THE NOT-SO-NEW RELOCATION LAWS

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AGENDA

- "Old" Law, "Common Law"
- New Laws: *Divorce Act,* Provincial Laws
- Trial Patterns 2021-26: Canada, Ontario
- Relocation vs Change of Residence
- Burdens: VM, SET, Both
- Interim Moves
- Unilateral Moves, Family Violence
- Double-Bind Question(s)
- Relocation-Specific Best Interests Factors

Materials:

- "Relocation FAQS 2026: 35 Questions"
- "Relocation: An Ontario Checklist" (2023)

"OLD" RELOCATION LAW

- *Divorce Act* 1986 silent on relocation
- *Gordon v Goertz* (SCC 1996)
  - McLachlin J for majority (vs L'Heureux-Dube J)
  - no presumptions/burdens, pure best interests
  - can't look at reason for relocation
  - "great respect" to "custodial parent"
  - best interests factors, para. 49 summary
- After: 50% of moves allowed, reg'l differences
- Little appellate development of law
- Leave to SCC denied 26 times 1996-2021!
- *Barendregt v Grebliunas*, 2022 SCC 24
  - Changed "common law" of *Gordon*
  - Comments on new divorce changes
  - Implications for AB, QC, YT, NU

NEW RELO LAWS: ELEMENTS

- **Divorce Act**: A new framework for relocation
- **Reverses most of *Gordon v Goertz*** (SCC 1996), but…

  Includes:

  1. Child-focused definition of **"relocation"**
  2. **Mandatory notice**, process
  3. **Burdens of proof**
  4. **Added best interests factors specific to relocation cases**
- Thompson, "Legislating About Relocating" (2019), 38 CanFamLQ 219
- Precursors: BC (2013), NS (2017)

PROVINCIAL MIRROR CHANGES

- **Ont *CLRA*, SO 2021, c 4, Schedule 2 (Mar 1)**
- Sask *Children's Law Act*, SS 2020, c 2 (Mar 1)
- NB *Family Law Act*, SNB 2020, c 23 (Mar 1)
- PEI *CLA*, SPEI 2020, c 59 (Mar 1)
- NS *Parenting & Support Act*, SNS 2021, c 15
  (April 1, 2022)(replaces 2017 version)
- MB *Family Law Act*, CCSM, c F20 (July 1, 2023)
- NL: *Children's Law Act*, SNL 2026, c 10 (to be proclaimed)
- NWT: *Children's Law Act*, Bill 23 passed (to be proclaimed)

- BC: "Older" relo law, *Family Law Act* (2013), proposals

"Old" "silent" law: AB, QC, YT, NU non-divorce cases
Gordon still applies, as refined in *Barendregt*
AB/QC expressly incorporate some divorce changes

CANADIAN TRIAL PATTERNS

- 347 cases to September 2026: 189 yes (54%)
- 92% moves by mothers; fathers 18/36 (50%)
- If VM, 55/66 yes (83%)
- If SET, 14/58 yes (24%)
- If both/no burdens, 80/128 yes (62%)
  - Most no order/agreement or interim order or unclear
  - Burdens not often applied where interim orders
  - Some "in-between", some no substantial compliance
- If interim move, 40/95 yes (42%) (mostly Ontario)
- Reasons: no category of reason "better"
- Still significant regional differences!
- Yes: BC 20/36; AB 19/30; SK 9/16; MB 3/8; ON 76/147; QC 23/35; NB 17/27; PEI 1/3; NS 13/29; NL 4/5; YK 1/1

ONTARIO PATTERNS

- 147 trial decisions to September 2026
- Relocation allowed in 76/147 cases (52%)
  - compare to ROC 113/200 (56.5%)
- Non-interim moves 49/81 (60%) allowed
- If VM, 26 of 30 (87%) moves allowed
  - No's: M's poor plan *Al Kowatli, Tass;* unilateral *Young*
- If SET, 5 of 20 (25%) moves allowed
  - *SK v PC* (abuse); *Sidiqui* (F's time with gm/aunt)
  - *Falarz v Gullusci* (1 hr drive, M PC before Jan 2022)
  - *Shipton*, 2025 ONSC 3210 (retrial); *Brohart*
- If both have burden, 19 of 31 (61%) allowed
  - most cases were prior interim orders
- If interim/temp move, 27 of 66 allowed (41%)
  - 18/22 VM, 1/10 SET, 8/34 both
  - burden on interim relocating parent, but "final"…

"RELOCATION", OR "CHANGE OF RESIDENCE"?

- DA, s 2(1): "relocation" defined
  - change in place of residence of child
  - or of parent
  - likely to have a **significant impact**
  - on child's relationship with other parent
  - or person with "contact order"
- Not distance or boundaries
- If not "relocation", then "change of place of residence", different notice, no regime
  - *SB v KB,* 2026 SKCA 88; *DTD v TAJ,* 2022 SKCA 34;
  - *RP v GU*, 2022 BCCA 255
  - *Falarz v Gullusci,* 2023 ONSC 2644
  - *Apa v Vagadia,* 2021 ONSC 5802
  - *SC v JC*, 2022 ONSC 4146; *Van Os*, 2022 SKQB 161
  - *Lawrence v Khan,* 2022 ONCJ 521
  - *Rudichuk v Higgins,* 2021 ONCJ 471

BURDENS OF PROOF

- **S 16.93, s 39.4 CLRA: Parenting time used to categorise**
- (1) Where parents have **substantially equal parenting time**, the parent who intends to relocate has the burden of proving relocation is in the best interests of the child
- (2) Where the relocating parent has **the vast majority of parenting time**, the parent opposing the relocation has the burden of proving relocation would **not** be in the best interests of the child
- (3) All other cases, **both bear burden**
- **S 16.94**: Burdens may not be applied if **interim order**
- Burdens apply where the current parenting time is in "substantial compliance" with the terms of an order, award or **agreement**

Q: BURDENS 1

Greg and Madalina were divorced in 2024 in Ottawa. The order provides that the two children, now aged 6 and 8 are in the primary care of Madalina. Greg sees them every second weekend, from Friday to Sunday night, as well as a week at Christmas, half of the school break and 3 weeks in the summer. Occasionally, Greg will take them for additional overnights to accommodate Madalina.

Madalina proposes to move the children back to Bulgaria, for the support of her family.

What burden applies?

substantially equal time: burden on Madalina

vast majority: burden on Greg

both bear burden

Q: BURDENS 2

Paul and Maria separated in late 2023. Their two children are now 9 and 11. For the first two years, Maria had primary care, with Paul having every second weekend from Friday until Sunday night, plus one evening each week. Paul's work schedule then changed. Maria now has the children from Sunday evening to Thursday morning, while Paul has them from Thursday after school until Sunday evening, plus a split of breaks and holidays. Paul pays child support, based on the set-off. Their relations were amicable, so nothing was ever put in writing.

Maria works for the federal government in Hamilton. She has just been offered a big promotion to a new position in Ottawa. She gives notice of relocation to Paul.

Paul says Maria has the burden of proof on best interests, but Maria says both have the burden. Who's right?

Paul Maria

Q: BURDEN 3?

Pierre and Micheline have a daughter, now 8 years old. They separated in 2023 in Cornwall and informally followed a week-about parenting schedule. Micheline filed for divorce in fall 2025 and the parties consented to an *interim* parenting order in November 2025 continuing their parenting schedule. The court proceeding is sorting out support and equalization.

Micheline now proposes to move to Quebec City, where all her family lives and where she will cohabit with her new partner. The relocation is part of Micheline's parenting proposal in her claim for an initial parenting order.

Micheline says that the November 2025 order is only interim and both parents have the burden here. Which burden of proof would apply in this case?

substantially equal time

both bear burden

Q: BURDEN 4

Gwen and Dylan separated in September 2025 in Thunder Bay. Their children are 2 and 4. Gwen has been home since the birth of the older child. Gwen started a divorce and sought interim primary care. The parents reached an interim consent order in November 2025: primary care to Gwen, with Dylan's parenting time every Saturday all day, plus one evening each week.

Gwen has been offered her "dream job" in Halifax but must start by September 1st. She brings a motion for interim relocation. Who bears the burden of proof on the motion?

Gwen Dylan Both

BURDENS: PERCENTAGES

- Too often ignored/skipped: wrong!
- Essential **first step** in best interests analysis
- **"Substantially equal time":**
  - **40%-50%,** but not rigid, mostly 50/50 time
  - *Malanowich, Sidiqui, Cote*
  - *DF – 23190*, 2022 QCCA 207
  - Only 24% allowed, unusual shared cases
- **"Vast majority" of time:**
  - **80% plus**, not rigid, "primary caregiver"?
  - *Shipton* (ONCA 2024): 77% is VM
  - Alberta cases; *Nouri, Zorab, Rudichuk*
  - 83% allowed, unless poor plan, bad faith

BURDENS: TECHNICAL ISSUES

- Require "order, arbitral award or agreement"
  - Oral/de facto agreement is "agreement"
  - *Fahlerz v Gullusci, Tariq v Khan, MJV v JR, KDH v BTH*
  - *TL v RAC, Lemay, Reid-Taylor v Vecchio*
  - Often missed!
- "Substantial compliance":
  - NOT just denial of PT: *KDH v BTH,* 2021 ABQB 548
    Tass v Jackson, 2023 ONSC 6564
  - About PT on ground reflected in order/agreement
- But can't alter burdens via self-help/withholding
  - *VS v FF, NP v DH, McLaughlin v Yusuf, Williams*
- Need for "order or agreement": unfortunate
  - Awkward for provincial laws, wider range of "parents"

BURDENS: APPEAL DECISIONS

- **Ontario:**
  - ***Shipton* (2024): 77% is "vast majority"**
  - ***Angelillo v Mughal* (2025): VM, but treated equally**
- Alberta:
  - *Nurmi* (2023): just a tie-breaker, wrong!
  - *Naim v Zawiwi* (2025): VM, but interim order, so both
- Quebec:
  - *DF – 23190* (2023): VM if 80%,
    but also talked of "sporadic or unimportant"
- Saskatchewan
  - *Friesen* (2023): VM burden ignored, upheld
  - *DS v KC* (2026): both, as no substantial compliance by F
- Nova Scotia: *Kendall v Weagle* (2025): reviewing evidence

BURDENS: INTERIM ORDERS

- Discretion "not to apply" burdens if interim order
- Courts too quick "not to apply" so far
  - *Doroteo v Neudorf*, 2024 ABKB 764 (Poelman J)
- When "not apply"?
  - recent separation
  - makeshift order where interim parenting contested
  - no status quo of some permanence
- When to "apply"?
  - interim order reflects status quo of some permanence
  - interim order reflects prior order or agreement
  - interim order reflects informal agreement

INTERIM RELOCATION

- 45% of all Ontario cases – unique in Canada
  - 70% of Canadian interim cases!
- Nothing specific in new relocation laws
- Remember *Plumley,* 1999 CanLII 13990 (Marshman J)?
  - substantial burden on moving parent
  - reluctance where genuine issue for trial
  - compelling circumstances needed
  - strong probability of success at trial?
- Often no order or agreement
- If is order, interim order, so burdens often not applied
- If SET, burden on moving parent to similar effect
- If "both" burden, real burden on moving parent
- If VM, competes with *Plumley* burden
  - burdens don't "cancel", **can sometimes shift**
  - VM also goes to likelihood of success at trial

ONTARIO AFTER *DIALLO*

- OntDivCt: *Diallo v Bah*, 2025 ONSC 2106 (Sachs J)
  - M, 2 kids, okay to go to Winnipeg for job and family
  - Final hearing: *Bah v Diallo*, 2026 ONSC 2355 (yes)
- *Plumley* "overtaken" by 2021 amendments!
- But no new interim test, just "best interests"…
- Pure best interests test? Yet *Diallo* concerns about disruption to children, limited process?
- *Diallo* leaves a mess, need for ONCA to rule
- *Gomez v Isaza*, 2025 ONCJ 324: Sherr J explains…
- Rest of Canada? Ignore *Diallo*, apply *Plumley* !
- Interim relo success rates? Overall Ont 27/66 (41%)
  VM 82%, SET 10%, Both 24%
- *Diallo* doesn't appear to change interim outcomes

UNILATERAL MOVES, VIOLENCE

- Non-compliance with relocation notice just a "factor": s. 16.92(1)(d)
- No "legal" presumptive effect, so far, but…
- Moves allowed 16/44 Cdn unilateral cases (36%)
  - Why? Mostly family violence
  - Issues around consent, agreement, changed mind
  - Ignorance of law, regret: moves delayed
- Family violence: Yes, 27/29 cases (93%)
  - In almost every case, M VM, PC or primary care
  - *Friesen*, 2023 SKCA 60: problematic
  - *ERG v JRG,* 2024 BCSC 789: M's bad faith
  - *AJK v JPB*, 2022 MBQB 43 (*ex parte* order to relocate)

THE DOUBLE-BIND QUESTION

- A factor a court can't consider: s 16.92(2)
- **Will you move without your child?"**
  - "**not consider**, if the child's relocation was prohibited, whether the person who intends to relocate the child would relocate without the child or not relocate."
- *Spencer*, 2005 ABCA 262 (also QCCA); adopted: BCCA, MBCA, PEICA, NBCA, NLCA
- Not followed earlier: SKCA, ONCA, NSCA, but now changed by **statutes**
- Purposes: to avoid default to status quo, to avoid unfairness of hypothetical question
- If court can't "consider", then "irrelevant" if asked by opposite party, objection sustained

Q: DOUBLE-BIND 1

Phil and Martha have one child, Ben, now 7. They separated in early 2024. Their 2024 separation agreement provided for Phil to have Ben every week from Monday afternoon to Wednesday afternoon. Phil works as a waiter in a high-end restaurant.

Martha applies to relocate to a city in the next province, as she has been offered a job promotion. Phil opposes the move, and seeks equal shared parenting, with his primary care in the alternative.

What options can be "considered", to avoid double-bind?

Only Martha relocates with Ben, or Phil assumes primary care here

Martha relocates with Ben, or shared parenting here

Some other combination?

Q: DOUBLE-BIND 2

Same facts, Phil and Martha. Martha's counsel asks Phil if he would be willing to relocate, to follow Martha. Phil is a waiter in a high-end restaurant here. Phil's counsel objects.

Can Martha's counsel ask the question?

Yes No

Q: DOUBLE-BIND 3

Assume Martha couldn't wait for the decision, to keep her job promotion, and had to move. She's been there for 8 months by the hearing, coming back to exercise her parenting time. Martha is clear that she is not moving back, regardless.

Can the court consider Martha's intention not to return?

Yes No

DOUBLE-BIND DOUBLE-DOWN?

- Provision does NOT apply to left-behind parent, or moving parent's new partner, or grandparents
- BC case law "a judicial minefield"
  - *TK v RJHA*, 2015 BCCA 154
- *Barendregt*: reflects BC law, citing *Joseph*

  common law: can't ask left-behind parent

  but that's not what statutes say
- Can relocating parent "volunteer" intentions?
- Complications for decisions:

  adjourn vs conditional orders: if goes, if stays
- Cases: *Nurmi*, 2023 ABCA 123; *Chapman v Somerville*, 2022 SKCA 88; *Bourke v Davis*, 2021 ONCA 97

ADDED FACTORS: REASONS

- DA, s 16.92(1)
  7 relocation-specific factors
  added to 11 basic "best interests" factors in s 16(3)
- **Canvass relocation-specific factors first!**
  most decisions walk through all 18 factors

Reasons for the relocation: para. (a)

- **Reverses *Gordon v Goertz***
- *Gordon* mostly ignored anyway in practice
- often multiple reasons
- no one *category* of reason does better,
  about *quality* of reason
- reasons tied to *consequences* for children

Impact of relocation upon the child: para. (b)

MORE ADDED FACTORS

Amount of time spent & involvement with child:
para. (c)

Notice of relocation given? para. (d)
just a factor, no presumptive effect, but…
discomfort: *ST v AT*, 2023 BCSC 875

Geographic restrictions: para. (e)
just a factor, as in *Ligate* (ONCA 1997)
should it get more weight now?

Reasonable parenting proposal: para. (f)

General compliance with "family law obligations":
para. (g), incl support, property

Other additional factors?
statute not exhaustive

RELOCATION: VARIATION

- Variation of parenting orders generally
  DA s 17(1)(b), (5)
- Relocation "deemed" to be "material change"
  DA s 17(5.2)
  "significant impact" test means "material"
- What if same relocation proposed/rejected before?
- If relocation prohibited on a variation,
  "not in itself" a "material change"
  DA s 17(5.3)
  may be other "material changes"
- See *DG v AM*, 2022 ONSC 2478 (Sharma J)

TRAVEL COSTS, CHILD SUPPORT

- Travel costs: s 16.95
  - explicit authority to attach terms
  - best way to address
  - no need to prove undue hardship!
- Reduce/lower/eliminate spousal support
- Reduce/zero s. 7 contributions
- **Last resort**: reduce table amount
  - undue hardship necessary under CSG
  - s 10(2)(b): unusually high expenses for PT
  - *and* s 10(3): lower household SOL
  - but if so, reconsider relocation?