

Judicial Leadership and Domestic Violence Cases – Judges Can Make a Difference

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THE CHALLENGE FOR JUDGES

British Columbia's new **Family Law Act**, which comes into force on March 18, 2013, changes in significant ways how agreements are reached by parents and their lawyers, if they have them, and how decisions are made by judges. Family violence plays a central role in the legislation. As this is Canada's most recent legislation dealing with family law, we use it, and the issue of family violence, as a vehicle to discuss court cases involving continuing conflict.² While much has been done, many challenges still exist. Although the challenges that arise in cases of family violence must be addressed by all sectors of the justice system and by society in general, judges have played, and can continue to play, a very important leadership role in dealing with these challenges..

We consider how the judicial role has changed over time. The role in family cases, and to lesser extent in criminal cases, involves not only the traditional judicial role of making decisions based on evidence presented by the parties at trial but includes also helping people reach timely, fair and cost effective resolutions. Judges do the latter by managing cases early in the court process with the goal of either assisting people in reaching an agreement, or if that is not possible, helping them to organize the case for a timely trial that deals with the real matters at issue, based on the relevant evidence.

We focus on information that can be beneficial to judges both when hearing trials, and when otherwise managing cases and provide some of that relevant information. We include a summary of the research used by the B.C. Ministry of Justice as a basis of the new **Act**, and provide an overview of the key provisions of the **Act**. We discuss some concerns that people who use the court system have raised about courts and family violence cases.

Based on the approach of the Canadian Judicial Council and the National Judicial Institute to the education of judges, we provide: the collective views provided to us for the National Judicial Institute by representatives of many organizations who deal with

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² We use the term continuing conflict, rather than high conflict, as we think it better reflects the kinds of cases with which courts must grapple. For a further explanation of the use of this term, see, Bala, N, Birnbaum, B. and Martinson, D., *One Judge for One Family: Differentiated Case Management for Families*, Canadian Journal of Family Law, 2010, 26, 2 395.

violence against women and children; and information from three experienced family law practitioners with respect to what they describe as the “invisible strings” that can be at play during judicial case conferences and settlement conferences. This information was also provided for the NJI.

We know that judges take their judicial role very seriously and strive to do justice for the people the courts serve. We also recognize that judges face significant challenges when doing so. People sometimes do not understand the nature of the judicial role and the decision making process, including the limitations that are placed on what judges can and cannot do generally, and in specific cases. This lack of understanding may affect their full participation in the court process. A judge is required to do justice between the parties without preconceived notions about the merits of the particular case. While we emphasize that judges should have information about many subjects, challenging questions arise as to if, when and how the information can be used in individual cases.

In addition, there may be a lack of understanding by some of the practical challenges that judges face, including: very heavy workloads; not enough judges to do the work; not enough time to devote to judicial settlement efforts; not enough time and legal support to write/prepare judgments; and not enough administrative support. The problems judges face are compounded when people do not have any legal representation, or do not have effective legal representation. While the ***Ethical Principles for Judges***³ that guide judicial conduct refer to the importance of public confidence and respect for the judiciary, they also make the important point that “[m]any factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary.”⁴

At the same time, we respectfully suggest that improvements can be made. There are aspects of what judges strive to do that are so fundamental to the effective administration of justice that they must be addressed by judges. The barriers that exist within court institutions can and should be tackled by judges. In family violence and other continuing conflict cases the stakes, particularly for children, are extremely high. They can be seriously harmed. The longer the problem continues, the more harmful the situation can become and the more difficult it will be to resolve. Not only is harm caused by parental behaviour and the conflict associated with it, but the court process itself may exacerbate the conflict, placing the children in the middle and affecting their lives on a daily basis in highly destructive ways. There are also long term adverse consequences for children including but not limited to difficulty forming and maintaining healthy

³ Ethical Principles for Judges, the Canadian Judicial Council, http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf

⁴ Ibid, 3, Integrity, Commentary 1.

relationships, depression, suicide, substance abuse, antisocial behavior, and low self-esteem.⁵

We deal with the difficult issues that arise under the following headings, and then conclude with observations about what judges have already done and can continue to do to enhance the administration of justice in family violence cases:

- I. The Changing Judicial Role in Family and Criminal Cases
- II. The Changing Judicial Role – Contextual Judging
- III. The Changing Judicial Role – the Importance of Judicial Education

- IV. Research Information about Family Violence
 - A. Nature and Context of Family Violence
 - B. Exposing Children to Family Violence
 - C. Violence is Relevant to Post-Separation Parenting
 - D. Risk Assessment
 - E. Consensual Dispute Resolution
 - F. False Allegations
 - G. Child Alienation

- V. “Community” Information
 - A. Concurrent Proceedings in Cases Involving Violence Against Women and Children
 - B. Credibility Assessment
 - C. Risk Assessment
 - D. Expert Parenting Reports
 - E. Court Orders and Their Enforcement
 - F. Use of Language in Judgments
 - G. Alternative Dispute Resolution

- VI. Invisible Strings – Judicial Dispute Resolution

- VII. The B.C. Legislature’s Approach to Family Violence
 - A. Parenting Arrangement
 1. Overall Parenting Scheme
 2. Best Interests of the Child Generally

⁵ D. Martinson, *One Case – One Specialized Judge: Why Courts have an Obligation to Manage Alienation and other High-Conflict Cases* Family Court Review, Vol. 48 No. 1, January 2010 180-189 at 180 – 181.

3. New Best Interests Considerations
 4. The Child's Views
 5. The Role of the Child's Guardian
 6. Parenting Assessment
 7. Parenting Coordinator
 8. Children's Lawyer
 9. Intervention by the Attorney General
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- B. Protection from Family Violence Orders
 - C. The Critical Link Between Encouraging Out of Court Resolution and Family Violence
 - D. Family Violence: Professional Responsibilities of Lawyers

I. THE CHANGING JUDICIAL ROLE IN FAMILY AND CRIMINAL CASES

In both family law cases and criminal law cases the role of a judge has expanded beyond the traditional role of hearing evidence presented by counsel at a trial and making a decision. It now also involves assisting people in resolving matters by agreement and engaging in pre-hearing/trial management. We suggest that it is particularly important not only to the adjudicative role, but also to this broader role, that judges have as much relevant information about a particular case, as is legally appropriate.

A. Family Law Cases

The role of judges in resolving disputes in family law cases has changed over the last several years. Traditionally a judge decided interim applications and trials based on the evidence the parties presented. Now, judges also manage cases beginning at an early stage of the proceedings with a view to achieving an effective resolution by agreement, if appropriate, and if not, by making sure that the judicial hearing (whether an application or trial) deals with the real issues, with the appropriate evidence, and takes place in a timely, fair and cost effective manner.

There are three broad reasons for this shift. The first is the recognition that resolutions reached by agreement usually work better than those imposed by a judge. The second is that experience shows that most cases ultimately settle, but too many of them settle on the “eve” of trial; not only can this escalate cost, be time consuming, and create frustration, but it can escalate conflict, with harmful consequences to parents, and to children. The third is an understanding that for those cases requiring a hearing, it is equally as important for the same reasons, to have both a trial/hearing which deals effectively with the real issues in the case and the decision as soon as is reasonably possible.

While we provide more information about the family violence provisions in the **Family Law Act**, below, a summary is useful here, when discussing the question of the changing judicial role. The **Act** defines family violence broadly and it includes, among other things, psychological or emotional abuse, and direct or indirect exposure to family violence. In the best interests of children test, there is an overarching direction that an agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child’s physical, psychological and emotional safety, security and well-being. The Court must set aside agreements if satisfied that they do not protect to the greatest extent possible, the child’s physical, psychological and emotional safety, security and well-being.

The best interests test in the **Act** applies to parents (called guardians) making agreements as well as to judges making decisions. In making agreements, both parents and the court must consider: the impact of family violence on the child's safety, security and well-being; whether the actions of the person responsible for family violence may impair his or her ability to care for the child and meet the child's needs; other civil or criminal proceedings, and whether cooperation is appropriate and would increase risk. Parents and the court must engage in a risk assessment, considering specific factors set out in the **Act**. Parents in making agreements and the court must consider the views of the child, unless it would be inappropriate to do so.

Both parents, when making an agreement, and the Court, must consider the child's views, unless it is inappropriate to do so. There is no starting presumption about either parenting responsibilities or parenting time, and in particular it must not be presumed that parental responsibilities should be allocated equally among guardians; that parenting time should be shared equally among guardians, or that decisions made by guardians should be made separately or together.

The **Act** provides for an Order for Protection from Family Violence, which can be brought as a stand-alone application, and which expires one year after it is made unless it says otherwise. Specific risk factors must be considered. It will be enforced under s. 127 of the **Criminal Code**, not under the **Family Law Act** or the **Offence Act**.

Dispute resolution professionals, which include lawyers, mediators, parenting coordinators and arbitrators, are required to assess whether family violence might be present in all cases that arise under the Act, not just "custody" cases. There must therefore be an assessment when dealing with child and spousal support, property and family debt division, pensions division, applications for temporary possession of the family home, and applications for protection from violence orders. This is done both for the purpose of ensuring that agreements can be negotiated fairly and to determine how to best approach the case.

How do these provisions impact upon the role of a judge, particularly when dealing with parenting issues? When a judge at a case/settlement conference has the role of facilitating a settlement, the judge is assisting the parties in meeting their obligations under the **Family Law Act** to negotiate an agreement that, for the particular child, protects to the greatest extent possible the child's physical, psychological and emotional safety, security and well-being. There is no starting presumption under the legislation that for the family before the court, cooperation and joint parenting will be appropriate. In fact, most families who are capable of resolving their cases amicably, and using cooperative parenting, agree to do that without coming to court. This will be even more the case under the new legislation, which has a significant emphasis on out of court resolution. General principles about what is often in children's best interests without

information about the particular family and all the relevant circumstances of the parents and children, should not be the basis of an approach to settlement in a particular case.

We suggest the judge, before taking part in settlement discussions, should ensure that there has been an assessment for the presence of family violence so that this information can be used in deciding whether a fair agreement can be negotiated at all, or if it can be, what protections need to be in place to ensure a fair process. If there are settlement discussions, information relevant to the best interests factors in the legislation, including information about whether family violence is present and the impact it has had, and the risk it may impose in the future, is necessary so that the judge can assist the parents in making an agreement that is in the best interests of their child as defined in the **Act**.

The same information is relevant to the pre-hearing/trial of a case. A judge will not be in a position to assist in focusing the issues and discussing the evidence, without knowing what the real issues are in the case.

B. Criminal Law Cases

Judges can, and do, to varying degrees, become involved in both pre-trial case management and pretrial dispute resolution efforts in criminal cases. One important example is the approach taken in problem solving courts. The National Judicial Institute published, in September 2011, ***Problem Solving in Canada's Court Rooms – a Guide to Therapeutic Justice***.⁶ The Guide describes initiatives, often led by judges, which, “have resulted in the establishment of courts and courtrooms dedicated to addressing some of the root problems — mental health issues, addiction, limited anger- and risk-management skills, poverty, and social marginalization — behind criminal activity.”⁷ The Guide describes both initiatives setting up separate courts and ways in which judges can use a problem solving approach in “regular” courtrooms.

The Canadian Council of Chief Judges passed a resolution in April 2011 supporting both the use of the problem solving approach and the importance of judicial education to assist judges in effectively using it:⁸

Therapeutic Justice Resolution

Canadian Council of Chief Judges, April 2011

Whereas, judges are expected to deal not only with disputed issues of fact and law but are also being asked to resolve a variety of human and social problems that contribute to offending behaviour,

⁶ Written for the National Judicial Institute by Susan Goldberg, NJI Library, www.nji.ca

⁷ Ibid at VI.

⁸ Ibid at 22.

Whereas, Therapeutic Justice is characterized by active judicial involvement and the explicit use of judicial authority to motivate individuals to accept needed services and to monitor their compliance and progress in addressing the underlying criminogenic factors which brought them into conflict with the law,
Whereas, it is desirable that judges apply the principles of Therapeutic Justice whenever it is appropriate to do so, including but not limited to, within the context of Problem Solving Courts,
Whereas, education of judges is necessary in order to deliver Therapeutic Justice,
And whereas, it is necessary to develop best practices and to effectively evaluate the results of Therapeutic Justice,

It is therefore moved:

1. That the Canadian Council of Chief Judges endorses the principles and purposes of Therapeutic Justice as set out above and encourages their application in the courts whenever it is appropriate and feasible.
2. That the Canadian Council of Chief Judges provides leadership in the understanding and promotion of the principles and purposes of Therapeutic Justice.
3. That the Canadian Council of Chief Judges considers it necessary that education in Therapeutic Justice be made available to all judges with particular emphasis on the education of new judges.
4. That the Canadian Council of Chief Judges supports the development of evidence-based best practices in Therapeutic Justice and the dissemination of that information to all judges.
5. That the Canadian Council of Chief Judges supports the development of a standardized and effective evaluation mechanism in respect to Therapeutic Justice.

The Guide makes the important point that particular care must be taken in domestic violence cases because of the complexity of the dynamics involved and the importance of keeping victims, including children, safe. One form of a problem solving court discussed is a family violence court. Having separate courts to deal with cases involving family violence is not without controversy, and while a discussion of the benefits and concerns is beyond the scope of this paper, we encourage those considering such an approach to evaluate with care the issues that arise.⁹

⁹ See, by way of example only, Jane Ursel, Leslie M. Tutty, and Janice LeMaistry, *What's Law Got to Do With It? The Law, Specialized Courts and Domestic Violence in Canada*, 2008 Cormorant Books Ltd.; and Dr. Darcie Bennett, *Imagining Courts that Work for Women Survivors of Violence*, Forthcoming, B.C. Pivot Legal Society.

The Guide also discusses restorative justice initiatives as an aspect of a problem solving approach. We agree with and emphasize the cautionary note contained in the Guide relating to domestic violence.¹⁰ It points out that restorative justice initiatives aim to restore damaged relationships between victims and offenders and communities and to encourage reconciliation between parties. In the case of domestic violence, however, these goals can be problematic. The survivor may not wish to restore the relationship, and reconciliation of the partners may be dangerous. Further, domestic violence challenges the essential component of restorative justice theory that suggests that a community knows best how to handle the criminal behaviour of its members: in fact, folk wisdom about abuse often predominates on a community level, reinforcing myths about the causes of, and best treatment for, domestic violence.

II. CHANGING JUDICIAL ROLE - CONTEXTUAL JUDGING

Fundamental to our justice system are the principles of judicial independence and judicial impartiality. The *Ethical Principles for Judges*,¹¹ created by the Canadian Judicial Council for federally appointed judges, but reflected in guidelines for provincially appointed judges as well, both emphasize and give meaning to those concepts.

They also highlight the importance of public confidence in and respect for the judiciary, describing them as “fundamental to an effective judicial system, and, ultimately, democracy founded on the rule of law.”¹² They say that “judges should strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background, sexual orientation or disability.”¹³ The Commentary states that “the Constitution and a variety of statutes enshrine a strong commitment to equality before and under the law and equal protection and benefit of the law without discrimination.”¹⁴ It makes the important point that equality according to law is “not only fundamental to justice, but is strongly linked to judicial impartiality.”¹⁵

The Commentary emphasizes that the constitutionally protected right to equality is not a commitment to identical treatment, but rather to the equal worth and human dignity of all persons, and a desire to rectify and prevent discrimination against particular groups

¹⁰ Ibid at 19-20

¹¹ *Ethical Principles for Judges*, the Canadian Judicial Council, http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf

¹² Ibid, 3. Integrity, Commentary 1.

¹³ Ibid, 5, Equality, Principle 2.

¹⁴ Ibid, 5 Equality, Commentary 1.

¹⁵ Ibid 5, Equality, Commentary 2.

suffering social, political and legal disadvantage in our society.¹⁶ As former Supreme Court of Canada Justice, Claire L'Heureux-Dube has put it:¹⁷

...increasingly, we are recognizing that inequality and discrimination stem not from positive intentions on the part of any given individual, but rather from the effects of often innocently motivated actions. This analysis requires that we understand equality, and make it part of our thinking, rather than treading heavily on it with the well-worn shoes of unquestioned, and often stereotypical, assumptions.

Understanding social context is an important part of the judicial role. As former Supreme Court of Canada Justice Frank Iacobucci has put it, "...understanding the Canadian social context and incorporating this into the process of adjudication requires that we always bear in mind the moral underpinnings of our Constitution and in particular the fundamental principles of equality."¹⁸

What is meant by contextual judging? There are, we suggest, six key aspects to contextual judging:

1. Broadly, it involves considering the social setting/background factors that may inform judicial decision making, with a focus on social diversity.
2. It recognizes that difference should be respected.
3. It pays particular attention to diversity associated with disadvantage and stratification.
4. It applies to all aspects of judging and requires a constant examination of:
 - a. laws themselves,
 - b. the way they are interpreted and applied, and
 - c. the practices and procedures associated with themto ensure that inequality is not created or perpetuated.
5. Acknowledges that judges bring a lifetime of knowledge and experience (a particular world view) that can play subtly and adversely upon the decision making process unless they are constantly vigilant.
6. Equality and contextual judicial inquiry are not optional, but mandated by law, including:

¹⁶ Ibid, 5 Equality, Commentary 1.

¹⁷ The Honourable Claire L'Heureux-Dube, "A Conversation about Equality", 2001, Denver Journal of International Law and Policy, 29:1, p. 73

¹⁸ Hon. Justice Frank Iacobucci, "The Broader Context of Social Context", Remarks, Social Context Education Faculty and Curriculum Design Program 1, Part II, Victoria, June 2001.

- a. The Charter of Rights and Freedoms
- b. Human Rights Legislation
- c. Relevant international conventions
- d. Ethical Obligations
- e. Requirements in the jurisprudence that decisions should be informed by Charter values.

III. CHANGING JUDICIAL ROLE – THE IMPORTANCE OF JUDICIAL EDUCATION

The Canadian Judicial Council, in 2005 reinforced its support in the 1990s for credible, comprehensive social context education for judges by its recognition that credible, in-depth and comprehensive social context education must be an ongoing part of judicial education. The Council “supports a three dimensional approach to judicial education, in which substantive content, skill development and social context awareness are continually addressed in judicial education programming and course development and mandates the National Judicial Institute to continue to implement social context education in its curriculum.”¹⁹

The Canadian Judicial Council and the National Judicial Institute Board of Governors also support the notion that while judicial education should be led by judges, it is enhanced by the involvement of lawyers and legal and other academics and by the participation of a wide range of other community members with relevant knowledge. This is referred to as the Three Pillars approach to judicial education planning and program presentation. Both organizations have concluded that “credible” judicial education means credible to both judges and non-judges.

The changing nature of the judicial role means that judges can benefit from additional knowledge, skills and training.²⁰ Our focus is on family law, but the information provided may well also be relevant to case management and sentencing aspects of criminal proceedings. NJI programming covers all of these areas.

Judges would benefit from having knowledge about:

- the complexities of family dynamics, including the nature of, causes of and implications of family violence.
- assessing for the presence of family violence
- the impact of behaviours and attitudes on children

¹⁹ National Judicial Institute Social Context Education Board of Governors, October 2009, p. 1.

²⁰This section of our paper is based in part on the analyses found in Bala, N. Birnbaum, B and Martinson, D, *One Judge for One Family: Differentiated Case Management for Families*, Canadian Journal of Family Law, 2010, 26, 2 395 at 410-412.

- the impact of behaviours and attitudes on parents and their ability to effectively parent
- the multiple causes that underlie continuing conflict in families, including personality disorders, other mental health issues, substance abuse, and patterns of controlling behaviour, and their implications
- child development theory, and in particular how children can be adversely affected by conflict between their parents
- risk assessment methods and their benefits and limitations
- the significance of hearing from children, as well as the short and long term consequences of not hearing from them
- when expertise is required and if it is, the nature of the expertise required.

Judges would also benefit from having:

- effective dispute resolution and management skills.
- effective communication skills
- the ability to provide decisions in a timely way.

Judges, of course, do not have to accept all of the information and suggestions provided. Such information forms a part of the total information judges have accumulated, based on their education and life experience. We agree with the comment of Justice Sheilah Martin, a judge of the Court of Queen’s Bench of Alberta, when she was dean of the Faculty of Law, University of Calgary. Dean Martin said, “I have never heard a compelling argument against more knowledge.” Judges will evaluate it in the same way that they evaluate other information they receive. If judges do not agree with concerns that are raised, after giving them full and fair consideration, it is important to consider whether steps can be taken to correct what the judge considers to be misconceptions. Misconceptions can create a lack of confidence in the legal system in the same way that real ones do. Women confronted with domestic violence must feel that they can have confidence that they will be treated fairly by the judicial system; otherwise, even fewer women than now report the violence will do so in the future.

The next part of this paper includes social context information relevant to domestic violence. As we indicated at the outset, it includes:

- research information used by the BC legislature in enacting the Family Law Act
- information based on a consultation with “community” members, those who work on a day to day basis with women who allege domestic violence; and
- information provided by three experienced family law practitioners about dynamics created by family violence that can be at play, and yet seem invisible, during judicial settlement conferences, and

- the B.C. legislative approach to family violence.

IV. RESEARCH BASED INFORMATION ABOUT FAMILY VIOLENCE

A. Nature and Context of Family Violence

1. Nature of Family Violence

The Ministry has relied upon research saying that family violence takes many different forms. Psychological and emotional abuse can include: intimidation, harassment, coercion or threats respecting other people, pets or property; unreasonable restrictions on financial or personal autonomy; stalking and intentional damages to property. Controlling, coercive patterns of emotional abuse are one of the highest predictors of the future risk,²¹ making a future physical attack up to 20 times more likely.²² Family violence includes sexual abuse, which is often overlooked in discussions about violence. Physical violence can go beyond an assault and can involve forced confinement and deprivation of the necessities of life.

Many different typologies of violence have been identified, and some research has placed violence on a continuum. The Ministry suggests that these patterns must be considered when assessing the impact of such violence. Canadian researchers Dr. Peter Jaffe, Dr. Claire Crooks, and Professor Nick Bala say that there is great variability among the patterns and contexts of violence between adults in relationships.²³ LaViolette's continuum of Aggression and Abuse has five categories ranging from "common couple aggression" to "terrorism/stalking".²⁴ Though the view is not without controversy, the Ministry has concluded that taking into account the differences in types of family violence may help family justice professionals to make more accurate assessments of future risk, and could guide the development of responses tailored to particular situations and differing risks of future violence.²⁵

2. Putting Family Violence in Context

²¹ J. Kelly and M. Johnson, "Differentiation among Types of Intimate Partner Violence: Research Updates and Implications for Interventions," (2008) 46(3) Fam Ct Rev 476.

²² Statistics Canada, above, at 39.

²³ P.G. Jaffe, C. Crooks and N. Bala, "Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices," (2005) at 9, online: http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2006/2005_3/pdf/2005_3.pdf. See also N. Bala, P. Jaffe, and C. Crooks, "Spousal Violence and Child-Related Cases: Challenging Cases Requiring Differentiated Responses", (2007) 27(1) CFLQ 1 at 17-20.

²⁴ See discussion of "Typologies of Family Violence" in P.G. Jaffe, et al., "Making Appropriate Parenting Arrangements in Family Violence Cases" above, at 9.

²⁵ *Ibid* at 20-21.

While men do experience family violence, and while men are without question entitled to the benefit of and protection of the law when that happens, the research relied upon by the Ministry shows that violence, particularly violence within the family, significantly and disproportionately impacts upon women and children. The Ministry points out that according to Statistics Canada, the nature and consequences are more severe for women. Women are more likely to experience the most severe and frequent forms of spousal assault, are more likely to be physically injured and require medical attention, and are more likely to report negative emotional and psychological consequences. Children are more likely to witness violence inflicted on their mothers.²⁶

Gender-based violence has been noted as perhaps the most wide-spread and socially tolerated of human rights violations. Violence reinforces inequities between men and women. It compromises the health, dignity, security and autonomy of its victims. Violence is not only gendered, but additional factors, such as race, ethnicity, class, disability, sexual orientation, also interact/intersect to affect risk, and impact safety, and other social responses.

Many women do not report family violence, or if they do, they do not report it until there have been multiple incidents. In "Family Violence in Canada: A Statistical Profile"²⁷, it is reported that "In 2009, victims of spousal violence were less likely to report the incident to police than in 2004. Just under one-quarter (22%) of spousal assault victims (men and women) stated that the incident came to the attention of the police, down slightly from 2004 (28%)."

Keeping under-reporting in mind, we note that statistical information for Canada shows that:

- In 2010 almost 103,000 victims of intimate partner violence were reported, that figure includes both spousal and dating violence.
- 460,000 women were sexually assaulted by men in one year.²⁸
- 65 women were murdered by a spouse and 24 by a dating partner in 2010.²⁹
- ~100,000 women and children are admitted to emergency shelters each year.³⁰

²⁶ Statistics Canada, *Measuring Violence Against Women: Statistical Trends 2006* (Ottawa: Minister of Industry, 2006) at 30-31 & 35, online: <http://www.statcan.gc.ca/pub/85-570-x/85-570-x2006001-eng.pdf>, citing information from the General Social Survey 2004 on Victimization.

²⁷ Statistics Canada, January 2011 at p. 7.

²⁸ Gannon & Mihorean, 2005, reporting 2004 Stats Can

²⁹ (Stats Can 2012)

³⁰ Johnson, Holly & Dawson, Myrna (2011) *Violence Against Women in Canada*, Don Mills: Oxford University Press.

In 2010, police reported approximately 48,700 victims of spousal violence.³¹

The 2012 BC Coroners Report³² provided this information about deaths from 2003-2011:

- There were 147 intimate partner violence related deaths in B.C.
 - 72% were women.
 - 100% of suicides were men.
 - Men were responsible for 83.7% of all intimate partner deaths, including 100% of incidents resulting in more than one death.

- There were 120 intimate partner violence related homicides.
 - 72.5% were women
 - 27.5% were men.
 - 80% of those homicides were committed by men, including 100% of peripheral victims (eg. children, other family members, or unrelated people)
 - People of aboriginal descent were over-represented, accounting for 9.2% while comprising just 4.8% of the population.
 - 75.8% were committed by the current spouse or romantic partner
 - 14.2% by an ex-spouse or partner, and
 - 10% by another relative or unrelated person.

Unlike other forms of violence, the risk of becoming a victim of family violence was more than twice as high for women as for men. The main factor behind this increased risk was related to the higher representation for women as victims of spousal violence. In 2010, women aged 15 and older accounted for 81% of all victims of police-reported spousal violence.

Violence is a particularly challenging issue for aboriginal women. There is much diversity among aboriginal people. Despite their great diversity, Aboriginal people are much more likely than non-Aboriginal people to be victims of violent crime and spousal violence. With respect to Aboriginal women, Statistics Canada reports that 24% of them reported being victims of spousal violence from a current spouse or previous spouse or common-law partner in the last five-year period up to 2004. This was the case for 7% of non-Aboriginal people.

³¹ Statistics Canada, *Family Violence in Canada: A statistical profile, 2010* (Ottawa, Minister of Industry, 2012) online: <http://www.statcan.gc.ca/daily-quotidien/110127/dq11027a-eng.htm>, citing information from the General Social Survey 2010 on Family Violence.

³² <http://www.pssg.gov.bc.ca/coroners/publications>

3. Evaluating the Gender Symmetry Approach

There is an approach taken by some that there is really no gender inequality because “[m]en and women are equally likely to engage in violence against a marital (or intimate) partner.” This appears to emerge from findings using the Conflict Tactic Scales.³³ The confusion leading to the gender equality of violence statements seems to arise in part from the blurring of categories of violence and the inclusion of a continuum of behaviours, from “minor”, such as pushing to “serious”, such as hitting and strangling. As well, some of those situations in which women are considered equally violent, they are responding to violence perpetrated against themselves. Therefore, the contexts, reasons, and outcomes are not the same for both. As we have noted above, women are more seriously injured, more fearful for their lives, and more likely to be killed than men.

This point is emphasized by Drs. Jaffe, Crooks and Professor Bala³⁴ who note that while some statistical information may suggest that rates of violence are similar for men and women, that is not so when that information is taken together with additional contextual information. That information identifies important gender patterns in severity, impact and lethality of violence. The finding they examined revealed that:

- Women are twice as likely to suffer ten or more incidents of violence in comparison to men (Statistics Canada, 2005).
- Women are significantly more likely than men to suffer injuries, require medical attention, lose time from work, live in fear, and worry about the safety of their children (Statistics Canada, 2005).
- Women are four times more likely to be killed by their spouses (8 female homicide victims per million couples compared to 2 male homicide victims per million couples). (Data taken from the Homicide Survey for the years 1993 – 2002, Dauvergne, 2003).
- Cases of spousal homicide–suicide involve women as the target in 97% of these cases (Statistics Canada, 2005).

³³ Straus, Murray (1979), Measuring Intra family conflict and violence: The Conflict Tactic (CT) Scales, *Journal of Marriage and Family*, Vol 41, No. 1 pp. 75-88. Coleman, D.H. and Straus, M.A. (1986). Marital Power, Conflict, and Violence in a nationally representative sample of American Couples, in *Violence and Victims*, Vol 1(2), pp. 141-157.

³⁴ P.G. Jaffe, C. Crooks and N. Bala, “Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices,” (2005) at 9, online: http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2006/2005_3/pdf/2005_3.pdf.

Such an erroneous gender symmetry belief existing in the community can cause an abused woman to hesitate to report abuse, fearing, among other things, that she may be charged or further abused or deported or have her children removed.

B. Exposing Children to Domestic Violence

The B.C. Ministry concluded that being exposed to violence is harmful to children whether they see it, hear it, or experience its aftermath.³⁵ Children exposed to violence are at greater risk of psychological harm, including increased incidence of aggression, hyperactivity, anxiety, depression, or behavioural problems.³⁶

Dr. Jean Clinton, a child psychiatrist with an expertise in child brain development, will discuss, at this conference, the way that stress experienced by children can negatively impact upon children's brain development. This includes stress caused by both the trauma of living with and witnessing family violence or other forms of high conflict, together with stress of continuing contentious legal proceedings.

As far as outcomes other than a negative impact upon brain development, one meta-analytic study on the effects of children witnessing domestic violence determined that there was a notable risk to children, one that is at least as problematic as direct abuse at the hands of one's parents.³⁷ These findings were confirmed in a subsequent meta-analysis by Wolfe et al.³⁸

In 2009, over half (52%) of spousal victims with children reported that their children heard or saw assaults on them in the previous five years. This was up from 43% in 2004. Children are more likely to witness violence inflicted on their mothers.³⁹ The likelihood of children witnessing violence was also heightened when the spousal victim was estranged from his or her partner.

³⁵ P.G. Jaffe and S.G. Kerr, "The Need for Differentiated Clinical Approaches for Child Custody Disputes with Findings of Domestic Violence and Legal Aspects of Domestic Violence and Custody/ Access Issues" presented at the National Family Law Program (Whistler, B.C., June 29-July 2, 1998) at 14.

³⁶ M. Shaffer, above at 89, citing Kolbo, et al., 1996 and Rudo et al., 1998.

³⁷ Kitzmann, K.M., Gaylord, N.K., Holt, A.R. & Kenny, E.D. (2003). Child witnesses to domestic violence: A meta-analytic review, *Journal of Consulting and Clinical Psychology*, Vol. 7, No. 2 pp. 339-393.

³⁸ Wolfe, D.A. Crooks, C.V. Lee, V., McIntyre-Smith, Al, & Jaffe,, P.G. (2003) The effects of children's exposure to domestic violence: A meta-analyses and critique. In *Clinical Child and Family Psychology Review*, Vol. 6, No. 3, pp. 171-187.

³⁹ Statistics Canada, *Measuring Violence Against Women: Statistical Trends 2006* (Ottawa: Minister of Industry, 2006) at 30-31 & 35, online: <http://www.statcan.gc.ca/pub/85-570-x/85-570-x2006001-eng.pdf>, citing information from the General Social Survey 2004 on Victimization.

Spousal assaults witnessed by children also tended to be more severe compared with assaults when children were not present. For example, spousal victims reporting the presence of children were more than twice as likely as other spousal victims to state they had been injured.

In addition, there is a link between spousal abuse and child abuse. A number of different studies have attempted to estimate the overlap between the two, with the majority of studies finding an overlap of 30-60%.⁴⁰ Further, patterns of violence can repeat from generation to generation.

C. Violence is Relevant to Post-Separation Parenting

Dr. Peter Jaffe, Dr. Claire Crooks and Professor Nick Bala, writing in 2007⁴¹ say that in contrast to the approach taken to child maltreatment, it has largely only been in the last decade that legal and mental health professionals have acknowledged that spousal violence is relevant to parenting. Before that, it was seen as an adult issue not relevant to the best interests of a child. It was believed that a man could be a violent spouse but still be a “good father”. They describe a number of reasons why violence is relevant to parenting:

1. Spousal abuse often does not end with separation

Research has shown that physical abuse, stalking and harassment continue at significant rates post-separation, and may even become more severe. In fact, promoting contact between children and a violent ex-spouse may create an opportunity for renewed spousal violence through visitation and exchanges of children. While in a majority of cases (e.g. common partner / interactive violence) the incidence and risk of violence decreases after separation, in a significant minority of cases the intensity and lethality of spousal violence increases after separation.

2. High overlap between spousal violence and child abuse

As noted in our discussion on children’s exposure to spousal violence, the presence of spousal violence is a red flag for the co-existence of child maltreatment.

3. Perpetrators of spousal violence are poor role models

⁴⁰ *Ibid*, citing J. Edleson, “The Overlap Between Child Maltreatment and Woman Abuse”, (February 1997, revised April 1999), online: http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=389.

⁴¹ *Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the Literature to Identify Promising Practices*, prepared in 2005 for the Federal Department of Justice by Peter G. Jaffe, Ph.D., C. Psych., Claire V. Crooks, Ph.D C.Psych. and Nicholas Bala, LL.B. LL.M. (“Jaffe,Crooks, Bala”)

Children's socialization with respect to relationships and conflict–resolution is negatively affected by exposure to a perpetrator of spousal violence. For example, when children witness one parent assaulting the other, or using threats of violence to maintain control within a relationship, their own expectations about relationships may come to parallel these observations. The potential for violence in the subsequent intimate relationships of a spousal violence perpetrator represents a threat that children's exposure to poor modelling will continue.

4. Victims of spousal violence may be undermined in their parenting role

Perpetrators of spousal violence may undermine their (ex)-partners' parenting in a range of obvious and more insidious ways. For example, male perpetrators may blame the children's mother for the dissolution of the family, or even explicitly instruct the children not to listen to her directions. Intervention with these fathers requires that this facet of their parenting be addressed; fathers need to both recognize the ways in which they undermine their children's mothers and commit to stopping these behaviours.

5 Perpetrators may use litigation as a form of ongoing control and harassment

The family court litigation process can become a tool for batterers to continue their abusive behaviour in a new forum. Litigation exacts a high emotional and financial price for abused women already overwhelmed with the aftermath of a violent relationship. Some authors have suggested that some batterers have the presentation and social skills to present themselves positively in court and convince assessors and judges to award them custody. In many cases, perpetrators are self–represented, heightening the possibilities for abuse through berating a former partner in cross–examination.

6. In extreme cases spousal violence following separation is lethal

Spousal violence and homicides are inextricably linked. National figures from Canada and the US suggest that women are at a greater risk of homicide from estranged partners with a prior history of spousal violence, than while they remain in an intimate abusive relationship. The growing literature linking spousal violence, separation and homicide has raised awareness of the need for prompt police reaction and careful investigation of post-separation violence and stalking. To assist with this work, risk assessment tools have been developed.

A 2007 Statistics Canada Report found that 74% of people accused of murder or attempted murder of a spouse had no contact with police for domestic violence issues in the preceding 11 years. This Report is contrary to previous research findings and the

public perception that the murder of a spouse usually follows a mounting pattern of violence.

7. Spousal violence may negatively affect the victim's parenting capacity

Victims of spousal violence may experience depression, low self-esteem and substance use difficulties, all of which can compromise their parenting. However, for many of these parents, separation from the perpetrator of spousal violence may lead to improvement in both general functioning and parenting. During the court process, these parents may present more negatively than they will in the future, once the stress of the proceedings and life change has attenuated.

D. Risk Assessment

Some studies indicate that a family breakup may mark the beginning or the escalation of violence.⁴² In particular, statistics from the US and Canada have linked separation to spousal homicide and suggest that women are at a greater risk of homicide from estranged partners with a prior history of spousal violence than while they remain in an intimate abusive relationship.⁴³ According to the 1999 General Social Survey, family violence began after separation in 39% of cases.⁴⁴ The British Columbia Family Justice Services Division has recognized an increased risk of family violence just before, during and immediately after separation.⁴⁵

The B.C. Ministry White Paper identified breaches of protection orders as a key indicator of escalating risk.⁴⁶ The *Keeping Women Safe* report linked improved enforcement and offender accountability with victim safety, and recommended clarifying the roles of police and Crown counsel in enforcement.⁴⁷

There are numerous risk assessment instruments which are focused upon these types of factors to assist in violence prediction. There is however little evidence that any one validated instrument predicts violence better than another.⁴⁸ Having said that, it is clear

⁴² Statistics Canada, *Family Violence in Canada: A Statistical Profile 2006* (July 2006) at 15, online: http://www5.statcan.gc.ca/access_acces/archive.action?loc=/pub/85-224-x/85-224-x2006000-eng.pdf.

⁴³ Peter G. Jaffe, et al. "Making Appropriate Arrangements in Family Violence Cases", above at 16.

⁴⁴ T. Hotton, Canadian Centre for Justice Statistics, Statistics Canada, *Spousal Violence After Marital Separation* (June 2001) at 2-3, online: <http://publications.gc.ca/Collection-R/Statcan/85-002-XIE/0070185-002-XIE.pdf>.

⁴⁵ British Columbia Ministry of Public Safety and Solicitor General, "Violence Against Women in Relationships Policy," at 11, online: <http://www.pssg.gov.bc.ca/victimservices/publications/docs/vawir.pdf>.

⁴⁶ White Paper, above, at 146. *No source was cited for this proposition.

⁴⁷ Critical Components Project Team, *Keeping Women Safe: Eight Critical Components to an Effective Justice System Response to Domestic Violence* (April 16, 2008) at ss. 3.2 and 3.6, online at Ending Violence Association of British Columbia: <http://www.endingviolence.org/files/uploads/KeepingWomenSafeExec0416.pdf>.

⁴⁸ Skeem, Jennifer & Monahan, John (2011). "Current Directions in Violence Risk Assessment", in *Current Directions in Psychological Science*, 20(1), pp 38-42.

that many risk instruments are based upon a common set of risk factors which may be configured in different ways and with different emphases. This was demonstrated in the Coffee Can Study.⁴⁹ In this study, the accuracy of four established instruments to predict antisocial behavior and violence were compared to four new instruments randomly generated from the total pool of items taken from all four of the original established instruments (these items had been metaphorically drawn from a “coffee can”). None of the four original instruments better predicted post-release failure than the four new randomly generated instruments. This substantiated the idea that risk assessment tools are not that unique, one from the other.

The following are examples of risk assessment tools used for domestic violence, intimate partner violence situations:⁵⁰

- ODARA –Ontario
- B-Safer – British Columbia, New Brunswick
- Domestic Violence Investigation Guide BC (der. from Alb.)
- Spot the Signs – Coupal
- SARA
- VRAG
- PCL-R
- HCR-20

There are several key factors (red flags) that are important to any risk assessment:

- Recent separation of two partners
- Power and control over partner issues
- Past/ongoing/escalation of abuse prior to present incident
- Alcohol/drug abuse/mental illness
- Complainant’s perception of personal safety and future violence
- Lack of support systems – family and community
- Use of threats to use weapon/firearm

Intersecting diversity issues impact on both risk and responses to domestic violence. This impacts in particular on aboriginal, immigrant, and refugee women. Factors that are significant include:

- Minority status

⁴⁹ Kroner, DG, Mills, JF, Reddon, JR (2005). A coffee can, factor analysis, and prediction of antisocial behavior; the structure of criminal risk. *Int. J. Law Psychiatry*. Jul-Aug; 28(4): 360-74.

⁵⁰ A full description of risk assessment tools used in Canada can be at http://canada.justice.bc.ca/pi/rs/rep-rap/2009/rr09_7.pdf. They are contained in the Canada Justice report by Millar (2009), entitled *An inventory of spousal violence risk assessment tools used in Canada*. The exception is the Spot the Signs Guide created by lawyer Jocelyn Coupal which can be found at <http://www.spotthesigns.ca/pdf/SpotTheSigns.pdf>.

- Language/cultural challenges
- Sponsorship threats
- Poverty/lack of access to services
- Social and geographic isolation
- Lack of services/lack of access to services

There is continuing discussion surrounding the purpose of risk assessment tools and in what circumstances it is most appropriate to employ them. One of the positions relates to the belief that the purpose is to predict recidivism, while others argue that the purpose is violence prevention and risk management.⁵¹

As well, there are those who argue that yet another purpose is to have the knowledge of the risk factors themselves disseminated through the risk instruments listing of them. For example:

- The listing of the red flag risk factors in the instruments should inform those working in the community with abused women and the general public about “the nature of IPV and escalation; the ability to highlight when particular care and caution may be required to assess danger...”⁵²
- Through that informing process, the community is in turn better able to provide appropriate support and intervention

The strengths of the risk assessment approach include the standardization and common language provided in the assessment. Additionally, the results can assist in triggering the allocation of resources for the victim and alleged offender. Some of the limitations are that little independent research has been undertaken on the reliability, validity and accuracy of intimate partner violence risk assessment tools, and, in any case the instruments have only moderate predictive accuracy. This problem may result in false positives or false negatives.⁵³ A false negative would predict that the accused person is of low risk for reoffending when in fact that is inaccurate and therefore may place the victim’s safety in jeopardy. A false positive can also result; this can occur when the accused person is inaccurately deemed to be at high risk to reoffend, thereby placing that person at risk for possible harmful official justice system responses; it may also make the victim more fearful.

Interestingly, other instruments have been more recently developed as additions or supplements to the risk assessment instruments, the latter of which focuses upon

⁵¹ Douglas, Kevin, Kropp, Randall (2002). A prevention-based paradigm for violence risk assessment: Clinical and research applications. *Criminal Justice and Behaviour* 29:619.

⁵² Johnson, Holly * Dawson, Myrna (2011). *Violence against Women in Canada*. Don Mills: Oxford University Press.

⁵³ Northcott, Melissa (rr2-08e). Intimate Partner Violence Risk Assessment Tools: review, Research and Statistics Division, Department of Justice Canada: 14.

negative risk factors. The most recent development is illustrated by the SAPROF (Structured Assessment of Protective Factors) instrument. The idea here is that the assessor obtains a more balanced assessment of risk for future violence. It takes a more dynamic approach in considering protective factors, aiming to create more effective treatment options.⁵⁴

E. Consensual Dispute Resolution

The Ministry concluded that family violence is an important consideration when dealing with consensual dispute resolution (“CDR”). In 2005, the B.C.’s Family Justice Reform Working Group recommended that families be required to attend a dispute resolution session before being permitted to use the court system to resolve a family dispute.⁵⁵ Several jurisdictions have mandatory CDR with exemptions or special protocols for cases involving family violence. However, there have been issues in applying these safeguards consistently. For instance, it was found that mediators in California violated state regulations by holding joint sessions in nearly half of the cases in which a screening interview identified allegations of violence.⁵⁶ The 2005 Report did not recommend that situations involving violence be automatically exempted from CDR. Rather, such cases could be exempted if a family member would be likely to be harmed as a result of participating, if an imbalance in bargaining power could not be managed to make the mediation procedurally unfair, or if the parties lacked the mental capacity to participate.⁵⁷ Abuse was also identified as a factor, although the Report identified some CDR options that could be appropriate even in cases of violence, such as shuttle mediation, the use of support people, impasse mediation, and collaborative law.⁵⁸

The question of whether CDR ought to be used in family violence cases is a controversial one. Some suggest that it is never appropriate, while others say that with the appropriate expertise by the person facilitating the settlement, workable agreements can be achieved.

Dr. Linda Neilson has recently commented on the implications of coercive domestic violence on a person’s ability to participate equitably in settlement processes. In her

⁵⁴ Vogel, V. de Ruiter, C. de Bouman, Y & Vries, Robbe M. de (2009), SAPROF, Guidelines for the assessment of protective factors for violence risk. English version, Utrecht, The Netherlands: Form Educatief.

⁵⁵ British Columbia, above, at 39.

⁵⁶ P.G. Jaffe and S.G. Kerr, above, at 36, citing (Hirst, 2002).

⁵⁷ British Columbia, above at 47-48.

⁵⁸ *Ibid* at 42-46, 74.

article, *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems*,⁵⁹ she says describes the effect as being profound:

More particularly, domestic violence can cause long-term heightened apprehension, lingering fear, as well as long-term psychological harm resulting in a loss of self-esteem, a reduced ability to respond assertively or to withstand settlement pressure, as well as a number of psychological conditions that can only be diagnosed by a mental health professional. Medical health and psychology experts tell us that trauma-induced harm does not end simply because the trauma ends; trauma-induced harm must be remedied therapeutically in safe, supportive surroundings. In addition to the continuing effects of harm, a related concern, documented in empirical research, is the tendency of coercive domestic violence to create heightened vulnerability to settlement suggestions. (footnotes omitted)

On the other hand, Kathleen Daly, in speaking specifically about sexual violence, suggests that restorative justice type responses may be appropriate in securing justice in an unjust society. She provides examples of cases of sexual assault in South Australia which were disposed of by conferencing with the victim and offender. One of the strategies she feels will move a way forward in knowing how to respond is to recognize the variety and meanings and contexts of sexual violence, domestic violence and family violence.⁶⁰

F. False Allegations

The Ministry notes that there have been concerns about the possibility of false claims of violence in family disputes. In 1998, the Special Joint Committee recommended that the federal government assess the adequacy of the Criminal Code to deal with intentional false claims of abuse, and develop policies for taking action in such cases.⁶¹ However, the final report from the 2001 federal-provincial-territorial consultations⁶² made no recommendation about false allegations, citing the research of Professor Nicholas Bala. This research suggests that deliberately or maliciously false allegations of family

⁵⁹ June 2012., at 45-46

<http://www.crvawc.ca/documents/final%202012%20footnotes%20July%20For%20Western%20Final%20report%20for%20Justice.pdf>.

⁶⁰ Daly, Kathleen (2002). Sexual Assault and Restorative Justice. In *Restorative Justice and Family Violence*, Heather Strang and John Braithwaite, eds. pp. 62-68. Cambridge: Cambridge University.

⁶¹ Parliament of Canada, "For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access," (December 1998) at recommendation 43, online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1031529&Language=E&Mode=1&Parl=36&Ses=1&File=6>.

⁶² Department of Justice Canada, Final Federal-Provincial-Territorial Report on Custody and Access and Child Support: Putting Children First (November 2002) at 19, online: <http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2002/flc2002/index.html>.

violence are few, and most false claims result from misunderstandings.⁶³ Further, denials and failure to report real situations of abuse are more common than false claims.⁶⁴

G. Child Alienation

There have also been concerns about child alienation, but research used by the Ministry suggests that there may be many complicated reasons why a child's contact with a parent may diminish over time.⁶⁵ Access denial may account for some loss of contact, but other factors such as "high conflict between the ex-spouses, the access parents' difficulty adjusting to their new and usually diminished parental role, socio-economic factors, the children's wishes, and simply life events that take access parents and custodial family units in different directions" are also important. Failure to exercise access is much more prevalent than access denial.⁶⁶ The White Paper concluded that when a child rejects a parent, no presumption of alienating behaviour is warranted.

Some jurisdictions have taken action to attempt to prevent false claims of violence and child alienation, but this has the potential to deter people from raising genuine concerns about violence. For example, Australia's legislation, which requires mandatory cost orders against a party who knowingly makes false statements, has been criticised for creating a chilling effect for victims of violence.⁶⁷

V. "COMMUNITY" INFORMATION

We had the privilege of organizing⁶⁸ a National Judicial Institute Domestic Violence Program Development Community Consultation, in Vancouver in April 2012. Obtaining information in this fashion falls within the mandate of the National Judicial Institute, at the direction of the Canadian Judicial Council, to provide "credible, in-depth and

⁶³ N. Bala et al., "Allegations of Child Abuse in the Context of Parental Separation: A Discussion Paper" (2001) at part 1.1, online: http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2001/2001_4/2001_4.html. See also L. Neilson, *Spousal Abuse, Children and the Legal System: Final Report for Canadian Bar Association, Law for the Futures Fund, March 2001* (University of New Brunswick: Muriel McQueen Fergusson Centre for Family Violence Research, 2001).

⁶⁴ Centre of Excellence for Child Welfare, *False Allegations of Abuse and Neglect* (Information Sheet) by T. Knott, N. Trocme and N. Bala (Montreal: Centre for Research on Children and Families, 2004) at 2, online: <http://www.cecw-cepb.ca/sites/default/files/publications/en/FalseAlleg13E.pdf>.

⁶⁵ N. Bala, et al., "Alienated Children and Parental Separation: Legal Responses in Canada's Family Courts," (2007-2008) 33 Queen's LJ 79; J.B. Kelly and J.R. Johnston, "The Alienated Child: A Reformulation of Parental Alienation Syndrome," (2001) 39(3) Fam Ct Rev 249; and Department of Justice Canada, *Child Access in Canada: Legal Approaches and Program Supports* (Research Report) by P. O'Connor (Ottawa: Department of Justice Canada, 2002) at 9, online at Department of Justice: http://canada.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2002/2002_6/index.html.

⁶⁶ Department of Justice, *ibid* at part 1.2.

⁶⁷ E. McInnes, "Parental Alienation Syndrome: A Paradigm for Child Abuse in Australian Family Law" (*Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 2003*); and Achimovich, "Parental Alienation Syndrome Revisited" (*Child Sexual Abuse: Justice Response or Alternative Resolution Conference, 2003*).

⁶⁸ With Dr. Catherine Murray, Chair, Gender, Sexuality and Women's Studies, Simon Fraser University

comprehensive” social context education for judges and to obtain community input in doing so. As we noted earlier, the National Judicial Institute’s Board of Governors and the Canadian Judicial Council support the notion that while judicial education programming should be led by judges, it is enhanced by the involvement of not only lawyers and legal and other academics, but also broader community participation.

The consultation brought together representatives of many organizations who deal with violence against women and children.⁶⁹ They discussed two broad questions: (1) What would you see as priorities in judicial education dealing with violence against women and children in intimate relationship?; and (2) Are there particular concerns that arise when there are (or there is the potential for) more than one judicial process taking place at the same time? How could these concerns be dealt with? The Consultation Report, which is included in the Conference materials, describes information provided by and areas of particular concern to those attending.⁷⁰ The six broad areas covered were:

- a. concurrent proceedings in cases involving violence against women and children;
- b. credibility assessment (including education the dynamics of domestic violence, “good enough” English, and understanding the realities of women’s lives);
- c. risk assessment;
- d. expert parenting reports;
- e. court orders and their enforcement;
- f. use of language in judgments; and

⁶⁹ The participants were: Shabna Ali, Executive Director, BC Society of Transition Houses; Shashi Assanand, Executive Director, Vancouver Lower Mainland Multicultural Family Support Services Society; Dr. Darcie Bennett, Executive Director, Pivot Legal Society; Roberta Ellis, Executive VP Human Resources, Work Place BC; Anastasia Gaisenok, Justice Education Society of BC, We Can End Violence Coalition of BC; the Honourable Kirsti Gill, Retired British Columbia Supreme Court Judge; Ishama Harris, Vancouver Rape Relief and Women’s Shelter; Pat Kelln, President, Pacific Dawn – Disabled Women’s Advocate; Hilla Kerner, Vancouver Rape Relief and Women’s Shelter and Women’s Equality and Security Coalition; Dalya Israel, Women against Violence against Women; Angela MacDougall, Executive Director, Battered Women’s Support Services; Tracy Porteous, Executive Director, Ending Violence Association of BC; Wendy Potter, Sexual Assault Service, BC Women’s Hospital and Health Centre; Shahnaz Rahman, Family Law Director, Westcoast LEAF (met separately with Kasari Govender, Executive Director and Laura Track, legal counsel, Westcoast LEAF); and Gisela Ruebsaat, Legal Counsel, Community Coordination for Women’s Safety, Ending Violence Association of BC.

⁷⁰ *National Judicial Institute Domestic Violence Program Development for Judges April 2012 British Columbia Community Consultation Report*, Fall 2012. (fredacentre.com)

g. alternative dispute resolution (including challenges with respect to dispute resolution generally, judicial dispute resolution and concerns about parenting coordinators).

A. Concurrent Proceedings in Cases Involving Violence Against Women and Children

1. Coordination of Concurrent Proceedings – a Key Issue for Women

Lack of coordination with respect to court proceedings taking place at the same time (concurrent proceedings) is a significant concern for women in violent relationships. For one family there can be up to four legal proceedings taking place at the same time: criminal, family, child protection and immigration (which is often overlooked).

2. A “Dangerous Disconnect” – Increasing Risk for Women and Children

There is a “dangerous disconnect” between or among proceedings that can put women and children at greater risk of future violence.

- There is no or almost no coordination or sharing of information between/among the courts, especially about factors relating to the risk of future violence.
- Often no information is given to one court about the existence of proceedings in another and judges are therefore unaware of the other proceeding(s); there is:
 - no institutional sharing of information;
 - no or few inquiries by the court in individual proceedings about the existence of other proceedings or their status; and
 - little or no information provided by the parties to the court in individual proceedings about other proceedings; information that is provided may not be accurate.
 - B.C.’s new ***Family Law Act***, which comes into force on March 18, 2013, requires the parties in cases involving parenting issues to provide the court with information about “any civil or criminal proceeding relevant to the safety, security or well-being of the child or other family member” (s. 37(2)(j)); this is a significant first step.
- Lack of coordination leads to inconsistencies and gaps in orders relating to contact.

- Criminal courts order no contact, child protection authorities say the children will be apprehended if there is contact and family court focusses on the view that contact is in the best interests of children and grants unsupervised access.
 - There is little or no coordination with respect to the length of time a particular order is in effect, often leaving gaps.
 - The inconsistencies and gaps at best cause confusion about contact and at worst provide the opportunity for continued abuse.
- When there are concurrent proceedings, criminal cases are often given priority which can cause significant delay and adversely affect a timely resolution in other proceedings.
 - For immigrant women, especially those without status, immigration proceedings can add yet another layer of complexity; Judges often are not aware of the immigration consequences of orders that they make.
 - The more processes that are in place, the longer it takes and the more stressful it becomes, financially and emotionally; this disadvantages women further as they generally have less time and less money than men.
 - Women are required to “tell their stories” over and over, often to a series of judges both among and within proceedings.
 - Women can feel forced to “drop” charges because they “can’t do it any more”, especially while taking care of children.
 - The more often women are required to be in the same place as their partners, the more opportunities there are for abusive behaviour.
 - The more processes that are in place, with the increased stresses, the more conflict may escalate, which can result in an increased risk of harm to women and children.

3. Inaccessibility of Legal Advice Exacerbates the Problem

Lack of legal advice at all stages of the process is a significant concern.

- Many women, especially marginalized women, cannot afford a lawyer and are not eligible for legal aid.

- Male partners often have more money for a lawyer.
- Male partners get legal assistance for criminal proceedings,
- Without legal counsel it is even more difficult to navigate through concurrent proceedings, let alone deal with one proceeding.
- Front line support people without formal legal training end up giving legal advice.

4. Litigation Harassment and Abuse

Litigation harassment and abuse can be a significant problem.

- Concerns, which can escalate the conflict and increase the risk of harm, include:
 - the continuation of controlling behaviour;
 - emotional and financial stress; and
 - delay.
- When there is only one court proceeding these problems increase when several judges deal with one case.
- The problems created are compounded when there are concurrent, unconnected proceedings.

5. Disconnects in Other Parts of the Family Justice System

In addition to the lack of coordination between/among court proceedings women also experience a lack of coordination between or among other parts of the justice system such as police, crown counsel, probation services and the like.

- Problems are even more acute in rural areas.
 - There is limited access to judges, who “drop in”, resulting in several judges dealing with cases, and delay.
 - When both family and criminal cases are on the court list in some rural areas, criminal cases are usually given priority; often there is not enough time for both proceedings to be heard so the family case is adjourned.

6. Added Challenges for Particularly Marginalized/Vulnerable Women

While dealing with concurrent proceedings, women may also face a myriad of other issues which makes them even more vulnerable and less able to access justice; they may:

- face combinations of disadvantage, such as:
 - living in poverty, with all its consequences - disadvantages that disproportionately impact upon women; and
 - being one or more of the following:
 - an aboriginal woman;
 - a racialized woman;
 - a women with disabilities;
 - a senior woman;
 - an immigrant/refugee woman, and
 - a sexual minority.
- in addition to multiple court proceedings, have to deal with many other social and economic challenges, which can also include administrative challenges, such as obtaining:
 - an adequate standard of living, which includes access to accessible, adequate day care;
 - social assistance when required;
 - appropriate affordable housing;
 - adequate health care;
 - access to education; and
 - access to mental health support for challenges caused or contributed to by the violence.
- For example, the Battered Women’s Support Services in Vancouver gets about 10,000 requests for services per year and about 80% deal with an “intersectional matrix of legal issues”; around 40% are immigrant women, 25% aboriginal women and the rest, “the rest of us.”

7. Barriers to Access to Justice – Reinforcing/Reproducing Gender Inequality

All of these barriers to access to justice:

- contribute to the already existing problem that many women are unwilling to report abuse to authorities,
- create a “staggering burden” for women; and
- “reinforce/reproduce” gender inequality in the courts.

B. Credibility Assessment

1. Judicial Education on the Dynamics of Domestic Violence

Judges would benefit from more knowledge about the dynamics of domestic violence.

a. Why, When, Where and How Domestic Violence Occurs.

There can be a “fundamental misunderstanding and lack of comprehension” about the nature of abuse and its consequences. Judges would benefit from more information about:

- emotional, financial, and psychological abuse of women and children;
- the dynamics of power and control;
- children’s exposure to domestic violence; and
- how and when violence occurs:
 - A “lock on the bedroom door” doesn’t “cut it” – can be a wrong assumption that abuse can only happen in the bedroom.
 - The absence of physical evidence does not necessarily mean that there has not been abuse.
- and the role of sexual violence in intimate relationships; this is often overlooked at all stages of the family/criminal justice processes.

b. Impact of Domestic Violence

Judges should know more about the fact that the existence of domestic violence can have a significant negative impact upon women and upon their ability to testify.

- Judges sometimes misinterpret women’s behaviour on the stand (e.g., silence) and by doing that render them even more powerless than they already are because of the violence.

c. Linking Domestic Violence and Ability to Parent

More information about the critical link between domestic violence and the ability to parent is needed.

- Judges continue to say that though a father has been abusive to his wife he is still a good parent. There must be education on the significant and adverse connection between a person who is abusive to his partner, and his ability to properly parent.

d. Reasons Women Don't Report Abuse

Judges would benefit from learning more about the reasons why many women do not report assaults to the police. It was observed that some family court judges are unlikely to conclude that violence exists unless the police have been called and charges laid.

e. False Allegations of Abuse

More information is needed about false allegations of abuse, including:

- legitimate reasons why a women may report abuse of a child after separation such as:
 - the child feeling it is safer to report after separation and
 - the child feeling more threatened as the child must now see the father alone.
- and information about Canadian and other research with respect to false allegations showing they are not that prevalent, and it is more likely that a man will falsely deny abuse than it is that a woman will falsely report it.

f. Cultural Considerations and their Impact

There are numerous challenging issues facing people from other cultures, including:

- lack of awareness of the Canadian criminal justice system; being used to systems of justice that are very different;
- limited English language skills;
- the problems of interpretation; it is needed at all stages of the process. Yet:
 - it is often not available at all;
 - if it is, it is often of poor quality; and
 - there is little understanding of the impact on some women of having a male interpreter when they are required to describe violence.

- the fact that women are judged against “white middle class values/laws” which don’t fit immigrant populations.

There are significant implications of alleging violence for the many women without immigration status.

- New and proposed immigration laws will adversely impact upon women and make it even less likely that they will report the abuse.
- Concessions are not given for women experiencing violence, even though the government may say this. Instead, immigrant women will fall through the cracks.

Judges would benefit from a greater understanding of honour killing.

- The whole family/community rather than the individual plans the act
- There is a concern that “culture” may become a defence to acts of violence.

Information about family systems would be useful in custody cases where the best interests of children are at issue. For example:

- the mother and father often stay in father’s home with his parents; the mother is alienated in the process.
- Yet, our justice system looks at couples rather than family systems

g. Making Challenges Encountered by Women with Disabilities More Visible

There are particular issues facing women with disabilities, including education about the abilities of people with disabilities that are often overlooked in discussion about women’s equality. For example:

- there can be a stigma that suggests they are less intelligent/capable;
- there are challenges with respect to accessing court, especially if the women’s partner is relied upon for mobility; and
- there are concerns about women having to teach their children how to keep safe because court orders are not effective.

2. “Good Enough” English

- Allowing “good enough” English to suffice, rather than providing adequate translators at the trial (and also at all other stages of the process).

- This is a significant concern; some courts wrongly conclude that if you can get by in English in your day to day life, you can also effectively communicate in a stressful situation, such as being in court..
 - There are many examples of women not knowing words in English.
 - Eg. there is no word for sexual assault in the Punjabi language.

3. Police Investigations – The Effective Gathering of Evidence

- There are concerns about the way evidence that may impact upon the assessment of a women’s credibility is collected and presented:
 - Police officers and crown counsel, in many cases, do not seek out evidence that is available.
 - More use could be made of, for example, out of court statements,
 - 911 calls
 - and “testimony screens”.

4. Understanding the Realities of Women’s Lives

- Judges would benefit from more knowledge about the nature of and continued existence of gender inequality and its historical roots; some of the approaches taken are viewed as a continuation of the historical and inaccurate view that all women’s allegations of violence must be viewed with suspicion.
- As pointed out in the discussions about concurrent proceedings (repeated here for convenience):
 - Many women face combinations of disadvantage, such as:
 - living in poverty, with all its consequences - disadvantages that disproportionately impact upon women
 - being one or more of the following:
 - an aboriginal woman;
 - a racialized woman;
 - a woman with disabilities;
 - a senior woman;
 - an immigrant/refugee woman; and
 - a sexual minority.

- Many women have to deal with, in addition to multiple court proceedings, many other social and economic challenges, which can also include administrative challenges, such as obtaining:
 - an adequate standard of living, which includes access to accessible, adequate day care;
 - social assistance when required;
 - appropriate affordable housing;
 - adequate health care;
 - access to education; and
 - access to mental health services concerning challenges caused or contributed to by the violence.
- Judges need to be able to put themselves in a woman's shoes so as to understand the background and other contextual factors that relate to her actions.

“We are asking women to walk into the judge’s house (where there are different rules, language, etc.). We need to flip it on its head and have judges walk into the women’s worlds. It is important for judges to: understand what it’s like for a woman to have her child turned over to someone who she is afraid of and who has hurt her; and recognize what’s being asked of women when they step into the justice system. Judges should try to meet them half-way.”

- There is a real and/or perceived “disconnect” between judges and the communities they serve:
 - Judges often have a white male middle class perspective and have never experienced power imbalance and its implications.
 - Seen by some as a repercussion of colonialism.

C. Risk Assessment

- There is often either no or a limited assessment of either the nature and extent of the violence or the risk of future harm:
 - Judges need to be informed about the dynamics of domestic violence and its consequences in order to properly assess risk.

- There can be gaps in the information needed to effectively assess risk
 - This problem is exacerbated when several different judges deal with a particular case.
 - A standardized approach would be beneficial.
 - It is difficult to make appropriate decisions about sentencing in criminal cases and contact in civil cases without an understanding of the nature and extent of the violence and the risk of future violence.
 - In custody cases, granting unsupervised access without such assessments has the potential effect of “giving the court’s stamp of approval” to abuse of children.
- Risk is particularly acute for women with disabilities, who are often unable to protect themselves.

D. Expert Parenting Reports

1 Key Issues

- The over use and misuse of expert reports when there are allegations of violence and abuse was one of the most significant concerns raised in the consultations.
 - (Note that after these consultations, Westcoast Leaf released its report, *Troubling Assessments: Custody and Access Reports and their Equality Implications for B.C. Women*, June 2012, Shahnaz Rahman (Family Law Director) and Laura Track (Legal Director). Both Ms. Rahman and Ms. Track participated in the NJI consultations.
- Many experts do not have the necessary qualifications to assess cases where there are such allegations.
- There is often no “screening” for violence; this should be a requirement.
- Women’s concerns about violence and abuse have too frequently been ignored or minimized, or rejected completely by psychologists; often no or no adequate analysis is done to explain this result.

- *In many of these reports, the evaluators appear to systematically minimize domestic violence against the women/mothers (or an attempt is made to “mutualize” it and deflect from core issues of power, control, abuse and dominance from a gendered perspective).*
- Allegations of violence can be used to inappropriately pathologize women.
- Some psychologists are not neutral, and have preconceived biased notions about parenting that favour father’s significant participating in children’s lives, even when domestic violence exists, and even when well-founded research shows that such contact puts children at risk:
 - There are numerous examples of lawyers telling clients that they should choose a particular psychologist because he favours fathers
 - Analyses of reports of these experts have confirmed this bias.
- There is an overuse and inappropriate use of psychological testing (see more below).
- There are inadequate protections in place to ensure the resulting report remains private.
- Guidelines with respect to the preparation of these reports are not adequate.
- Many judges place significant importance on the opinions of and the recommendations of the experts in contested cases, without analyzing the bases for them.
 - A judge should carefully evaluate the expert’s qualifications, the effectiveness and fairness of the process by which the report was created, and the reasons given by the expert for reaching the opinion, to determine what weight (importance) if any, should be given to the opinion.
 - Deferring to an expert opinion without such an analysis would be tantamount to allowing the expert to usurp the role of the court.

2. Psychological Testing – Use and Misuse

Judges would benefit from a better understanding of what psychological tests are being used, and what conclusions can and cannot be drawn from them.

- They can measure some things such as intelligence, academic abilities, skills, personality, attitudes and behaviours but cannot go beyond that to provide objective evidence to support specific opinions about parenting.
- Yet, psychologists offer opinions about parenting matters based, to a greater or lesser extent, on test results.
- The testing can be used inappropriately to pathologize the mother.
- Judges should be aware of research such as that conducted by Dr. Allan Wade, a family therapist and researcher. He has raised concerns about the use and misinterpretation of psychological tests in custody and access reports; he concludes that some widely used tests are inappropriately used to claim that the person who has been abused is mentally ill and as a result not a competent parent.
- Judges should be aware that the effects of trauma, violence and abuse can have profound effects on the test results.
- Credible assessment tools such as the child abuse inventory are not used.

3. When an Expert Report is Needed

Expert reports can be very useful in helping parents achieve an effective, long lasting settlement, and can assist the Court if a decision by a Judge is needed. At the same time they can be costly, time consuming and stressful. Before the parents agree to such a report, or before the Court orders such a report, even with the consent of the parents, questions such as these should be considered:

- What are the real issues in dispute? Is an expert opinion required to resolve them?
- If so, what is the specific purpose of the report?
- What type of expertise is required to effectively address the issues that arise?
- Does the expert being considered have the specific expertise needed?
- Does the expert have the appropriate cultural competence needed?
- Is the expert impartial, without any preconceived, biased notions about parenting roles?
- How will the views of the child be considered?
- Is psychological testing required? If so, what kind of testing and what is its purpose?
- What information will be provided to the expert and why?

- If translation is required, how will it be effectively provided throughout the process?
- How will privacy of the contents of the report be assured?
- What is the cost of the report? Is the cost reasonable? Who will pay? How and when?
- What period of time is required to complete the report?

4 Elements of an Effective Expert Report

The expert report will neither assist the parents in reaching an agreement nor provide assistance to the Judge if it is not conducted fairly, in an open and transparent way. The expert's opinion based on that process must be perceived by both parents (and by the children when appropriate) as being fairly reached.

- Concerns were raised about the amount of time spent with collaterals for each side, how many collaterals are spoken to, how much time is spent with each parent, and the like.
- Some experts received significantly more affidavit information from one parent than the other.
- The question of cultural competence and the availability of interpreters arises here; it is difficult to have an expert watch a parent interact with children when that is done in a language other than the mother's first language.

In considering whether the opinion offered is helpful and effectively explained, these questions can be considered:

- What facts has the expert relied upon to reach the opinion?
- If, as is often the case, parents have differing views on key issues that impact upon the result, which view has been accepted, and what are the specific reasons why one is accepted and one is not? Are those reasons sound?
- If a mental health diagnosis is made with respect to one or both parents that is relevant to the result, is the basis for such a conclusion adequately explained, with reference to the specific medical basis for it? Is the diagnosis linked to the parenting issues in dispute? Is the conclusion about the diagnosis and its consequences well founded?
- Is a risk assessment appropriate, and if so, has a professionally sound assessment been conducted? Has a risk management plan been suggested?
- Has the expert appropriately considered the views of the child and explained what weight was attached to those views and why?
- Has the expert appropriately linked the opinion expressed to:
 - the specific purpose(s) for which the report was obtained,
 - the psychological testing, if appropriate,

- the relevant facts, and
 - the relevant legal criteria relating to a child's best interests.
- Has the expert acted fairly and impartially overall?

E. Court Orders and Their Enforcement

- Clear, easily understood, detailed orders are required, with an explanation of the consequences of breaching the order.
 - This would avoid inappropriate excuses such as “I am not paying her because I have supervised access only.”
- Enforcement of orders breached by men is a significant problem which can compromise women's safety.
 - There is little or no monitoring and often little or nothing is done even if there is a breach.
- Situations which create/involve risk are fluid, and there can be legitimate reasons why a woman does not comply with an access order.
 - There are situations where protection of the children is paramount
 - Judges should not take the view that an order must be obeyed, no matter what the circumstances are.
 - The criteria for assessment in these circumstances set out in B.C.'s new ***Family Law Act*** which set out situations in which “denial is not wrongful” are helpful. (In effect March 18, 2013)

Section 62 says denial of parenting time or contact is not wrongful in any of the following circumstances:

- *The mother reasonably believed that:*
 - *the child might suffer family violence.*
 - *the father was impaired by drugs or alcohol at the time.*
- *The child was suffering from an illness and the mother has a written statement by a medical practitioner*
- *In the 12 months before the denial the father repeatedly, without reasonable notice or excuse failed to exercise parenting time*

- *The father:*
 - *Told the mother beforehand he would not come, and*
 - *Did not later give reasonable notice that he would come.*

F. Use of Language in Judgments

- In some judgments the judge does not “name what happened” in a violent situation, and uses language which excuses, shifts blame for, and minimizes the violence.
- The work of Dr. Allan Wade and Dr. Linda Coates is useful in this respect:
 - By studying actual judgments they have concluded that in the language used the judge has:
 - Concealed the violence
 - Mitigated the “perpetrators” responsibility,
 - Concealed the victims’ resistance and
 - Blamed or pathologized the victims
 - See *Telling it like it isn’t: obscuring perpetrator responsibility for violence crime*, Discourse and Society, Vol. 15(5): 3-3010.1177/095792650405031.

G. Alternative Dispute Resolution

1. Challenges With Respect to Dispute Resolution Generally

- While alternative dispute resolution options can be effective, they are strongly promoted for family law cases without sufficient consideration being given to the presence of domestic violence and its implications:
 - There is little or no screening for domestic violence
 - The professionals involved, including the lawyers, often do not have adequate training with respect to domestic violence.
- The approach to family violence found in British Columbia’s new Family Law Act, which comes into effect March 18, 2013, is supported. It, among other things, requires “dispute resolution professionals”, including lawyers to: (s. 8)
 - assess whether family violence may be present and

- if it appears that family violence is present, assess the extent to which the family violence may affect:
 - the safety of the party or a family member, and
 - the ability of the party to negotiate a fair agreement.

2. Judicial Dispute Resolution

- There is a concern that “many judges and lawyers do not understand the concept of gendered violence.”
- Many women “don’t even know or fully understand what a judicial case/settlement conference is and can end up agreeing to things out of intimidation.
- Many women go through the process because they have no other options; they cannot afford a lawyer and cannot get legal aid; they can give up other things for custody as it is used as a bargaining tool.
- There is a strong emphasis (a starting presumption) that joint parenting is best, without any information about the family dynamics generally and the existence of family violence in particular.
- Many women do not raise the issue of violence because they are afraid that they will be accused of trying to alienate the father from the children, rather than trying to protect them, and end up losing custody.
- There are serious risk considerations at judicial case conferences (as well as other dispute resolution options.) Some women cannot be in the same room as their abuser. No risk assessment is conducted. There is a potential for re-traumatization.
- There is often inadequate translation for people for whom English is a second language.
- Some judges do not try to assist the people who attend, but rather just send them out and tell them to settle.
- Some judges “threaten” people that if they do not do what is being recommended, that judge will hear the court application that will determine the issue.
- Women feel isolated in case conferences and yet are often not allowed to bring a support person into the conference.

3. Concerns about Parenting Coordinators

- The appointment of a Parent Coordinator as part of a Settlement or Court Order can be helpful, particularly in cases where there may be ongoing conflict.

- But, there are issues that need to be addressed:
 - The person chosen (and it is not uncommon to choose a lawyer) often does not have qualifications relating to family violence:
 - *The role of the parenting coordinator (psychologists, lawyers, clinical counsellors) is not well understood, nor are the requirements clear. Some have not been trained to deal with the types of issues that come up where there has been violence and abuse: parents cannot be assumed as equal in their role with regard to children's case.*
 - Guidelines and practices are not made available.
 - Parenting Coordinators are not inexpensive, and they have the potential to be very costly.
 - Having a parenting coordinator could have the unintended effect of prolonging the dispute and creating more litigation.
 - It is time consuming, costly and stressful to have to act to have a parenting coordinator removed.

VI. INVISIBLE STRINGS - CONSIDERATIONS FOR JUDICIAL CASE CONFERENCES AND SETTLEMENT CONFERENCES

The information provided in this section was written by the Honourable Judge Patricia Bond of the Provincial Court of British Columbia, when she was a family law judge and two other experienced family law lawyers, Megan Ellis Q.C. and Zara Suleman. In our view they have raised the very important question of how family violence can be invisible to judges and others at judicial case conferences and settlement conferences.⁷¹ While there is some overlap with information provided in the other sections, we have chosen to include all of the information provided, as it emphasizes the importance of the information to those working day to day with women who use the courts. Using three families, the authors provide very helpful examples of the issues that can arise.

A. Introduction

The trend towards alternate dispute resolution processes, which includes mandatory judicial case conferences, increases the risk that victims of spousal violence will acquiesce to arrangements which expose them and their children to ongoing harm. This may range from physical violence and harassment, to the use of children to intimidate, to financial coercion and even destitution. Women with long histories of

⁷¹ Please note that the footnotes for this section are found at the conclusion of our paper.

submission are often unable to recognize or articulate the nature of the coercion to which they were subjected. Conditioned to give in, they are particularly ill-prepared to assert their own needs or resist their partners' demands in the context of a settlement conference. Even those who are able to secure representation – and their numbers are decreasing - are not necessarily better equipped to acknowledge and sever the invisible strings by which they are controlled.

The issue of domestic violence has gained greater attention in the past three decades, and yet the role it plays in individual relationships is often overlooked. The control exercised by one party in a relationship by a range of means, including threatened and actual harm, does not cease upon separation. What are often longstanding patterns of coercion and acquiescence continue, and sometimes become more intense in the period following a separation. It is in this context that parties meet with each other, with mediators, and judges to try to re-organize their lives, and the lives of their children.

Although Family Mediation Canada's Practice Certification and Training Standards recommend that participants in mediation be screened for histories of violence, in B.C. courts, such screening is neither required nor available for most of the settlement procedures available. Further, these meetings frequently take place under time pressure, and in circumstances where one party is experiencing significant financial strain pending an agreement or an order for support.

This paper casts some light on the ways by which some spouses, even in the presence of a mediator or a judge, are able to perpetuate their control and bring about an "agreement" which may be neither fair nor in the best interests of their children.

1. Spousal Violence is Commonplace

Statistics show us that:

- a. In 2006, over **38,000** incidents of spousal violence were reported to police across Canada.ⁱ
- b. According to the 2004 General Social Survey (GSS) it is estimated that **7%** of Canadians 15 years of age and over in a current or previous common-law union had experienced spousal violence in the previous 5 years.ⁱⁱ
- c. The Maternity Experiences Survey (Canada, 2006), estimated that **6%** of mothers (aged 15 and older) who had recently given birth had experienced abuse or violence at the hand of a spouse, partner, or boyfriend within the previous 2 years.ⁱⁱⁱ

- d. In 2006, 56 women and 22 men were killed at the hands of a spouse; in 2005, 62 women and 12 men; in 2004, 63 women and 12 men; in 2003, 64 women and 14 men; and in 2002, 63 women and 16 men.^{iv}
- e. Data indicates the rate of intentionally false allegations in custody or access disputes is 12%, in contrast to the 4% of all cases that are considered to be intentionally fabricated. The research indicates that non-custodial parents (usually fathers) most frequently make intentionally false reports. “Of the intentionally false allegations of maltreatment tracked by the 1998 Canadian Incidence Study of Reported Child Abuse and Neglect, custodial parents (usually mothers) and children were least likely to fabricate reports of abuse and neglect.”^v

2. Physical Assault is One End of a Spectrum

Violent relationships are not violent at all times.

- a. Violence is embedded in a pattern of power and control and involves tactics which are not overtly violent, such as: intimidation, emotional abuse, isolation, minimizing, denying, blaming, use of children, economic abuse, coercion and threats, as well as violent tactics. The non-violent control tactics may be effective without the use of violence, in part because of an implied threat of violence if compliance is not secured.
- b. There is a growing understanding that spousal violence is cyclical. Within a violent spousal relationship various forms of psychological or financial abuse tend to increase as tensions build, leading to acts of physical or sexual violence, followed by a “honeymoon stage” where the abuser apologizes and is given another chance.^{vi}
- c. In the 2003 Jaffe, Crooks, & Poisson study most women reported that where a former violent partner had access to the children, the children were a conduit for the abuse (78%). Specifically, they were used as pawns to inflict pressure or pain on the other parent. In such cases, children were encouraged to put down their mother, encouraged to demand to live with their father, and coached to make false allegations of abuse against their mother. In addition, 22% of the women within this group reported that their former partners were often verbally abusive and/or harassing during exchanges.^{vii}

- d. It is not unusual for victims to report that the psychological impact (fear, anxiety, loss of self esteem and post-traumatic stress) on them is worse than the physical effects of the abuse.^{viii}

3. Leaving a Violent or Controlling Relationship is Difficult

- a. Women's fear can take many forms and may include:
 - i. Fear of escalating violence resulting from their partner's anger if they leave or if charges are laid, which is based on a realistic assessment of possible consequences;
 - ii. Fear that the justice system will not respond to their needs;
 - iii. Fear of poverty or of not being able to "make it" on their own;
 - iv. Fear of personal shame from being publicly exposed as a victim of domestic violence;
 - v. Fear of shaming or loss of support from one's family or cultural community, often as a result of family or community pressures. This is especially true for immigrants and Aboriginal women;
 - vi. Fear of police, the court process, and child protection authorities, especially for marginalized groups;
 - vii. Fears about the court process and consequences of prosecution;
 - viii. Fear of breaking up the family and of the impact on their children of "losing" their father.^{ix}
- b. One-third of all spousal homicide narratives from 1997 to 2005 (225) included some indication that the couples were separated or in the process of separating. It was found that the majority (57%) of homicides involving separating or separated spouses occur during the initial process of separating (i.e. after one partner voices their intentions to leave the relationship, while moving belongings out of mutual residences, or while going through formal divorce or separation proceedings, etc.).^x
- c. In a 2001 study on spousal violence, approximately 24% of abused women (61,000) reported that the violence escalated after separation, and 37% of abused women (95,000) reported that the violence continued but

did not increase in severity. A further 39% of abused women (98,000) indicated that the violence first started after separation.^{xi}

- d. The majority of parents in “high conflict divorces” involving child custody disputes report a history of domestic violence. In a 2003 study by Jaffe, Crooks, & Poisson, the majority of women trying to leave abusive partners suffered multiple forms of abuse: emotional, psychological, financial and physical. The extent of the violence ranged from limiting contact with family and friends (80%), to threatening with a knife or gun (29%). For the majority of women (71%) the first abusive incident occurred during the first six months of their relationship.^{xii}
- e. Although pursuing charges in cases of domestic violence was for a time mandatory, it is no longer so. The current charge assessment policy requires B.C. Crown Counsel to examine the case at each stage of the prosecution and decide whether there is a substantial likelihood of conviction and, if so, whether prosecution is required to protect the public interest. Prior to 2003, Crown Counsels’ Policy Manual included the *Violence Against Women in Relationships Policy*, which provided a less flexible charging approach in cases of domestic violence.

4. A History of Spousal Violence Impedes Access to Justice

- a. The 2001 study, *Spousal Violence after Marital Separation*, reported that women assaulted by former spouses tended to suffer more negative emotional consequences than did men. Women were much more likely than men to report being fearful for their personal safety (39% versus 6%) and the safety of their children (17% versus 5%). In addition, women were more likely than men to report having lower self esteem as a result of the abusive relationship (29% compared with 7%), greater incidence of depression or anxiety (27% versus 16%), shame or guilt (19% versus 8%), and sleeping problems (18% versus 6%).^{xiii}
- b. According to a 2005 study by Fugate and Landis, after an abusive incident, only 18% of the women surveyed contacted an agency or counsel, 26% sought medical care, 38% contacted police and 71% talked to someone else (family or friend).^{xiv}
- c. For many women, their financial situation (particularly as it relates to legal costs) creates a double disadvantage: the abuse leaves her fearful and ashamed while a lack of money leaves her with few resources for ending the abuse.^{xv}

- d. For many women (65% according to a 2002 study by Jaffe, Zerwer & Poisson) a separation is their first encounter with the legal system. As a result women often do not know how to go about accessing legal services (54%).
- e. The incidence of domestic violence is often underestimated by family courts, lawyers, and court-related services because:
 - i. The majority of victims of domestic violence do not raise concerns about their victimization in mediation.
 - ii. By its very nature, domestic violence is notoriously difficult to substantiate. Most abused spouses have difficulty proving their abuse in family court proceedings because of insufficient corroborating evidence.
 - iii. The presentation of batterers and victims is such that their competence as parents in child custody proceedings is difficult to assess. Most batterers betray no obvious mental health problems. In contrast, many victims demonstrate a variety of trauma symptoms related to their abuse.^{xvi}

5. Victims of Spousal Abuse Experience Pressure to Conceal or Minimize

Victims of spousal abuse may conceal or minimize the existence or extent of the abuse for a variety of reasons.

- a. The 2005 Fugate and Landis study reveals that for many women there is a severity threshold for abuse, and abuse that they believe falls below that threshold does not warrant intervention. Thresholds are personally determined and vary among women. It cannot be known whether the women said the situation was not serious enough to warrant intervention because they truly believed that or because they were influenced by their own or others' perceptions that assistance would not be forthcoming.^{xvii}
- b. In the 2002 Jaffe, Zerwer & Poisson study, most of the women (82%), told their lawyer about the abuse. For the 18% who did not disclose abuse, reasons included embarrassment, not being asked and relevance. Satisfaction on lawyers' understanding of domestic violence issues was split (half the women felt their lawyer did not understand domestic violence, the other half did).^{xviii}

- c. In the 2002 Jaffe, Zerwer & Poisson study, over one-third of the women surveyed felt pressured to attend mediation despite having experienced abuse because they were told that litigation cost too much or because they were advised to make a good impression by appearing cooperative.^{xix}

- d. Victims may feel pressured to accept a settlement because they do not have the resources to contest the proposed agreement. Particularly problematic are situations where the abusive partner has financial resources that far exceed those of the mother. In such cases, the abusive partner can “win by attrition” by pursuing the matter through the courts until the victim’s resources have been exhausted.^{xx}

B. THREE FAMILIES

The following three cases exemplify some of the concerns discussed above.

1. Dominic and Nancy

Dominic and Nancy were married for 15 years. They had a 14 year old son and a 13 year old daughter. Dominic was a businessman with a thriving business. Nancy worked as an administrative assistant, but left her job to stay at home full-time after their first child was born. She made all the arrangements for the children's health, dental, recreational and social activities. Dominic took care of all financial matters, including bill payments, investment decisions, managing his business and filing tax returns.

Over the years, Dominic took total control of the family finances. He did not permit Nancy to see bank statements or to have direct access to the family bank accounts. He provided her with a subsidiary credit card which had a limit of \$500.00. She agreed the limit would not be increased as a protection against fraud. He cross-examined her monthly on all expenses on the card, so she preferred not to use it except for her gas and vehicle expenses. When he was upset with her, he would not pay the credit card bill for several months. She would only discover this when the card was declined, which caused embarrassment for her.

Dominic also transferred funds into a joint account which Nancy could access for groceries; she had to ask him for funds from the account for any expense which was above and beyond the routine weekly groceries. All discretionary spending was handled by Dominic, using his credit and bank cards.

Dominic told her she was lucky that she did not have to deal with financial matters, that he took care of everything for her. He also told her that they did not have a lot of money.

Nancy had learned over the years of her marriage that if there was to be any peace in the family, she needed to be agreeable and let Dominic manage the matters that he cared about. When she attempted to inquire into their financial situation or questioned Dominic about his business, he would impute ulterior motives to her and become defensive, as though she was challenging his abilities.

On two occasions, more than 10 years before they separated, he had lost his temper with her, pushing her hard against a wall and screaming in her face. On one of these occasions he knocked her to the ground. There had been no further incidents of physical violence, but Dominic would shout at her and ridicule her from time to time.

Nancy learned to avoid contentious issues. If she did question Dominic, there would be negative consequences for her, such as Dominic losing his temper, withholding access to money or refusing to speak to her for several days. She knew nothing about his business affairs, and he teased her about her ignorance and dependence on him.

After 15 years of marriage, Dominic told Nancy that he wished to separate. Prior to this, he had spent several months taking every opportunity to remark on the high cost of lawyers. He pointed out news articles and commented on friends and acquaintances that had separated, at great cost. He told Nancy that they could not afford lawyers.

Dominic commenced Supreme Court Divorce proceedings and scheduled a Judicial Case Conference.

2. Dan and May

Dan and May had been married for 8 years. They have two girls, 4 and 6 years old. Dan is officially a contractor and May is an aesthetician. Dan is always making plans. He lives life on the edge, disdainful of authority. During their marriage, he sold marijuana from their basement. They were able to buy and furnish their own home, take expensive vacations and enjoy life.

May begged him to stop selling drugs when they had children, but Dan continued. He said that he had to, because she was not working. He stopped introducing his associates to her, and locked off a room in the basement which was adjacent to the back door. May set up a studio in the home and began seeing clients there.

One day May received a threatening phone call. When she told Dan about it he became furious and was very angry for several days. One day he was particularly jittery. May knew it was all related to the sale of drugs and was afraid to ask about it. They argued and Dan told her it would be taken care of and she better not say anything, or she would be taken care of too. May was terrified and took the kids to stay at her sister's home.

Ultimately the parties reconciled, but they soon separated again. Dan left this time, but at first would not provide any money to May. She had to consult a lawyer and start proceedings. They scheduled a Judicial Case Conference.

3. Sandra and Thomas

Sandra was a stay at home mom of two boys, ages 3 and 7. Her husband Thomas was an architect. His parents were very wealthy. Both Sarah and her husband were in their late 30s. Thomas spent long hours at his office and when home, claimed that he needed to be able to relax. His relaxation often included having a few drinks. When

Sarah could not keep the children quiet or asked Thomas to “babysit” while she went out, Thomas was liable to explode with anger. He would yell, throw objects, and sometimes kick furniture or punch a wall, but he did not hit her. The boys loved their father but were wary of him, careful to avoid doing things which could precipitate an angry outburst. Sandra would sometimes argue with Thomas but ultimately gave in to keep the peace. She was afraid of his temper and its effect on the children. Her attempts to raise what she saw as a his problem with alcohol resulted in him becoming enraged and threatening to leave her and make sure she never saw the children again.

Sandra organized all of the children’s activities and the family’s social life. Thomas attended the children’s events and family outings some of the time, but would often say he needed downtime.

In anticipation of a likely separation, Thomas consulted a lawyer who told him that he had the best chance at an equal division of assets, and a shorter period of spousal support, if he had the children one-half of the time. Thomas reduced his time at work and started insisting on taking the children to school and to activities. At the same time, Thomas became increasingly critical and contemptuous of Sandra in front of the boys. The children started to replicate his behaviour, becoming angry with and dismissive of their mother. Sandra wanted to change the situation but also wanted to keep the family together. Finally, Thomas told her that he was seeing another woman and that he intended to end the marriage.

Sandra was devastated by the news that Thomas was leaving. Although her friends and family urged her to retain counsel right away, she delayed in doing so until she was served with court documents. When she did meet with a lawyer, she denied that there had been any history of abuse. She told her lawyer that she wanted sole custody because her children needed their mother.

C. THE SETTLEMENT CONFERENCE- The Invisible Strings

1. Nancy and Dominic

Nancy did not obtain any legal advice prior to the hearing because Dominic told her they would go before the Judge and the Judge would help them settle everything. He prepared a summary of their assets, including a detailed list of every chattel, and they sat down and allocated each item. He told her his business had no value because there were debts and taxes to be paid and gave her a complicated calculation prepared by his accountant. Dominic also provided Nancy with a calculation of his income based on his Income Tax Return, but not including the income he split with her each year nor the income he left in his company.

At the Conference, Dominic told the Judge that they had reached an agreement and they just wanted to settle everything. He had drawn up a document which appeared to divide the family assets equally, but did not include his business. At the Judicial Case Conference, the Judge was pleased to be able to help this couple by granting a consent order providing for joint custody and guardianship, child and spousal support in accordance with the Guidelines, but based on Nancy earning \$30,000 (even though she was not yet employed), and on Dominic's declared income and an "equal" division of assets.

2. Dan and May

Prior to the Conference, Dan met with May. He told her he would provide her with \$2,500 per month, but only if she fired her lawyer. He told her that if she did not, she would get nothing and there was no way that she would be able to prove he had income to support that kind of a payment. He told her that he would be fair with her if she did not have a lawyer, but she better watch out if she kept her lawyer. May agreed and they attended the Judicial Case Conference without counsel. At the Conference, they agreed on the support Dan suggested, even though there was no disclosure of his income. They also agreed to put the house up for sale. It sold quickly and she received almost one-half of the sale proceeds.

3. Sandra and Thomas

At the Judicial Case Conference, the Judge encouraged the parties to settle. Thomas insisted that he have joint custody, given his role with the children in the marriage. He reported that he either took the children to school or picked them up from school at least fifty percent of the time and that he is now the assistant coach for the boys' baseball team. The Judge explained that joint custody and guardianship is a common arrangement and encouraged the parties to reach a consensus. He told them that sole custody orders are made only in exceptional cases. The Judge also mentioned that people in Sandra's position are expected to make efforts to become self-supporting.

The parties were unable to settle the issues at the Judicial Case Conference because Thomas had not provided the documents supporting his income provided in his Form 89 Financial Statement, or with respect to his company. As a result Sandra could not afford to move out of the family home, and even if she had, Thomas would not have permitted her to take the children with her.

C. How the Stories Unfolded

1. Dominic and Nancy

Five years later, Nancy learned through the wife of a friend of Dominic's that Dominic had sold his business for close to a million dollars. By this time she had drawn significantly on her share of the assets and was very concerned about her future. Her brother-in-law convinced her to get legal advice and she learned that the support had not been based on Dominic's income and that she had not received her share of the assets. She did not have the courage or the financial resources to apply to set aside the agreement.

2. Dan and May

May went to work for her sister's beauty shop, doing nails and make-up. However, Dan would frequently call and attend at the shop very upset with her over everything from arrangements for the children, issues about their separation, or other matters. He created so much upset at her work that her sister told May that she could not have him come there anymore. The only way for May to ensure this was to leave her job.

After that, May had to live on the proceeds from the sale of the home, with just occasional fill-in work for her sister. She could not find a regular position that would give her the flexibility to be available to pick up the children from school every day.

After approximately one year of using her savings to supplement her income, May sought the assistance of a lawyer to finalize matters. It cost her another \$25,000 in legal fees but they were eventually able to settle after two Settlement Conferences. May did not proceed to trial to pursue her interest in the Revenue Property retained by Dan (which he had since registered in his parents' names) because she was too afraid of what he might do to her.

3. Sandra and Thomas

Following the Judicial Case Conference, Sandra was confused and became increasingly depressed. Life in the matrimonial home was unbearable, and she felt trapped. She tried to discuss the possibility of mediation or collaborative process with Thomas, but each time he told her there was nothing to discuss. He said she needed to get work, just like the judge said, and she needed to agree that he would have the children equal time.

Ultimately, she agreed that Thomas would have the children fifty percent of the time in return for his agreement to let her move and pay her some support. She agreed the support would be based on her rent plus utilities and an allowance for food. She would have to get a job to cover the expenses for her vehicle and everything else. Sandra did not discuss this with her lawyer before agreeing to it because she did not have any money for legal fees.

Sandra found a minimum wage, part-time job in a flower shop run by an acquaintance. She moved into a small, furnished older home. It did not take her long to realize that she could not manage on the funds Thomas was giving her, even with her employment income. She was still responsible for taking the children to medical and dental appointments, dealing with the school, arranging haircuts and buying the children their school supplies, clothing, etc. The children were unhappy with her because they did not like the rented home and she could not afford the luxuries they were accustomed to. Thomas had insisted that all the furnishings remain in the home because it was the children's home. The youngest boy began using foul language and the daycare

complained about this. The older son was not doing well in school and his teacher was concerned about him. From time to time the boys would return home from access visits in tears. Sandra was concerned about what was happening, but the boys would not tell her.

In addition, Sandra was having a difficult time juggling the demands of work and the needs of the children. Although Thomas was involved in one of the children's extracurricular activities, she was responsible for dealing with the children when they were sick or had appointments during the day. Thomas made it clear that he simply could not leave work to deal with such things. On the other hand, he would periodically cancel his access at the last minute, even though he had promised the boys a specific activity or treat, and would demand make-up time, also on short notice.

Finally, Sandra's family offered financial assistance to her and she consulted counsel about these issues. Within a few months she was able to get an order for more generous child and spousal support and some of the furnishings from the matrimonial home. She then moved into a nicer residence, but Thomas began to claim that the children wanted to live with him full time in "their home" and that their mother was abusive to them. He claimed that she punished them unreasonably, threatened and attempted to control him, and refused to buy the children the clothing they needed, even though he was paying support to her.

In response to Sandra's application for enforcement of the order for production of documents against Thomas, he accused Sandra of making a fraudulent support claim against him. He demanded that she produce every receipt for the expenses she claimed on her Form 89 and insisted she was not spending the money she claimed she needed for the boys.

When reviewing the claims Thomas made against her, Sandra finally told her counsel that Thomas was in fact describing his own abusive behaviour towards her and the children during the marriage. Sandra's counsel ultimately convinced her that she needed to pursue a trial of all of the issues, and that she should agree to a custody and access assessment in preparation of the trial.

At the trial of the matter, the judge found that Thomas had been inappropriately disciplining the boys and had been encouraging them to disrespect their mother. However, he concluded that it was in the best interests of the children to have the maximum contact with both parents and ordered joint custody, but gave Sandra the ultimate decision-making authority. The boys were to spend alternating weeks with each parent. In making the award of joint custody, the judge noted that parties' behaviour is not often the best during matrimonial proceedings, and he was hopeful that Thomas would be able to act in the best interests of the children in the future. The

Judge also found that Thomas had attempted to hide his true income and ordered a lump sum to make up for the very limited support provided to Sandra immediately after the separation.

In the years following, the parties returned to court on many occasions to deal with parenting and support issues.

D. The Effects of Domestic Violence on Children

In none of the above scenarios was the justice system effective at protecting the victim of violence or coercion. The violence was never identified and no one took steps to ensure that the arrangements in place would be in the best interests of the children. Legislation mandates that divorcing parents persuade the court that appropriate arrangements are in place for the financial support of the children; there is no similar obligation to ensure that the children are protected from the destructive effect of ongoing violence between their parents, despite the potentially very serious consequences.

1. Children who experience parental separation and divorce are a population at risk. Researchers and mental health professionals have consistently found that these children face an array of emotional, academic, physical and behavioral difficulties.^{xxi}
2. Violence has an independent effect on children's adjustment. Witnessing violence can result in behavioral, cognitive and emotional problems including: aggression, conduct disorders, delinquency, truancy, school failure, anger, depression, anxiety, and low self esteem. Interpersonal problems include poor social skills, peer rejection, problems with authority figures and parents, and an inability to empathize with others.^{xxii}
3. Witnessing domestic abuse can have negative effects on pre-school-aged children's development, and can cause significant delays and insecure attachments.^{xxiii}
4. School aged children repeatedly exposed to violence are more likely to develop posttraumatic stress disorders, particularly when combined with other risk factors of child abuse, poverty, and the psychiatric illness of one or both parents.^{xxiv}
5. There are higher rates of child abuse and sibling abuse in violent high conflict marriages.^{xxv}
6. In addition to emotional and behavioral problems, difficulties experienced by child witnesses of domestic violence can include a variety of trauma symptoms:

nightmares, flashbacks, hyper-vigilance, depression, and regression to earlier stages of development. Other identified difficulties include compromised social and academic development.^{xxvi}

7. Studies on the impact of violence on very young children suggest that permanent negative changes in the child's brain and neurological development can occur, such as altering the development of the central nervous system and predisposing the individual to more impulsive, reactive, and violent behavior.^{xxvii}
8. In adolescence, exposure to domestic violence has been linked to drug and alcohol abuse, truancy, violent dating relationships, and involvement in the juvenile justice system.^{xxviii}
9. Exposure to domestic violence in childhood is also associated with significant problems in adult social adjustment.^{xxix}
10. Even if contact between the perpetrator and the children's mother is ceased, batterers may continue to expose their children to violence in subsequent intimate relationships and thereby continue to traumatize their children.^{xxx}
11. Many researchers have identified the overlap between domestic violence and various forms of child maltreatment. The identification of domestic violence in a family suggests a 40% to 70% probability that direct abuse of children may be occurring.^{xxxi}
12. In half of the families from the 2003 Jaffe, Crooks & Poisson study the children were victims of physical abuse in incidents totally separate from the abuse of their mothers.^{xxxii}
13. Mothers from the 2003 Jaffe, Crooks, & Poisson study reported that many of their children were affected by the exposure to domestic violence. Significant behavior problems related to aggression (35%) or anxiety and depression (21%) were common. One third of the children were reported to exhibit significant difficulties related to attention and hyperactivity.^{xxxiii}
14. Perpetrators of domestic violence are more likely to be deficient if not abusive as parents. There is a wide range of parental capacity among high conflict and violent families, however, common features are lack of warmth, coercive tactics, rejection of children and abuse.^{xxxiv}
15. Abusive ex-partners are likely to undermine the victim's parenting role. They are likely to attempt to alienate children from the other parent's affection, sabotage family plans, and undermine parental authority.^{xxxv}

E. Conclusion

Despite the best efforts of judges and masters to assist parties in resolving their differences expeditiously, a judicial case conference or a settlement conference which proceeds without taking into account a history of violence and/or intimidation, and its effects, risks compounding the problem. Even where a judge or master is aware that there is such a history, there is a danger of failing to appreciate the larger societal impact of the dynamics of abuse on a party's ability to negotiate, or even to understand the options.

A settlement process which does not consider and address a history of spousal violence or intimidation may well perpetuate or exacerbate financial inequities. An objectively "fair" custody or access regime may result in children being used to harass the former spouse, to great detriment. Children may also suffer because they lose time with the primary parent to the other parent whose motivation for seeking custody or access is predicated on a desire to control or a sense of entitlement which will likely not translate into a positive experience for the child in abuse cases. What may appear to be an effort by a party to "keep the peace" may well be resignation in the face of an implied threat of ongoing abuse if the other does not get their way.

While the goal of encouraging spouses to work out their differences by agreement is laudable, it is not justice to encourage the parties to compromise when the compromise itself, is unjust.

VII. THE B.C. LEGISLATURE'S APPROACH TO FAMILY VIOLENCE

This section summarizes many of the key points relating to family violence, found in the *Family Law Act*, or arising as a result of the *Act*. For a more comprehensive look at the issues raised, along with the relevant section numbers, see *Family Violence and the New B.C. Family Law Act – Implications for: Best Interests of Children; Professional Responsibility; and the Interpretation of the Divorce Act*.⁷²

A. Parenting Arrangements

1. Overall Parenting Scheme

- The *Family Law Act* focuses on parenting arrangements, meaning parenting responsibility and/or parenting time, not custody or access.
- Only parents who are guardians have parenting responsibility and parenting time.
- Other parents have contact.
- Each parent who lives with a child is a guardian and remains a guardian after separation until changed by an agreement or order.
- A parent who has never lived with a child is not a guardian unless by agreement or order or unless the parent regularly cares for the child.

⁷² D. Martinson, October 2012, available through the NJI.

2. Best Interests of the Child Generally

- Best Interests of the child is the only consideration.
- The best interests test applies to guardians making agreements as well as to the court.
- There is an overarching direction: an agreement or order is not in the best interests of a child unless it protects to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being
- Agreements must be set aside by the court if satisfied they are not in the best interests of the child.
- Therefore, agreements must be set aside if the court is satisfied that they do not protect to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

3. New Best Interests Considerations

- Family Violence is broadly defined and includes, among other things:
 - Psychological or emotional abuse; and
 - Direct or indirect exposure of a child to family violence.
- Does not include the use of reasonable force to protect oneself or others from harm.
- Protects "family members" which include relatives living with the family.
- Guardians and the court must, among other things, consider:
 - the impact of family violence on the child's safety, security or well-being;
 - whether the actions of the person responsible for family violence may impair his or her ability to:
 - care for the child, and
 - meet the child's needs.
 - other civil or criminal proceedings; and
 - whether cooperation is appropriate and would increase risk.
- Must be a nuanced risk assessment, considering specific factors.
- General conduct not amounting to family violence cannot be considered unless it substantially affects a best interest factor and only to the extent that it does so.

4. The Child's Views

- Must be considered unless it is inappropriate to do so.
- Article 12 of the ***United Nations Convention on the Rights of the Child*** applies to children in British Columbia.
- The test should be interpreted to mean that it is inappropriate only if a child does not want to be heard or is incapable of expressing his or her own views; other issues go to weight.

5. The Role of the Child's Guardian

- Parental responsibilities relate broadly to decision making and are set out in detail.
- Parenting time is the time a child spends with a guardian; subject to an agreement or order, during that time the guardian can make day to day decisions affecting the child.
- There is specifically no starting presumptions about either parenting responsibilities or parenting time when making agreements or orders and in particular the following must not be presumed:
 - that parental responsibilities should be allocated equally among guardians;
 - that parenting time should be shared equally among guardians;
 - that decisions among guardians should be made separately or together.
- The Ministry of Justice Explanation says there is no presumption of joint guardianship when there is no agreement or order.
- In the interim between separation and the making of an agreement or order,
 - a guardian may exercise all parental responsibility in consultation with the child's other guardian(s) unless consultation would be unreasonable or inappropriate in the circumstances.
 - The exception is significant; consultation that negatively impacts upon safety and increases risk would not be reasonable or appropriate.

6. Parenting Assessments

- The Assessment is for the purpose of a proceeding under the parenting arrangement part of the **Act**.
- Therefore the assessment must be conducted within the best interest framework, which both the guardians and the court must apply:
 - The Assessment must consider all of the factors in the **Act** relating to safety, security and well-being.
 - The Assessor must be qualified to assess for, and assess for:
 - the presence of family violence and its impact ; and
 - the risk of future harm.
 - The Assessment Report must explain how allegations of family violence were dealt with generally, and how they relate to the opinion expressed.
- The guardians and/or the court should, at the outset, consider whether an assessment is really needed.

7. Parenting Coordinators

- Provides a useful vehicle for both guardians and the court to use to resolve disputes.

- Parenting Coordinators must use the best interests criteria in the **Act** and therefore:
 - must consider all factors, including family violence factors, relating to safety, security and well-being; and
 - must have the expertise needed to assess for violence. They must
 - assess for the presence of family violence and its impact; and
 - assess the risk of future harm.
- Parenting Coordinators also have a specific statutory duty under the **Act** to assess for family violence.

8. Children’s Lawyer

- The Court has the authority to appoint a lawyer to represent the child’s interests.
- The Court must be satisfied that:
 - the degree of conflict is so severe that it significantly impairs the capacity of the parties to act in the best interests of the child; and
 - it is necessary to protect the best interests of the child.

9. Intervention by the Attorney General or Other Person

- Contains a provision similar to the one in the **Family Relations Act** allowing the Attorney General (or another person) to intervene in a proceeding.
- Inclusion of this provision in the new **Act** indicates recognition on the part of government that interventions by the Attorney General are, in some cases, necessary to ensure that the best interests of children are met.

B. Protection from Family Violence Orders

- A new approach is taken to protecting family members, including children, from family violence.
- The approach includes the following:
 - This can be a stand-alone application and can be made without notice.
 - Sets out specific risk factors that must be considered.
 - If a child is involved the court must also consider:
 - whether the child may be exposed to family violence and
 - whether there should be a specific Protection Order protecting the child.
 - Expires one year after it is made unless it says otherwise.
 - Will be enforced under s. 127 of the **Criminal Code**, not under the **Family Law Act** or the **Offence Act**.
 - Sets out criteria to be applied when there are “mutual” applications.

C. The Critical Link Between Encouraging Out of Court Resolution and Family Violence

- The **Family Law Act** has two broad, laudable goals:
 - protecting people, and in particular women and children, from the very significant consequences of family violence; and
 - encouraging people to use appropriate processes to reach effective family law agreements with respect to family law disputes in a timely way without going to court.
- The goal of encouraging early out-of-court resolution by agreement cannot be implemented at the expense of the goals of ensuring safety, security and well-being and reaching fair agreements. The legislation only supports out of court resolutions which are fairly negotiated, and which take into account the family violence framework found in the **Act**.

D. **Family Violence: Professional Responsibilities of Lawyers**

- Family law clients have obligations under the **Family Law Act** to reach agreements that ensure a child’s safety, security, and well-being. Lawyers have professional responsibilities to assist their clients in making such agreements.
- In order to do that a lawyer must investigate whether there is in fact family violence at play in a particular case and consider its implications.
- This must be done at an early stage in the process, as the information is critical to the determination of how the dispute ought to be effectively and fairly resolved.
- **The Law Society Code of Professional Conduct** (which comes into effect January 1, 2013) includes requirements that involve determining whether family violence is an issue, and if it is, its nature and impact:
 - a lawyer has a duty to the client to obtain sufficient knowledge of the relevant facts before giving advice and before recommending dispute resolution options.
 - a “competent lawyer” must investigate facts, identify issues, ascertain client objectives and consider possible options.
 - A lawyer should encourage out-of-court resolution “whenever it is possible to do so on a reasonable basis.”
 - A lawyer has a duty to advise the client to avoid or end litigation, but only “whenever the dispute will admit of fair settlement.”
- The responsibilities found in the **Law Society Code** apply to all family law matters, including those that involve the **Divorce Act**.
- The **Family Law Act** (s. 8) provides that a family dispute resolution professional (*which includes a lawyer advising a party in relation to a family law dispute, which in turn is defined as a “dispute respecting a matter to which the Act relates”*) must:
 - assess in accordance with the regulations whether family violence may be present: and

- if it appears that family violence may be present, the extent to which the family violence may adversely affect:
 - the safety of the party or a family member of that party, and
 - the ability of the party to negotiate a fair agreement.

- The family dispute resolution professional must, having regard to the assessment:
 - discuss with the party the advisability of using various types of family dispute resolution to resolve the matter, and
 - inform the party of the facilities and other resources, known to the family dispute resolution professional, that may be available to assist in resolving the dispute.

- When the family law dispute relates to guardianship, parenting arrangements and contact with a child, the family dispute resolution professional must:
 - advise the party that agreements and orders must be made in the best interests of the child only.

- The duty to assess for family violence applies to “a dispute respecting a matter to which this **Act** applies” so covers not just parenting matters, but applies to all issues that can arise under the **Act**.

- If a lawyer is acting on behalf of a party in a proceedings under the **Family Law Act**, that lawyer must provide, at the time the proceeding is started, a statement, signed by the lawyer, certifying that he or she has complied with the section 8(2) duties. Given the importance of the obligations found in s. 8, this requirement cannot be met by the giving of perfunctory information. The obligations must be complied with in a meaningful way before the certificate is signed.

- If the client is a married person:
 - a lawyer has a responsibility to advise that client about the advantages and disadvantages of proceeding under the **Divorce Act** or postponing the divorce and proceeding under the **Family Law Act**.
 - the lawyer must determine whether family violence is an issue as that will form a significant part of that analysis.

JUDICIAL LEADERSHIP

Many judges across Canada have used creative methods to design court processes that work effectively. This has often been done in collaboration with non-judge community members in ways that work for the particular community in which the judge judges.

We have already referred to the family violence courts that exist in several areas that deal with criminal cases involving charges of domestic violence. The Toronto Integrated Domestic Violence Court, created by the Ontario Court of Justice, provides a very good

example of how judicial leaders can effectively work with others to develop a court that deals with the challenging issues that arise in cases where there are concurrent criminal and family proceedings. (For more information about that court, see, ***Judicial Coordination of Concurrent Proceedings in Domestic Violence Cases.***⁷³)

As we mentioned earlier, the National Judicial Institute published, in September 2011, ***Problem Solving in Canada's Court Rooms – a Guide to Therapeutic Justice.***⁷⁴ The Guide, as we said, describes initiatives, often led by judges, which, “have resulted in the establishment of courts and courtrooms dedicated to addressing some of the root problems — mental health issues, addiction, limited anger- and risk-management skills, poverty, and social marginalization — behind criminal activity.”⁷⁵

In British Columbia, the Pivot Legal Society is about to release a report called, ***Imagining Courts that Work for Women Survivors of Violence.***⁷⁶ The report, authored by Dr. Darcie Bennett, makes the point that “judicial champions have been very important in developing specialized courts in British Columbia and elsewhere.”⁷⁷ After referring to Vancouver’s Downtown Community Court, the report praises the Honourable Judge Joe Wood of the Provincial Court of British Columbia for his work in the area of domestic violence. Judge Wood has created a court that works within, rather than separate from, the existing court structure, and he involved non-judge community members in doing so.⁷⁸

The Duncan Domestic Violence Court, BC’s only dedicated domestic violence court, has also benefitted from significant leadership from a committed member of the judiciary. Justice Josiah Wood, who was involved in the initial research project that led to the development of the domestic violence court in Duncan, is currently the Court’s presiding judge. The Chief Judge of the Provincial Court has also provided ongoing support for the initiative.

When dealing with cross-border child abduction cases, judges in each province/territory, working with the Canadian Judicial Network, have developed protocols and guidelines for communication between judges, both across provincial/territorial borders, and international borders. The Network, chaired by Justice Robyn Moglove Diamond of the Manitoba Court of Queen’s Bench, will consider, in early 2013, the use of such communication between judges when there are concurrent proceedings within a province or territory.⁷⁹

⁷³ D. Martinson, October 2012, at p. 20, available through the N.J.I.

⁷⁴ Written for the National Judicial Institute by Susan Goldberg, NJI Library, www.nji.ca

⁷⁵ Ibid at VI.

⁷⁶ Dr. Darcie Bennett, Executive Director, Pivot Legal Society, forthcoming, November 2012. www.pivotlegal.org

⁷⁷ Ibid at 51.

⁷⁸ Ibid at 51.

⁷⁹ For more information about the Network, see *Judicial Coordination of Concurrent Proceedings in Domestic Violence Cases*, D. Martinson, October 2012, available through the N.J.I.

We encourage judges to continue to look for other effective solutions to the challenges created by family violence and other continuing conflict cases. They require early intervention by and management by the court. The co-author of this paper, Donna Martinson, has written about the question of the need for effective early intervention and case management herself, and also with Professor Nicholas Bala and Professor Rachel Birnbaum.⁸⁰ In continuing conflict cases:⁸¹

...Social science tells us that early intervention is critical and recommends steps that can be taken to assist these families. Judges can have a very important role to play in reducing conflict; they need to intervene early and develop an effective plan for the family in questions. It is also clear that if courts do not intervene effectively, cases can end up being dealt with by several different judges, continuing for many months, or even years, without an appropriate resolution. Far from meeting the goals of the judicial process of resolving cases in a just, timely, child-focused and affordable way, having a number of judges deal with a case can have the opposite effect. The resulting delay is not only financially and emotionally exhausting for the parents, but the lack of an effective, timely resolution adversely affects the well-being of the children involved and increases costs to parents and the justice system.

We know that many individual judges do undertake the management of these difficult cases; they are to be applauded for doing so. However, a court system does not work effectively if only some families have the benefit of such an approach because of the judge who happened to be assigned to their case. We respectfully suggest that for those places which do not have specialized family courts, existing court structures need to be reorganized so that all families will have access to that management in a systematic way, as part of the regular case assignment and scheduling processes of the court. "Courts as institutions must find a way to ensure that all families have access to a judge who has the knowledge, skill, time and resources to give them the service to which they are entitled."⁸² Leaving decisions about whether a case will be managed by one judge to individual judges, who take on this work in addition to the judge's other caseload, is often ineffective and contrary to the best interest of children.⁸³

FINAL THOUGHTS

Bold steps are required to address the challenges we have discussed. Judges, working with others in their communities, are well-placed to continue to make important contributions to benefit all of those who rely on the courts for timely, effective resolutions of their legal problems.

⁸⁰ Bala, N. Birnbaum, B and Martinson, D, *One Judge for One Family: Differentiated Case Management for Families*, Canadian Journal of Family Law, 2010, 26, 2 395 at 410-412. Martinson, D., D. Martinson, *One Case – One Specialized Judge: Why Courts have an Obligation to Manage Alienation and other High-Conflict Cases* Family Court Review, Vol. 48 No. 1, January 2010 180-189.

⁸¹ Ibid, *One Judge for One Family*, at 398.

⁸² Ibid at 446.

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