nu) 1988, c I-5

Ontario

Children's Law Reform Act, RSO 1990, c C.12

Courts of Justice Act, RSO 1990, c C.43

Family Law Rules, O Reg 114/99.

Prince Edward Island

Custody Jurisdiction and Enforcement Act, RSPEI 1988, c C-33

Quebec

An Act Respecting the Civil Aspects of International and Interprovincial Child Abduction, CQLR c A-23.01

Civil Code of Quebec, CQLR c CCQ-1991

Code of Civil Procedure of Quebec, CQLR c C-25

Saskatchewan

The Children's Law Act, 1997, SS 1997, c C-8.2

The International Child Abduction Act, 1996, SS 1996, c I-10.11

Yukon

Children's Law Act, RSY 2002, c 31

Family Property and Support Act, PSY 2002, c 83

Maintenance Enforcement Act, RSY 2002, c 145

Practice Direction Family-2 Parenting After Separation, 15 January 2016

AUSTRALIA

Family Law Act 1975, No 53 of 1975 as amended *(Cth)*

UNITED STATES

Michigan

Child Custody Act of 1970, MCL 722.23

Friend of the Court Act, MLC Ch 552.501- 552.535

Support and Parenting Time Enforcement Act, MCL Ch 552.601- 552.650

UNITED KINGDOM

Children and Adoption Act 2006, c 20

Children Act 1989, c 41

Table of Cases

Canada

Inwood v Sidorova, [1991] OJ No 1417 (Gen Div)

Jackson v Jackson, 2016 ONSC 3466

JDG v HMLM, 2014 BCPC 390

JT v CTh, 2004 ONCJ 278

KLT v MAT, 2008 NSFC 16

Kozachok v Mangaw, 2007 ONCJ 70

M(BP) v M(BLDE), [1992] 97 DLR (4th) 437 (OCA), leave to appeal to SCC refused, [1993] 3 SCR vii

MG v CM, JG, DG, TM and CF, 2009 NSFC 15

MW v EB, 2006 CanLII 273 (ON SC)

McEown v Parks, 2016 ONSC 6761

McKee v McKee, [1951] AC 352 (PC)

Patterson v Powell, 2014 ONSC 1419

Penney v Gould, 2011 ONCJ 84

Prekaski v Prekaski, 2015 SKQB 76

R v Clement, [1981] 2 SCR 468

R v EFD (1995), 100 CCC (3d) 123 (NSCA)

R v Gibbons, [2012] 2 SCR 92

R v Petropoulos (1990), 29 RFL (3d) 289 (BCCA)

Re: K (contact: committal order) [2002] EWCA Civ 1559, [2002] All ER (D) 312

Re: Y (Private Law: interim change of residence) [2014] EWHC 1068 (Fam), [2014] All ER (D) 106

Re Leponiemi and Leponiemi (1982), 35 OR (2d) 440 (CA)

Ramsay v Ramsay, 2001 NWTSC 61

Reithofer v Dingley, [2000] OJ No 1132 (Sup Ct Just)

Richardson v Richardson, [1987] 1 SCR 857

Salloum v Salloum (1994), 154 AR 65 (QB)

Shamli v Shamli, 2004 CanLII 12363 (ON SC)

Stirling v Blake, 2013 ONSC 5216

Sturkenboom v Davies (1996), 25 RFL (4^{th}) 173 (Alta CA)

VSJ v LJG, (2004), 5 RFL (6th) 319 (OntSC)

WT (Re), 2016 ABPC 296

Zahr v Zahr (1994), 24 Alta LR (3d) 274 (QB)

List of Contacts

Emily Bloxom
Counsel
Justice Policy Development
Policy Division
Ministry of the Attorney General

Patricia Elliott
Program/Policy Analyst
Family Justice Services Division
Ministry of Justice
British Columbia

Penny Lipsack
Barrister and Solicitor
Legal Services Branch
Ministry of Justice Victoria, British Columbia

Ginette Le Sann
Project Manager, Judicial Services
Manitoba Justice

Jonathan M. Nicholson
Barrister & Solicitor
Director, Alberta Justice
Social Enhancement Legal Team

France Rémillard
Autorité centrale du Québec
Ministère de la Justice

Janet Sigurdson
Crown Counsel Family Law Section
Legal Services Branch
Manitoba Justice

Peter Sperling
Manager
Victoria Justice Access
Ministry of Justice
British Columbia

Michael J. Zimmerman
Acting Manager, Family Law Section

Dept. of Justice and Public Safety
Honourable C.R. McQuaid Family Law Centre
Prince Edward Island