Family Violence & Family Law Brief

Responding to Family Violence in Family Court: Challenges & Recommendations

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Muriel McQueen Fergusson Centre for Family Violence Research

ALLIANCE OF CANADIAN RESEARCH CENTRES ON GENDER-BASED VIOLENCE

This Brief was prepared by the Atlantic Research Team of the *Supporting the Health of Survivors of Family Violence in Family Law Proceedings* project and the Muriel McQueen Fergusson Centre for Family Violence Research (MMFC) on behalf of the Alliance of Canadian Research Centres on Gender-Based Violence.

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Design

Natalia Hidalgo, Communications Coordinator at the Centre for Research & Education on Violence Against Women & Children

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ABOUT THIS PROJECT:

Supporting the Health of Survivors of Family Violence

Supporting the Health of Survivors of Family Violence is a project aimed at addressing the many challenges that survivors of family violence experience within the family court system. Funded by the Public Health Agency of Canada, the project has established five regional Communities of Practice (CoP) through the Alliance of Canadian Research Centres on Gender-based Violence. The **Atlantic Family Violence & Family Law Community of Practice** is coordinated in collaboration with the Muriel McQueen Fergusson Centre for Family Violence Research. The Atlantic CoP members come from a wide variety of sectors, including family law lawyers, mediators, criminal law practitioners, social workers, family violence and transition house counsellors, addictions and mental health nursing, and several community organizations, including the Public Legal Education and Information Service of New Brunswick (PLEIS NB), and the Elizabeth Fry Society. To learn more about the Atlantic CoP and its activities, visit: **https://fvfl-vfdf.ca/**

"In this Brief"

Identifying Family Violence in Family Court

Research has shown that increased levels of awareness and education are needed to assist legal, social, and health service providers in the detection, assessment, and response to family violence. The special consideration that family violence warrants in family law proceedings has received both legislative and judicial notice in recent years, with changes to the *Divorce Act* in March 2021 and several subsequent court decisions, including three from the Supreme Court of Canada.[1] These amendments included an expanded definition of family violence, detailed criteria for making a decision in the best interests of a child, and several key factors for courts to consider when adjudicating cases of family or intimate partner violence (Nonomura et al, 2021). These changes have been welcomed by family law practitioners for the guidance and consistency in the approach that they offer courts in understanding the scope of family violence and assessing how much evidentiary weight it should have on the proceedings (Martinson & Jackson, 2021).

The recent amendments to the *Divorce Act* address several challenges for family violence survivors that have been identified by family law practitioners and researchers in the field, including the need for increased collaboration between family and criminal court systems. Importantly, the new legislation provides an **evidence-based definition of family violence** that encompasses coercive and controlling behaviour. This kind of IPV was identified in the amendments' legislative backgrounder as "the most serious type of violence in the family law context… because it is part of an ongoing pattern, involves more danger, and is more likely to be associated with compromised parenting" (Justice Canada, 2019, p. 24).

Importantly, the legislation links this expanded definition of family violence explicitly to judicial considerations of the best interests of the child. Where family violence is present, the court must assess specific factors, including the nature, seriousness and frequency of family violence; the presence of coercive or controlling behaviour; the risk of harm to the child's safety; whether the child or other family members have experienced

TYPES of IPV

Canada's *Divorce Act* amendments resulted from Bill C-78 (42nd Parliament) which described four types of intimate partner violence (IPV) identified by expert research:

1. **coercive and controlling violence**: violence that forms "a pattern of emotionally abusive intimidation, coercion, and control coupled with physical violence against partners" (Kelly & Johnson, 2008 at 478).
2. **violent resistance**: violence in response to coercive and controlling violence, often in defence of self or others.
3. **situational (or common) couple violence**: violence that is generally the result of an inability to manage anger or conflict and not associated with control or coercion.
4. **separation-instigated violence**: violence that can range from minor to severe and generally occurs at the time of separation with multiple incidents

(Justice Canada, 2019).

[1] *Association de mediation familiale du Québec v Bouvier*, 2021 SCC 54; *Barendregt v Grebulinas,* 2022 SCC 22; *Colucci v Colucci,* 2021 SCC 24.

fear for their safety; as well as any steps taken by the perpetrator to prevent future incidents and improve their ability to care for and meet the needs of the child (*Divorce Act,* s. 16(4)).

The *Divorce Act's* expanded definition of family violence has also facilitated judicial findings of family violence and its impact on children involved or exposed to it. A Canadian study conducted prior to the amendments found that intimate partner violence was only deemed relevant to parenting orders in 10% of family law cases (Sheehy & Boyd, 2020). Reports from survivors themselves reflect the same trend in family court decisions prior to the amendments. A study conducted in 2018-2019 using focus groups and interviews with Canadian women who had experienced family violence and accessed the family court system found that among the 160 participants, nearly half (44%) had been advised *not* to bring up family violence during the legal proceeding, despite 70% of participants indicating their partners had threatened death to them and/or their children (Hrymak & Hawkins, 2021). Nor have courts always found it necessary to take family violence into account when making decisions about parenting orders, particularly when it had occurred in the past or was not directed at the child(ren) (Boyd & Lindy, 2015; Hyrmak & Hawkins, 2021). Caselaw emerging in the wake of the *Divorce Act* amendments suggests a shift in another direction. In *Barendregt v Grebulinas* (2022), the Supreme Court made it clear that family violence is a "critical consideration in the best interests analysis" and that "[c]ourts must consider family violence and its impact on the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child" (¶146). Subsequent cases from across the country seem to be following the trend.[2]

> *"The suggestion that domestic abuse or family violence has no impact on the children and has nothing to do with the perpetrator's parenting ability is untenable." (Barendregt v Grebulinas,* 2022 SCC 22 at ¶143)

Ongoing Challenges: Family Violence Cases in Three Stages

There remain several significant challenges for family violence survivors during the family court process. Some of the most commonly reported difficulties include: 1) a lack of legal representation, 2) the re-traumatizing experience of the adversarial court system, made worse for self-represented parties, 3) the limited availability of single-judge case management, 4) judges with limited knowledge of family law and family violence, 5) an insufficient sharing of community

[2] See, for example, *C.L.T. v. D.T.T.* [2022] NBJ No 309, where the court cites *Barendregt v Grebulinas, supra* note 1 at length to establish the impact of family violence on the parenting abilities of the parties, including the father's refusal to recognize the behaviour as such; or *Barnhart v Murphy* [2023] NSJ No 42, where the court pays considerable attention to the couple's history of family violence in its assessment of the child's best interests, even though neither party had raised current allegations of family violence. In *Alberta (Dir. Child, Youth, and Family Enhancement) v. H.F.* [2022] AJ No. 1227, the decision of the provincial court was overturned on the basis of the judge's failure to give appropriate weight to the evidence of family violence; and when categorizing the father's pattern of "harassing and degrading text and email messages; surreptitious and unwanted video recording" of the mother as "family violence", the court in *K.L. v A.P.* 2022 BCJ No. 1923 cites a decision of the BC Court of Appeal where the trial judge's decision not to consider family violence in determining the child's best interests was held to be a "serious error" (*K.W. v L.H.,* 2018 BCCA 204).

resources; and 6) a lack of collaboration among community professionals, including reluctance to become involved in court proceedings (Olszowy, et al., 2020; Neilson, 2020; Martinson & Jackson, 2017). Despite the breadth of these challenges, there is much that family law practitioners can do to mitigate these risks. Best practices include improved education, awareness, and trauma-informed approaches to the detection and assessment of family violence at each stage of a family court proceeding. There are three stages of family violence cases where attuning the court to the nature and impact of the violence is particularly important: the crisis stage, the case management stage, and, finally, the trial stage.

Stage #1: Crisis

The first stage at which most family violence cases reach the court is one of crisis. Materials have often been prepared hastily and can be incomplete. This adds a layer of complexity for family court judges who approach each case without any knowledge of the family history or family dynamics. The crisis stage leaves little time for learning about family violence or establishing the trust needed between the court and the parties for its adequate disclosure. Instead, crisis stage proceedings often involve *ex parte* motions (e.g. IPV intervention orders) where the victim of family violence or another party seeking to protect a child is the only one before the court. Family court judges must assess the credibility of one-sided arguments when crafting safety plans or temporary parenting orders, many of which may need revisions as the case proceeds.

RED FLAGS – Lethal Risk Indicators of Family Violence

Several risk factors for family violence have been identified in the research. The following **lethal risk factors** are highlighted in Justice Canada's HELP Toolkit (2021) as indicating a cause for heightened risk assessment and safety planning:

- Access to weapons, particularly to guns and/or threats made with weapons
- Unemployment and significant life changes
- Pending or actual separation
- Prior domestic violence, escalating in severity or frequency
- Presence of children in the home, particularly children not biologically related to the perpetrator
- Death threats
- Attempted strangulation or choking
- Suicidal tendencies and/or attempts
- Stalking or monitoring partner's movements
- Forced sexual acts and sexual abuse and/or violence during pregnancy
- Victim expresses a fear of being killed

(Justice Canada, HELP Toolkit, pg. 16).

These difficulties are worsened by the inequitable access to justice that family violence survivors face. Research shows that the period immediately following separation is the most dangerous time for IPV survivors; yet, most do not have legal representation at this stage of their case (Birnbaum & Bala, 2021). Survivors and children experience increase vulnerability in the time following the initial urgent motion in a family violence case, where several factors can pull the family back into a context of abuse, including financial dependence, pressure from third parties or external family members, intimidation by the perpetrator, and feelings of shame or self-blame. This can lead to requests for order reversals or revisionist facts when victims have been retraumatized and coerced into recantation and/or reconciliation (McGuire et al., 2021). While full affidavit evidence is not expected at the crisis stage, courts may ask for oral evidence from the moving party (e.g. victims seeking to "undo" protective measures ordered at the first appearance) to address concerns of coercion or to probe for further risk factors, so legal counsel should prepare clients for this possibility.

Stage #2: Case Management

When family law cases reach the case management stage, there are two primary goals: (1) the collecting of additional information that is important to the judicial proceedings; and (2) attempting to resolve the matter without a trial (Neilson, 2020). When the case involves family violence, two additional objectives arise: (3) assessing the credibility of family violence allegations; and (4) determining whether additional temporary orders are needed to address safety concerns, prevention efforts, and the therapeutic needs of the family.

The dynamics of family violence cases are fluid and therefore benefit from legal processes or protocols that are more adaptable to change or standard procedure. In jurisdictions with restrictions on materials filed (e.g. page limits), many judges will be flexible upon request during case management or may be willing to hear further viva voce evidence from parties. In these instances, counsel should prepare the parties for these question periods with the judge. It is essential that judges and legal practitioners be attuned to the impact of trauma at this stage, when victims can feel extremely vulnerable, emotionally fragile, and fearful of their abuser – all of which can affect the consistency and details of a survivor's disclosure (Cross et al., 2018, p. 26). Trauma also does not impact all victims in the same manner (Neilson, 2020). While some individuals are revictimized by sharing their accounts of violence with the judge, others have reported it to be healing (Neilson, 2020). The challenges of telling their stories in court are exponentially greater for victims that are self-represented.

Good legal practice in family violence cases, therefore, requires lawyers to have a comprehensive understanding of the facts in order to skillfully answer questions from the bench as well as direct judges to details in the factual record that may have been missed. As the court obtains more fulsome information, there can often be a succession of temporary without prejudice orders as the court's understanding of the dynamics and the family situation evolve. This begins by evaluating what information has already been submitted by the parties in order to establish any potential gaps. When family violence allegations are deemed credible, the presiding judge can offer opinions on matters pertaining to parenting and financial orders during the case management stage. This can help to create an increased sense of security for victims and children.

A trauma-informed approach is critical at the case management stage of a family violence case. Complainants may be required to submit or review evidence with triggering effects such as photographs of injuries, dates, and descriptions of violent incidents, social media records, and medical reports, among other things. Relatedly, judges must also be equipped with trauma-informed training to understand the potential ramifications (e.g. on credibility assessments) of subjecting victims of violence to the court system in a manner that is not trauma-informed.

The various assessments, expert opinions, and social services that may be helpful to the parties in establishing safe parenting plans should be considered and requested in family violence cases during the case management stage and *well in advance of trial*. These often include (with consent of both parties) Voice of the Child reports, but counsel should also consider requesting orders for mental health or psychological assessment and treatment services for victims and the perpetrator, such as family counselling, substance abuse, and relapse prevention treatment, expert opinion reports on impact, risk, and safety protocols, and financial training. Providing the court with multiple options at the case management stage can help judges to employ creative and flexible solutions, such as the use of progressive orders.

Progressive Orders in Family Violence Cases

The fluid nature of family violence cases means that the circumstances of the parties can change both quickly and dramatically. Survivors are therefore best served by court orders that evolve as the case moves through the stages of a family court proceeding. Specifically, orders that provide progressive "goal posts" for the parties can be a useful tool for addressing the complex dynamics of family violence cases. As the case evolves from the crisis stage, progressive orders can be used to create temporary "stop gaps" that provide some degree of stabilization for families, establishing more refined plans over the course of the case management stage. The inclusion of directives (e.g. to take positive steps towards addressing violent behaviour) can also help to transition a family towards resolution (where possible) or amended parenting plans. When, during the interim period, a party has continued to engage in behaviour that is abusive, coercive, controlling, or otherwise indicative of family violence, the use of progressive orders provides an opportunity to hold perpetrators accountable while also offering an evidentiary basis for applications to amend existing safety and parenting plans or implement new ones. Progressive orders also help to demonstrate what may or may not work for a family, as well as the likelihood of the parties following through with recommended services and the family violence issues being meaningfully addressed. All of this information is useful for legal counsel and judges to have when formulating long-term parenting and financial frameworks at the trial stage.

Evidence to Gather and Disclose During the Case Management Phase

Family violence research has cited evidentiary issues as one of "the most significant challenges faced by victims of family violence when they come to court" (Boyd & Lindy, 2015, p. 112). Without sufficient evidence, many domestic violence cases are dismissed. In a study of Canadian family law cases from 2014-2018 involving claims of family violence, judges discounted IPV allegations in 31% of cases (28/90) due to a lack of sufficient evidence (Sheehy & Boyd, 2020, p. 83).

Evidence, such as expert testimony, has therefore been recognized as crucial to substantiating family violence claims (Henaghan et al., 2022). Family law practitioners need to be prepared to gather and disclose several categories of evidence during the case-management stage, including but not limited to the following:

Evidence relating to the seriousness, length, and credibility of the family violence allegations:

- A detailed summary provided by the client
- Medical and other health records for treatments; dental records for assaults to the face
- Photos of injuries, recordings of abuse and/or surveillance videos for altercations that took place in public
- Notes and records of professionals who the parties have spoken to about the family violence, including will-say statements from friends and family, complete records from child protection agencies, school records or will-say statements from school professionals, attendance records, and court findings or orders from other legal proceedings involving the same parties
- Veterinarian bills, photographs of injuries or damage, and invoices for repair, if violence to pets or property damage is involved
- Corroborating bank statements and transaction statements, if financial abuse is alleged
- Records of communication between the parties (e.g. social media evidence) that demonstrates abuse and/or coercive control

Evidence highlighting red flags that may have contributed to family violence:

- To show a history of aggression or violence: historical criminal records, previous court orders and documents, and will-say statements from other victims
- To show a history of substance abuse: records from professionals or treatment facilities used by the perpetrator; social media posts exhibiting an abuser's history of substance use; will-say statements from family, friends, or previous partners re: substance abuse
- Evidence that the perpetrator has access to weapons (e.g. proof of ownership or the location of the weapons)
- Documentary evidence to show the perpetrator has a history of non-compliance with court orders (e.g. probation orders; bail terms)
- Employment records showing unstable employment, reasons for dismissal, or evidence of problems with landlords, evictions, and financial strain or abuse

Evidence regarding the physical, social, or psychological impacts sustained by the victims:

- Medical and therapeutic records from doctors and social service professionals involved in addressing the impact
- Will-say statements from family, friends, school professionals, and community supports who observed impact on child(ren)

Evidence respecting aggravating factors that may make the victims more vulnerable to abuse:

- Documentation from professionals showing mental health or cognitive difficulties experienced by victims, including medical records showing their extent and severity
- Consider the role of community groups and cultural leaders in providing will-say statements to offer context for the victim's experience and its impact

Evidence pertaining to actions taken by the abuser to address family violence:

- Records of the service providers who were accessed by the abuser
- Proof of completion for therapeutic programming undertaken.
- Letters from service providers articulating the perpetrator's level of cooperation and progress throughout the program, including the perceived benefit of the program

In cases with children, evidence of the children's wishes and preferences for parenting plans:

- Where children are impacted and are capable of expressing their views, parties must determine the best way for the children's interests to be expressed. Section 6(4) of New Brunswick's *Family Services Act* states that this can be done by the child themselves if they have the capacity, a parent, or through an appropriate spokesperson.
- Children's views may be expressed in many ways, such as a Voice of the Child Report, testimony from third parties (e.g. social workers, school counsellors) or in some jurisdictions, a judicial interview.

Evidence of support from family and friends:

- Provide the court with detailed information about the support network that parties and children will have as part of their safety plan moving forward
- Include information about family and friends who will be called on for supervisory and caretaking roles (e.g. criminal record check; child protection history; substance use)
- Evidence of the relationship and trust between family and friends who are included in safety plans and the parties involved, in particular the children and their best interests

Identify the assessments and expert opinions/services that the court will need to properly assess and address the family violence issues:

- Provide the court with a clear proposal for any assessments, opinions, or services that may be needed to establish a parenting plan that will protect the family moving forward.
- Recommend the use of mental health assessment and treatment services, anger management and family violence counselling, as well as expert opinions that can speak to relevant cultural considerations, enhanced vulnerabilities, and effective prevention plans

Evidence to support income and property claims:

- Fulsome financial disclosure at the case management stage helps to prevent the perpetuation of coercive control and financial abuse in the post-separation period
- At minimum, the standard Disclosure Template (e.g. Ontario's Form 13) should be provided early in the case management stage

Evidence of the particulars of parenting and plans, including services required

- Housing plans for each parent and education plans for the child(ren)

- Medical and health-related care plan for all family members
- Proposals for parenting time (with reasons, terms, and conditions) and services to address and resolve the family violence issues

The Importance of a Well-Crafted Notice of Motion

Family court judges need as much context as possible to craft safe and responsive parenting plans in cases involving allegations, histories, indicators, and risk factors of family violence. Motions brought on an urgent basis during the crisis stage of a family violence case can be hastily written and incomplete. Providing the court with sufficient information to make safe and risk-responsive decisions is crucial – even on urgent motions. **Helpful affidavit evidence** can include specific dates of violent incidents, information on court interventions, and third-party witness accounts of the violence. If there is a parallel criminal proceeding, information should also be shared about bail conditions and other prohibition or restriction orders. Risk factors such as a history of family violence, substance abuse, violence against animals, coercive behaviour, or financial control are also helpful inclusions for the court as is information about the *impact* of family violence on the parties, including any services sought to address it.

A good example is provided in the Ontario case, *M.A.B. v M.G.C.* (2022) in which the provision of an evidentiary record of the abuser's history of violence helped to establish a pattern of behaviour that informed the court's assessment of the parenting plan. As Justice Chappel noted, the case history "reveals important information about the parenting roles that the parties played since the child's birth. It also highlights several persistent and very disturbing themes and patterns of conduct and concerns that are vital to determining [the child's] current needs and best interests" (2022 ONSC 7207, para 69).

Stage #3: Trial

The trial normally marks the final stage of a family law proceeding. By this point, all motions, disclosures, and expert opinions should be complete, including any written reporting of children's views and preferences. Family violence trials are typically long, complex, and costly in their financial and traumatic impact. Too often, issues of assessment, expert opinions, and victim services are not raised with the court until this late stage of trial management or scheduling and this prolongs the process for families. Parties should exchange comprehensive offers to settle, obtain updated child protection disclosure, and produce any expert testimony before trial.

Evidence related to the nature, extent, impact, and credibility of family violence allegations will also need to be provided to the court to inform decision-making about safety and parenting plans, even in variation hearings where in the past, some judges were reluctant to allow "historical" evidence (i.e. that which pre-dates the parenting order the party is seeking to change). The *Barendregt v Grebliunas,* decision has made it explicitly clear that "the history of parenting arrangements is always relevant to understanding a child's best interests" (at 114). Admission of this evidence can sometimes be streamlined and treated as a business record, if it is documentary

and made in the ordinary course of business. This can include child protection records, police occurrence reports, hospital records and intake reports, and some service professionals' notes.[3] Similarly, the reports of some health practitioners can be admitted into evidence without the professionals needing to appear as witnesses (s. 52(2) of the *Canada Evidence Act*) provided notice is given of the intention to adduce them, and the other parties do not require the witness to be produced for cross-examination.

When family violence cases do move to trial, legal professionals should consider whether victim evidence can be conveyed through affidavit rather than oral recount and cross-examination, in order to reduce the risk of re-traumatization. Testimonial aids, such as a testimony screen or using a closed-circuit video (CCTV), are also important options to consider in family violence cases. A 2020 study of Canadian lawyers with child witness examination experience in criminal trials found that the use (in court) of recorded interviews with the child was done in *most* cases (33% always; 50% frequently; 8% sometimes; 4% rarely; 4% never) and 73% of lawyers reporting using CCTV screens/shields or separate spaces for child witness testimony (Bruer et al, 2022). In some jurisdictions, the use of victim video statements in criminal prosecutions of domestic violence has been found to increase the rate of early guilty pleas (Walton et al, 2021).

[3] Parties must serve Notices of Intention to Adduce Business Records, s. 35(3) of the *Canada Evidence Act*.

Recommendations for Family Law Practitioners

The complexity and traumatizing potential of family violence proceedings creates an imperative for constant assessment and improvement of the system and its practices. Routine training on family violence, sharing information and community resources, and even judicial reform are all important interventions. Family violence research and survivors suggest the following measures should also be seriously considered:

- *Affidavit Information:* Legal counsel must ensure that any initial urgent motions include as much information as possible on incidents of family violence. A lack of information within the motion could jeopardize the credibility of the evidence and delay any protective orders.
- *Financial Support:* Financial constraints are a significant barrier for victims wanting to escape their abusive relationship. Accordingly, legal counsel should encourage victims to include claims for financial support in their initial urgent motion brought forth to the court.
- *Legal Aid Access:* Enable easier access to legal representation to assist victims in disseminating information about their case to the court. A wide net of eligibility is required for Legal Aid to ensure that all victims in need of assistance can access appropriate services.
- *Single-Judge Case Management:* Judicial reform should both permit and advocate for the use of single-judge case management in situations of family violence where there are parallel court proceedings taking place. Where available, legal counsel should request the use of a single-judge case management system for family violence proceedings.
- *Informing the Judiciary:* Judges need increased information about the unique challenges that arise in family violence cases, including the signs of trauma and how much assistance they can provide to self-represented victims and perpetrators within a family violence case.
- *Coercive Control:* This concept must be approached broadly by legal professionals given its complexity and the role that coercive control plays in aggravating family violence cases.
- *Regular Training:* Legal sector professionals, including judges, can greatly benefit from training on current issues, best practices, and advancements in family violence. A set of regularly updated guidelines and evidence "checklists" and lethal risk indicators should be created to assist judges and establish a more uniform approach to family violence cases.
- *Support Persons:* Given the traumatic nature of testifying in family violence proceedings, lawyers should be prepared to inform their clients of their ability to bring a support person to court. Further, judges should receive training on the importance of having a support person present for victims throughout the duration of the legal proceedings.
- *Community Resources:* Courts should maintain an updated list of community resources to provide to perpetrators and victims as needed.

Contact Us

To learn more about the *Supporting Survivors of Family Violence in Family Law Proceedings* project, visit https://fvfl-vfdf.ca/ or the sites of our partnered research centres:

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https://unb.ca/mmfc/
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Dr. Katreena Scott (website)

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https://www.raiv.ulaval.ca/en
Dr. Geneviève Lessard
Dr. Dominique Bernier (website)

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https://umanitoba.ca/resolve
Dr. Kendra Nixon (website)

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