FAMILY VIOLENCE AND PARENTING ASSESSMENTS: LAW, SKILLS AND SOCIAL CONTEXT

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June 2019

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INTRODUCTION AND OVERVIEW

This report considers the substantive equality rights of women and of children in family law cases involving family violence in British Columbia, with a particular focus on challenges that can arise when a court orders a parenting assessment. and ways to address them. Section 211 of the British Columbia *Family Law Act*[1] (the FLA) gives the Court the discretion to appoint a family justice counsellor, a social worker or another person appointed by the Court to assess one or more of: (a) the needs of a child in relation to a family law dispute; (b) the views of a child in relation to a family law dispute; and (c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child. The FLA also has numerous provisions relating to family violence which the court must consider and which provide the legal underpinnings of s. 211 Reports.

The report is a continuation of the authors' work relating to the roles and responsibilities of judges to implement the substantive equality rights found in Canada's Charter of Rights and Freedoms, described in *Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases,* published in the Canadian Journal of Family Law in 2017. In that article we referred to judicial education - and in particular judicial education about the social context of family violence - as an important judicial core competency requirement when dealing with these very challenging cases. We referred to our own legal and qualitative research relating to that social context.

We have, between us, continued that work since then, considering more specifically what the prerequisites of effective judicial education on family violence are and what particular knowledge is necessary when considering the court's oversight role with respect to parenting assessments. We have focused on judges not just because of the critical role they play in the justice system, but also because the knowledge required to judge competently in family violence cases is no different from that required by lawyers and all other professionals involved in the family justice system. The methodology used to develop effective professional development programming about family violence for judges which we describe, also applies to the development of such programs for all professionals.

We have called this report Law, Skills and Social Context to reflect the fact that we are dealing with family violence within the existing three dimensional approach to judicial education adopted by the Canadian Judicial Council in the 1990s and reaffirmed in the April 2018 Professional Development Policies and Guidelines[2], Guideline A.6: "Council has formally recognized that effective judicial education demands a three dimensional

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[1] SBC 2011, c 25

[2] April 2018: Canadian Judicial Council Professional Development Policies and Guidelines, Policies Applicable to Recently Appointed Judges, online: <https://www.cjc-ccm.gc.ca/cmslib/general/Judicial%20Training/CJC%20Professional%20Development%20Policies%20and%20Guidelines%202018-04-05.pdf>

approach encompassing substantive content, skills development and social context awareness."
With respect to social context awareness, a 1994 Canadian Judicial Council Resolution supported the development by the NJI of social context education for judges, stating that such education must be credible, in-depth and comprehensive; "credible" meant credible not just to judges, but also to the public. Three specific topics were identified for initial focus: gender, aboriginal justice and race. The Council also reaffirmed its commitment to this approach in the 2018 CJC Professional Development Policies and Guidelines, and underscored that "credible, in-depth and comprehensive" social context education is indispensable to maintaining a fair and well-informed judiciary.[3]

Chief Justice Wagner elaborated on the social context component of this three dimensional approach to judicial education in his comments on the CJC Judicial Education Website, created in July 2018.[4] His comments are particularly relevant in family violence cases: Social Context education, broadly speaking, "provides judges with the necessary skills to ensure that myths and stereotypes do not influence judicial decision making" and ensures that judges are "aware of the challenges faced by vulnerable groups in society". Similarly, former Chief Justice McLachlin, in 2012, emphasized the importance to judging of understanding context – peoples' lived realities.[5] She stated that judges, to judge justly, must "appreciate the human beings and situations before them, and appreciate the lived reality of the men, women and children who will be affected by their decisions".[6]

Such contextual analysis is not only highly relevant to the court's assessment of family violence and its impact generally in family law proceedings, but is equally relevant to the court's oversight role with respect to s. 211 Reports, including decisions about whether to order a report, the report's admissibility, and the weight which should be attached to it. Assessors have a quasi-judicial role, requiring them, like judges, to apply the existing legal framework in a fair and impartial way, consistent with the principles of substantive equality. The first author was invited, in 2013, to speak to the B.C. College of

[3] See Rosemary Cairns-Way and Donna Martinson, *Judging Sexual Assault: The Shifting Landscape of Judicial Education in Canada*, January 2019, Forthcoming, CBR 97(2). (The Shifting Landscape)

[4] The Right Honourable Richard Wagner, Message from the Chair, Judicial Education, Canadian Judicial Council, online: <http://judicialeducation.cjc-ccm.ca/>

[5] The Right Honourable Beverley McLachlin, "Judging: the Challenges of Diversity" (Inaugural Annual Lecture delivered for the Judicial Studies Committee, Scotland, 7 June 2012), online: http://www.scotland-judiciary.org.uk.

[6] *Ibid.*

Psychologists about this requirement: *Family Violence and the New FLA: Independent and Impartial Parenting Assessments*.[7]

The authors of this report initially addressed the issue of family violence and parenting assessments in 2012, both for a national NJI Program on Domestic Violence and for the Joint Education Conference of the B.C. Supreme Court and the B.C. Provincial Court: *Judicial Leadership and Domestic Violence Cases: Judges Can Make a Difference.*[8] A community family violence consultation done for the NJI program and contained in the article[9] revealed, among other things, that women's organizations which support women's equality in the justice system had numerous concerns about the way in which allegations about family violence were dealt with in parenting assessments. Among them were: overuse of reports; lack of family violence qualifications of assessors; lack of family violence screening, risk assessment and safety planning; lack of cultural competency of assessors; and the overuse and misuse of psychological testing, which, if not trauma informed, can inappropriately pathologize women.

They also raised concerns about the lack of impartiality of some assessors, both respect to family violence and its impact, and with respect to parenting views which are inconsistent with the applicable legal framework. This can, they said, lead to the minimization/disappearance of violence in the analysis generally and when there are also allegations of parental alienation. At that time, most of the people who participated in the NJI consultation were optimistic that the new FLA would make a significant and positive difference generally, and with respect to parenting assessments in particular, as were we.

One gap identified early on involved the qualifications of assessors to appropriately assess family violence. Regulations to the FLA required mediators, arbitrators and parenting coordinators to have special training relating to family violence – a minimum of 14 hours, and lawyers were strongly encouraged by the Law Society of B.C. to do the same. However, there was no such requirement for s. 211 assessors. This concern was raised with government. The then B.C. Attorney General and Minister of Justice, the Honourable Suzanne Anton, stated in the Legislature that the government was

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[7] http://fredacentre.com/wp-content/uploads/2010/09/The-Hon.-D.-Martinson-Independent-and-Impartial-Parenting-Assessments-November-21-2013. (Independent and Impartial Parenting Assessments)

[8] The Honourable Donna Martinson & Dr. Margaret Jackson, *Judicial Leadership and Domestic Violence Cases: Judges Can Make a Difference*, (National Judicial Institute: 2012), online: FREDA Centre for Research on Violence Against Women and Children, <http://fredacentre.com> [Martinson & Jackson, *Judicial Leadership*].

[9] National Judicial Institute Domestic Violence Program Development for Judges British Columbia Community Consultation Report, April 2012. http://fredacentre.com/wp-content/uploads/2010/09/The-Hon.-D.-Martinson-National-Judicial-Institute-April-2012-B.C.-Community-Consultations-on-Family-Violence-Report.pdf (the NJI Consultation)

considering FLA regulations which would require s. 211 assessors to have family violence qualifications.[10] The B.C. College of Psychologists was, at that time, also considering adding the requirement of qualifications in family violence to its Code of Conduct.

Since 2012/2013 we have continued to consider family violence justice system issues, including the use of parenting assessment, through our work with Simon Fraser University's FREDA Centre for Research on Violence Against Women and Children and through the UBC Allard School of Law Centre for Feminist Legal Studies. Organizations with which we consult say that many of the parenting assessment concerns identified in 2012 continue to exist today. With respect to assessor qualifications, there are still no s. 211 regulations with respect to family violence training, though the Ministry advises that they are still being considered.[11] The B.C. College of Psychologists has not changed its Code to include the need for family violence training, though doing so is still being considered.[12] These concerns are not unique to British Columbia; academic research internationally shows that concerns about the treatment of violence against women in parenting assessments have arisen across systems. Codes and Guidelines have been developed to assist.

Our focus in this report is on violence against women by men. We have explained this focus in our 2017 article *Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases* (Judges as Equality Guardians) this way:[13] Men can be victims of violence by women and other men, and women can be victims of violence by other women, and violence occurs in gender non-conforming relationships. These are all important issues. However, our work focuses on violence against women and children; we have chosen this work because in our view the existing evidence shows that violence in heterosexual relationships remains the most prevalent problem and significantly and disproportionately impacts women and children. We therefore use equality for women as an exemplar of how equality analysis should be applied in all intimate relationships. When considering family violence and s. 211 Reports, the issues which women and women serving organizations have identified and the potential solutions we propose as a result will, in our respectful opinion, lead to parenting assessments which are fair and just to everyone involved, not just women.

The remainder of our report is framed this way. Part I, *Family Violence and Social Context Awareness*, further considers the third dimension, social context awareness. Section A discusses how judicial social context education can enhance contextual legal

10. Government of British Columbia Hansard.

11 Ministry presentation to the B.C. Committee for the Coordination of Women's safety. October 2018.

12 Dr. Mary Korpach, CLEBC Conference – A Deeper Dive- The Intersection of Family Law and Psychology, April 2019.

13 (2017) 30 Can. J. Fam.L. 11 at p. 20

analysis generally. Section B looks at why, when substantive equality for women and children is at issue, it is important to involve and hear from women and women serving organizations about their realities and experiences of inequality generally and within the justice system. It addresses a lingering and we suggest an unfortunate view by some that education which has a focus on gendered violence, and which is informed by the experiences of women and women serving organizations, may lack balance, amount to inappropriate advocacy, and give preference to a special interest group. Section C provides some contextual information relating to women's inequality, focusing on the kinds of myths and stereotypes which can inappropriately influence decisions made by parenting assessors and by courts, and the intersectional challenges that make many women particularly disadvantaged/vulnerable. Section D looks at the substantive equality rights of children in the context of family violence, and the legal safeguards necessary to implement those rights.

Part II, *Section 211 Context Comparison: Issues Then (2012) and Now (2019)*, provides contextual information with respect to family violence and parenting assessments by engaging in a comparison between the concerns raised in 2012 and those continuing to exist. Part III integrates legal principles, judicial skills and social context relating to family violence and s. 211 Reports. Section A considers the court's oversight/gate-keeper role with respect to whether a report should be ordered, admissibility decisions at trial, and the role of critique/review reports. Section B discusses how to effectively assess the assessment, providing practical suggestions and guidelines. Section C deals with safeguarding the rights of children to be free from violence within the family. Section D raises the question of the role of legal representation for children in providing legal protections. Part IV is called *Do Claims of Gender Symmetry Minimize Contextual Analysis?* It considers whether a gender symmetry approach in analyzing domestic violence situations allows for a consideration of social context factors. Through an examination of various reviews from researchers'/scholars' perspectives and outcomes from multiple official reports, we conclude that the social context earlier argued as essential to secure an informed impartiality for critical decisions involving the women and their children does not appear to emerge from the outcomes. Finally we offer some concluding observations.

The first author, Donna Martinson is the primary author of Part III because of her legal background. The second author, Margaret Jackson is the primary author of Part IV because of her research with the FREDA Centre for Research on Violence Against Women and Children and her academic background in criminology and psychology.

PART I – FAMILY VIOLENCE AND SOCIAL CONTEXT AWARENESS

A. THE IMPORTANCE OF JUDICIAL SOCIAL CONTEXT EDUCATION GENERALLY

The first author of this report, Donna Martinson, was very pleased to be appointed by the National Judicial Institute in the mid-1990s as one of two Canadian judges to be seconded for some eighteen months to the NJI to act as Special Directors in the implementation of the 1994 CJC Resolution through a major Social Context Education Project (SCEP).[14] The judges were joined by University of Ottawa Law Professor, Rosemary Cairns-Way, as the SCEP's Academic Coordinator. Professor Cairns-Way and Donna Martinson, in 2018 and 2019, revisited the characteristics of the original SCEP and considered the importance of and nature of social context education. With respect to the latter, they looked at both social context education generally, and in relation to gender-based violence, focusing on sexual violence: *Judging Sexual Assault: The Shifting Landscape of Judicial Education in Canada,* (The Shifting Landscape).[15]

Several aspects of the SCEP described in The Shifting Landscape are relevant to the discussion of education about the social context of family violence generally and its links to parenting assessments:[16] programming must be judge led and controlled by judges; the education must be non-prescriptive - not eroding judicial independence by requiring "right answers" but facilitating discussion and allowing judges to independently assess the information offered; it should take into account the judicial role, its nature, complexity and constitutional limitations; and it must be directly related to daily courtroom decision-making.

The SCEP, supported by the CJC, specifically incorporated consultation and input from appropriate individuals and groups in the broader community, with the CJC and the NJI supporting the view that to be comprehensive, in-depth and credible, programming development and presentation required the participation of three groups: the judiciary; legal practitioners; and the broader community (the Three Pillars Approach). Cairns-Way and Martinson note that involvement of the broader community in judicial education planning and delivery was (and continues to be) directly connected to the nuanced and complicated understanding of judicial independence that was developed as part of the SCEP. It recognizes impartiality as the pre-eminent judicial obligation. Impartiality needs to be understood in the context of the Canadian commitment to substantive equality.[17]

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[14] The other judge was Justice John McGarry of the Ontario Superior Court.

[15] The Shifting Landscape, *supra* note 3.

[16] *Ibid*.

[17] The Shifting Landscape, *supra* note 3. Note: in the 2017 Martinson and Jackson article, *Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases, supra* note 13, they explore the reasons why judicial independence and judicial social context education go hand in hand. They note that while principles of judicial independence and impartiality continue to play a central

Former Chief Justice Beverley McLachlin spoke about this important connection in 2012. After explaining the need for judges to understand not just the legal problem, but the social reality out of which the dispute before the court arose, referred to in our Introduction, she added that judges must make decisions with what she describes as "informed impartiality." This, she states, requires an understanding that there are subjective elements to judging, making the point that judges can have biases:[18]

> Like everyone else, judges possess preferences, convictions and—yes—prejudices. Judges are not social or political eunuchs. They arrive at the bench shaped by their experiences and by the perspectives of the communities from which they come. As human beings, they cannot help but to bring these "leanings of the mind" to the act of judging. In short, judging is not an exercise of cold reason, uncontaminated by personal views and preconceptions.

Informed impartiality, she says, requires that decision-makers have the ability to identify their own preferences, convictions, and prejudices and to address them by being introspective, open, and empathetic.[19]

Cairns-Way and Martinson make the point that the third pillar of the Three Pillars Approach - including the broader community in education conception, design and delivery – incorporates the powerful idea, expressed well by a judge in the 1990s, that it is important for judges to know what they don't know.[20] This is particularly true when considering inequality and how to remedy it, and in understanding the complexities of the concept of impartiality. Judges committed to offering impartial justice have an obligation to explore their own perspectives and experience, and to learn about the perspectives and experience of others in order to avoid, as much as possible, acting on the basis of a partial perspective.

There is, they suggest, an inevitable tilt to the judicial partial perspective, which reflects the fact that judges as a group enjoy social, legal and political privilege. As a result, the

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role in the adversary system, an equality-based view of those principles has also developed. Judicial independence has long been recognized as not being a right on its own, but rather a means of achieving impartiality. Impartiality is directly linked to substantive equality, informing the way it is interpreted and applied. The Commentary to the Equality discussion in Ethical Principles for Judges link equality and impartiality, saying that equality is "strongly linked to judicial impartiality," at pp. 26 and 27.

[18] *Supra* note 5. [footnote omitted].

[19] *Ibid* at p. 11.

[20] The Shifting Landscape, *supra* note 3.

education needed to fill gaps inevitably focuses on the experiences and perspectives of those disadvantaged by the status quo, with the least access to power, and whose silences have been ignored. Lawyers and academics have, for the most part, a similar partial perspective. Education developed and presented without the inclusion of community members will be incomplete and potentially ineffective, running the risk of presenting judges with a filtered view of the actual social reality at issue.

B. THE INCLUSION OF WOMEN AND WOMEN SERVING ORGANIZATIONS AS PART OF THE BROADER COMMUNITY

In the SCEP, the emphasis on gender equality included a focus on gendered violence. Women's groups, as part of the broader community, were specifically included in planning and delivering education about gendered violence. This approach was supported by the CJC, the NJI, and the Project's Judicial Advisory Committee members. Doing so recognized that their contributions have the legitimate function of advancing women's substantive equality rights.[21] It addressed concerns initially raised by some judges about education on social context amounting to "indoctrination".[22]

In The Shifting Landscape article Cairns-Way and Martinson argue that not only is it appropriate to have participation of women's groups in developing and presenting education about gender equality issues, including gendered violence, it is essential. It provides necessary information about women's lived realities, including the inequalities they experience, and it is required to ensure that judicial education is credible, not just to judges, but to the public. That article focuses on sexual violence, using the case of Judge Robin Camp, and the passing by Parliament of Bill C-337, *The Judicial Accountability* Act; that Bill was stalled in the Senate. It requires those who want to become federally appointed judges to first engage in education about sexual assault, informed by sexual assault survivors and groups and organizations that support them. While Cairns-Way and Martinson conclude that such a legislative approach is not appropriate, they explain how judicial education can be enhanced by the inclusion of those women and organizations. What follows is their analysis in that respect, adapted so as to apply to family violence, as their observations and conclusions apply equally in that context.

The stakes in the adjudication of family violence could not be higher. Women's equality, personal safety, security, and their confidence in the fairness of the system are at risk. Yet, these are often the cases where judges[23] may not know what they don't know.

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[21] *Ibid.*

[22] *Ibid.*

[23] Note that in the original article the text says "like Robin Camp".

Judges, like everyone else, have unexamined and unacknowledged prejudices that reflect their identity and life experiences and that may be inconsistent with the principles of equality for women. The participation of women serving groups and organizations, as well as survivors of family violence is therefore particularly valuable in family violence education programming.[24]

Judges, academics and other professionals are essential resources for such programming. They are well placed to provide useful information about the first two of the three judicial education dimensions: the law relating to family violence; the constitutional principles of substantive equality; some of the judicial skills needed to fairly conduct a sexual assault trial; and, academic research and statistics about the social context of sexual assault. However, in most cases they will not be well placed to understand themselves, let alone educate others, about the actual lived reality of family violence survivors, including the intersecting and complex experiences of inequality and discrimination that many women who have been assaulted or otherwise exposed to family violence by a family member suffer. Members of the broader community who have such experiences, and those who work with them to provide support and to ensure that their equality rights are protected, have the expertise, knowledge and experience to provide that context.

In the early days of the SCEP some judges were concerned about hearing from what they considered to be special interest groups intent on indoctrination and not education. In 2019 we understand that women's groups and family violence survivors are not special interest groups, but groups who wish to ensure that women's constitutional equality rights are respected. The suggestion that including women serving organizations gives problematic access to special interest groups assumes that ensuring equality and preventing discrimination are ideological positions rather than legal obligations. As long as the contributions of relevant community participants and groups assist with achieving the educational objectives of the program, there is no reasonable basis upon which to exclude them, and every reason to include them. The real risk to a "balanced" program is the failure to include perspectives which have, perhaps unintentionally and unknowingly, been excluded. The premise that judges alone should determine their needs, and that judges learn best hearing from other judges, is incompatible with an inclusive vision of social context education.

[24] These cases can be contrasted with many commercial ones in which the business participants cannot be considered vulnerable and subject to discrimination in the same way.

C. WOMEN AND VIOLENCE: MYTHS, STEREOTYPES AND OTHER INEQUALITY EXPERIENCES

In the 2017 Martinson and Jackson article Judges as Equality Guardians we apply this general connection between impartiality and substantive equality to family law proceedings in which there are allegations of family violence, under the heading "Applying Substantive Equality Principles with Informed Impartiality in Family Law Cases".[25] We emphasize, in our judicial accountability discussion, that judges "are of course accountable to all people, not just women; we do not suggest that any particular outcome is required." We note that it is the process of analysis, based on principles of substantive equality, that matters.[26]

It is not possible here to do an in-depth analysis of gender issues that arise in family law cases concerning violence. We, though, consider the comments by Chief Justice Wagner with respect to the importance of (1) ensuring that myths and stereotypes do not influence judicial decision making and (2) being aware of the challenges faced by vulnerable - disadvantaged - groups. We provide some information that may be useful both when assessing parenting assessments themselves, and when making ultimate decisions.

1. Family Violence and the Assessment of Credibility

Understanding Historic Discrimination

Contextual analysis, and in particular understanding substantive gender equality and how inequality is manifested, requires being aware of historic patterns of discrimination against women; that is particularly true when considering women's credibility when they make allegations of family violence. It is now well accepted that laws and practices dealing with women's credibility were, until the later part of the 20th century, highly discriminatory against women.[27] Not the least among them were the requirements of corroboration and recent complaint. The safety, security and well-being of women who were victims of violence could be undermined by laws and practices. By way of example, until the latter part of the 20th century, family violence was often dealt with in family court, and not as a "real" crime. Most significantly, a man could legally have sexual intercourse with his wife without her consent. Claims about discriminatory

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[25] *Supra* note 13 at pp. 27-44. See also the Honourable Donna Martinson, The Invaluable Role of Non-Legal Community Involvement in the Planning and Delivery of Judicial Social Context Education, April 2018 NJI conference honouring former Chief Justice McLachlin, NJI Library.

[26] Judges as Equality Guardians, *ibid* at p. 21.

[27] See Judges as Equality Guardians, *supra* note 13, The Shifting Landscape, .*supra* note 3 and Post Separation Parenting – Submerged Gender Issues, *infra* note 142.

treatment in assessing women's credibility should be considered in that context. While the *Charter* for the most part led to the repeal of laws which discriminated against women on their face there were challenges in incorporating the legal changes into the everyday operation of the justice system. Gender based discrimination continued and was one of the reasons the 1994 CJC Social Context Resolution, referred to above, focused in part on education about gender inequality.

Myths and Stereotypes

In our 2012 consultation[28] a number of concerns about incorrect assumptions being applied to challenge women's credibility were raised. In the fall of 2018, the public was invited to provide input to Parliament's Standing Committee on Justice and Human Rights which was considering Bill C-78, the act to amend the Divorce Act. Many women and women serving organizations from across Canada participated, including the National Association of Women and the Law, and Luke's Place Support and Resource Centre. Their brief was supported by 40 Canadian organizations.[29] They too raise concerns about the inappropriate use of unfounded assumptions relating to family violence and specifically suggest that the new Divorce Act prohibit inferences in a number of situations; we describe the suggested unfounded assumptions below.

They would require that no inferences be drawn based only on the specific facts described in each suggested prohibited inference. For example, one suggested prohibited inference (number 4, below) is that the court shall not infer that if claims of family violence are made late in the proceedings or were not made in prior proceedings, they are false or exaggerated. The specific facts in a particular case would be that the woman disclosed late in the proceedings or did not disclose in prior proceedings. A contextual analysis would take into account the complexities of how, when and why violence may be disclosed; there can be reasonable explanations for the timing of the disclosure. The concerns raised on behalf of women about this kind of inference are not unlike the concerns raised in the latter part of the 20th century about the recent complaint principles in sexual assault criminal proceedings. For years the law sanctioned the incorrect and discriminatory view that if a woman did not report an alleged sexual assault shortly after it happened, it was likely untrue. It is now well recognized legally that there are a myriad of reasons why early disclosure may not occur.

We offer no opinion as to whether these suggested prohibited inferences should be incorporated into the legislation. However we do suggest that those described reflect

[28] *Supra* note 9.

[29] The list of organizations is found on the first page of the Brief.

the concerns of many women and women's equality supporting organizations. The submission states:

> Harmful myths and misconceptions about the realities and the dynamics of family violence are still widely held and may influence legal advice and decision-making in divorce proceedings. Therefore, adding a section to Bill C-78 that dispels these myths and misconceptions will help guide actors in the legal system in making decisions that do not endanger children or their mothers.
>
> Recommendation #4.7: Include a new section (see below) that prohibits the court from relying on or being influenced by myths and stereotypes that deny, mischaracterize or minimize the impacts of family violence and/or blame the non-abusive spouse.
>
> <u>The court shall not infer 4.1</u>
>
> In considering the existence and impacts of family violence, the court shall not draw any adverse inferences based on myths or stereotypes about family violence, including, but not limited to:
>
> 1. The court shall not infer that because the relationship has ended, or divorce proceedings have begun, that the family violence has ended.
>
> 2. The court shall not infer that the absence of disclosure of family violence prior to separation, including reports to the police or child welfare authorities, means the family violence did not happen, or that the claims are exaggerated.
>
> 3. The court shall not infer that the absence or recanting of criminal charges, or the absence of intervention of child welfare authorities means that the family violence did not happen, or that the claims are exaggerated.
>
> 4. The court shall not infer that if claims of family violence are made late in the proceedings or were not made in prior proceedings, they are false or exaggerated.
>
> 5. The court shall not infer that inconsistencies between evidence of family violence in the divorce proceedings and other proceedings, including criminal proceedings, mean the family violence did not happen, that the claims are exaggerated, or that the spouse making the claims is unreliable or dishonest.
>
> 6. The court shall not infer that, if a spouse continued to reside or maintain a financial, sexual, business relationship or a relationship for immigration purposes, with a spouse, or has in the past left and returned to a spouse, that family violence did not happen, or that the claims are exaggerated.

7. The court shall not infer that leaving a violent household to reside in a shelter or other temporary housing is contrary to the best interests of the child.

8. The court shall not infer that fleeing a jurisdiction with the children, with or without a court order, in an effort to escape family violence, is contrary to the best interests of the child.

9. The court shall not infer that the absence of observable physical injuries or the absence of external expressions of fear means the abuse did not happen.

The Association of Family and Conciliation Courts (AFCC) created Model Standards for Custody Evaluators in 2007[30] and Guidelines for Examining Intimate Partner Violence in 2016[31] as a supplement to the Model Standards. These Guidelines are widely used in the United States and in parts of Canada, such as Ontario, which has an AFCC Chapter, but they are not yet widely used in British Columbia. We will refer to these Guidelines further, but here we emphasize Guideline 5 under the heading "Ensure an Informed, Fair, Accountable Process". It deals with the importance of recognizing gender, cultural and other biases relating to intimate partner violence. Its inclusion supports the view that there continues to be concerns about gender-based bias. Guideline 5 states:

5. Mitigation of Bias. A Child custody evaluator strives to recognize his or her gender, cultural and other biases related to intimate partner violence and take active steps to alleviate the influence of bias on the evaluation process.

An evaluator endeavors to be alert to and avoid:

a. Imposition of personal assumptions, biases, and beliefs about intimate partner violence and parenting and co-parenting;

b. Misapplication of dominant cultural norms and values;

c. Application of gender-based stereotypes and role expectations that can normalize abuse and discrimination;

d. Consideration of hypotheses that are not informed by existing research data on intimate partner violence; and

e. Use and or misapplication of "cultural explanations" offered by parties to justify (i) maternal and/or paternal inequality and devaluation, (ii) attitudes to divorce that

[30] https://www.afccnet.org/Portals/0/ModelStdsChildCustodyEvalSept2006.pdf

[31] https://www.afccnet.org/Portals/0/Center%20for%20Excellance/Guidelines%20for%20Examining%20Intimate%20Partner%20Violence.pdf?ver=2016-05-16-183725-603 (Included in Program Materials)

stigmatize parents, and/or (iii) roles and practices that elevate or diminish the authority and social connections of either parent.

An evaluator's efforts to limit the impact of bias may include, but are not limited to: self-assessment, continued collection of information, updating central hypotheses, and seeking professional consultation.

Assessing Credibility in Family Violence Cases – A Cautionary Note

Gender based concerns about the assessment of women's credibility are further complicated by research showing how difficult it is for most people, including professionals, to actually detect deliberate lies.[32] *The Ring of Truth, the Clang of Lies – Assessing Credibility in the Courtroom*[33] is an article written by Retired B.C. Supreme Court Justice Lynn Smith in 2011. In it she discusses the challenges of detecting deliberate lies. The article is informed by a long-term credibility assessment project undertaken by her during a judicial study leave. Her conclusions are informative.

She says in essence that the body of social science research into detecting deception shows that credibility assessment is an inherently difficult task. The research consistently shows both that people, including professionals, are not particularly good lie detectors, and that most people overestimate their competence at lie detecting. She points to a large-scale meta-analysis of 79 studies from 1980 to 2007 showing that accuracy rates for deception detection averages 54.27%. She makes the point that the rates for what she calls professional lie catchers are only marginally better; another analysis of 28 studies from 1991 to 2007 found an average accuracy rate of 55.91%.

2. Family Violence and Women's Lived Reality More Generally

In our 2012 NJI Consultation the participants felt it was important for judges to understand the nature and extent of gender inequality, its intersectional nature, and the added challenges faced by particularly marginalized/vulnerable women.[34] While dealing with the court system (and sometimes two or more proceedings when there are criminal and/or child protection proceedings) they may also face a myriad of other issues which make 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

[32] What follows in this respect is excerpted from Independent and Impartial Parenting Assessments, *supra* note 7.
[33] Viscount Memorial Lecture, University of New Brunswick, 63 U.N.B.L.J. 10 (2012)
[34] NJI Consultation, *supra* note 9.

the following - an aboriginal woman. a racialized woman; a woman with a disability; a senior woman; an immigrant/refugee woman, and a sexual minority.

They said, collectively, that women may also 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 at that time received 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."

We identified ongoing inequality concerns for women relevant to family law proceedings in 2017 in Judges as Equality Guardians.[35] We discussed aspects of the nature and extent of ongoing violence against women, including concerns about how women's credibility can be inappropriately undermined, ongoing economic disadvantage and the continued existence of the multiple disadvantages described in the 2012 NJI Consultation. These same kinds of issues were also identified in late 2018 in the NAWL Luke's House Bill C-78 Brief, and in its accompanying Discussion Paper.[36] The latter identifies the importance of an intersectional gender-based approach to family violence and describes the realities of women's ongoing inequality. As they summarized it:[37]

> Women have not yet achieved equality. This is apparent in the family, where, predominantly, women continue to be the primary caregivers to children and to carry a larger role in terms of household management and choses as well as care of family elders. In addition, time spent on unpaid family labour affect the time spent at work, which contributes to the persistent gender pay gap in Canada. In turn, the gender pay gap makes such unpaid labour even more onerous and exacerbates women's difficulties when problematic intimate relationships end.

D. FAMILY VIOLENCE AND CHILDREN'S SUBSTANTIVE EQUALITY RIGHTS

Acting with informed impartiality in the conduct of parenting assessments and judging with informed impartially in family law cases impacting children require an understanding of and application of the substantive equality rights of children, taking into account children's lived realities. *The Charter*, like other domestic and international

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[35] *Supra* note 13 at pp. 27-39.

[36] http://nawl.ca/files/NAWL_and_Lukes_Place_Discussion_Paper_on_Bill_C78_(final_for_submission)_(1).pdf

[37] *Ibid* at p. 5

human rights instruments, ostensibly provides equal benefit of and protection of the law without discrimination to all people, including Charter protection from discrimination based on age. However, children's unique circumstances make the realization of those rights much more difficult for them than for adults. They cannot vote. Their rights, which focus on their overall safety, security and well-being, including their ability to participate in decision that affect them, can be overlooked, or even undermined by adults. Recognizing this, Canada played a leading role in 1989 in the creation of the *UN Convention on the Rights of the Child*, (the Convention or the CRC), ratifying it in 1991. It is the most universally ratified treaty in history, with only one country, the United States, having failed to do so.[38]

Lady Brenda Hale, Chief Justice of the United Kingdom Supreme Court, captured well the essence of the resulting child rights approach in her forward to *Rewriting Children's Rights Judgments, From Academic Vision to New Practice.*[39]; she stated that courts should "think of the child as a real human being, with his or her own distinctive personality and rights, and not as an extension of the adults involved."[40] That same year, at the CLEBC conference on Access to Justice for Children, Child Rights in Action, British Columbia's Chief Justice Robert Bauman emphasized the importance for children of not just having rights, but also being able to implement them. He described the enforcement of their rights within a framework of empowerment of children, not paternalism:[41]

> For any right to be more than just a promise, an individual must have a means with which to enforce the right. For children, accessing enforcement measures is particularly problematic because of the dependence, lack of maturity and actual or perceived voicelessness. Access to justice for children is about building a

[38] For more details about this point, and for a comprehensive look at legal representation for children and its underpinnings, see Hon. Donna J. Martinson and Caterina E. Tempesta, *Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation.* (A Child Rights Approach). (2018) 31 Can. J. Fam. L. 151. See also the comprehensive, online *Child Rights Toolkit*, a project of the United Nations *Convention on the Rights of the Child* Subcommittee of the Canadian Bar Association's National Children's Law Committee, May 2017, online: <www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit>

[39] Forward, May 31, 2017, in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore, editors, *Rewriting Children's Rights Judgments,* Oxford and Portland, Oregon, 2017 at ix. Lady Hale was a strong supporter of this international research project examining judgments from a child rights perspective.

[40] At p. ix. She elaborated on the need to consider children's rights in all areas of law in her follow-up keynote address called "Are Children Human" at the *World Congress on Family Law and Child Rights* in Dublin Ireland in June 2017.

[41] *Why Access to Justice for Children Matters***,** CLE BC Access to Justice for Children: Child Rights in Action Conference, May 11, 2017 at p. 2. The conference launched the CBA Child Rights Toolkit, *supra* note 38.

> system that recognizes these difficulties, but nonetheless gives children participatory rights. It is not about paternalism. It is about empowerment.

In *Children: the Silenced Citizens*,[42] the Senate Standing Committee on Human Rights referred to a paternalistic, needs-based approach as treating children as "human becomings" rather than human beings.[43] It observed that "the rights-based approach is of particular importance in the discussion of children's rights because of children's often intense vulnerability, the frequent competition between children's rights and those of adults, and the resulting ease with which a more paternalistic and needs-based approach can be adopted."[44]

In this section, we first consider family violence and its connection to children's participatory rights under the CRC. We then consider further Chief Justice Bauman's comments about enforcement of children's rights by looking at the CRC's implementation scheme. We conclude by looking at the legal status of the CRC in Canada, including a review of recent *obiter* comments by the B.C. Court of Appeal in this respect in *J.E.S.D v. Y.E.P.*[45] (*J.E.S.D.*).

1. Family Violence and Participatory Rights

Violence against children while in the care of parents, legal guardians or other persons is specifically addressed in the Convention. Article 19(1) states:

> State Parties [Canada] shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardians(s) or any other person who has the care of the child. (emphasis added)

An integral part of the implementation of the *Convention* is the creation in the Convention itself of the United Nations Committee on the Rights of the Child (the Committee) to examine the progress made by "States Parties" in achieving the realization of the obligations undertaken in the *Convention*.[46] The Committee periodically provides "General Comments" on the interpretation of the Articles of the

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42 Senate, Standing Committee on Human Rights, "Children: The Silenced Citizens: Final Report of the Standing Senate Committee on Human Rights" (April 2007) [The Silenced Citizens].

43 *Ibid* at 24.

44 *Ibid* at 27.

45 BCCA 2018 BCCA 286. (JESD)

46 *Ibid*, at 43.

Convention.[47] The three most relevant to family law and family violence are General Comment 12 (2009), "the right of the child to be heard",[48] General Comment 14 (2013), "the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)",[49] and General Comment 13 (2011), "the right of the child to freedom from all forms of violence".

With respect to family violence, the Committee, in General Comment 13, emphasized that the child's right to be heard has particular relevance in violence situations and said that the participation right commences with very young children who are particularly vulnerable to violence. (para. 63) The Committee also expressed urgent concern about violence against children generally: the extent and intensity of violence against children is alarming (para. 2); this requires that measures to end violence be massively strengthened and expanded (para. 2); no violence against children is justifiable; and all violence against children is preventable (para. 3(a)).

There is a concern that when family violence is in issue, some children do not have an opportunity to participate, in a meaningful way, in family law proceedings that will have such a profound effect on their lives and to have their views taken seriously. For example, the November 2018 Women's Legal Education and Action Fund (LEAF's) Brief to the Justice and Human Rights Parliamentary Committee relating to Bill C-78, tied this concern to claims of alienation when family violence is an issue:[50]

> The requirement in s. 16(3)(e) to consider child views and preferences recognizes that the perspectives of children are inextricably linked to their best

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[47] While the General Comments are not binding in the same way that a legislative provision might be, they are the mechanism by which Canada's compliance with the CRC is measured in Canada's "Concluding Observations", the Committee's evaluation of its compliance. Article 44 of the CRC requires Canada to submit reports on its compliance measure. In that sense, the General Comments are both persuasive, and authoritative. Both General Comments and Concluding Observations have been referred to by Canadian courts in interpreting domestic law. (See e.g. *Divito v Canada (Public Safety and Emergency Preparedness),* 2013 SCC 47 at paras 26–27, [2013] 3 SCR 157 (citing a General Comment) [*Divito*]; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at paras 186–187, [2004] 1 SCR 76 (citing a Concluding Observation) [*Canadian Foundation for Children*]; *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at para 462 (citing a General Comment))

[48] UN Committee on the Rights of the Child, *General Comment No 12 (2009): the right of the child to be heard*, 2009, UN Doc CRC/C/GC/12 [General Comment 12].

[49] UN Committee on the Rights of the Child, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, 2013, UN Doc CRC/C/GC/14 [General Comment 14].

[50] https://www.leaf.ca/wp-content/uploads/2018/11/LEAF-Brief-on-BILL-C-78-.pdf a p. 2. (The first author of this paper participated in the writing of this Brief)

> interests. The provision also placed the Divorce Act in line with Canada's obligations pursuant to the United Nations Convention on the Rights of the Child, Article 12, which obligates Canada, in all matters affecting the child, to ensure that the views of all children, without discrimination, are heard and given due weight – taken seriously, in accordance with age and maturity. The new provision should help to prevent the current practice of ignoring the views of children when claims of alienation are made and where family violence is at issue. (emphasis added)

More recently, in April 2019, a very broad-based group of academics and other organizations concerned about violence against women and children in several countries addressed an attempt through the World Health Organization (WHO) to consider the addition of "parental alienation" (PA) as a "caregiver-child relationship problem" in ICD-11, the *International Classification of Diseases 11th Revision.* The concerns were set out in a letter of protest supported, as of June 14, 2019, by over 1000 endorsements from institutions and experts in 35 different countries. More detail is provided in Part II, "Family violence and Alienation Cases".[51] Those signing were concerned that there had not been any prior consultation about the proposal. Two concerns summarized at the beginning of the letter are particularly relevant to the issues discussed in this section:

> 7) The silencing of women and children such that evidence of family violence and of negative parenting is not presented to courts; and
>
> (8) The discounting of the perspectives of children and the non-protection of children from parental abuse, contrary to the internationally recognized rights of children set out in the United Nations *Convention on the Rights of the Child.*

2. Implementation of Children's Rights

Here we look at the implementation of children's rights generally, and then focus on one of the safeguards/guarantees we identify, the right of the child to be heard under Article 12 of the Convention.

Generally

The CRC, in its preamble, states that, bearing in mind that, as indicated in the Declaration on the Rights of the Child, "the child by reason of his physical and mental

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51 See also Linda C Neilson (2018). Canada. Parental Alienation Empirical Analysis: http://www.fredacentre.com/wp-content/uploads/2018/02/Parental-Alienation-Linda-Neilson.pdf and the letter.
The letter can be found at: http://learningtoendabuse.ca/WHO.22April-1.pdf

immaturity, needs special safeguards and care, including appropriate legal protection before as well as after birth".

The CRC, through the UN Committee on the Rights of the Child, describes legal guarantees and procedural safeguards which are essential to the enforcement/implementation of children's rights. In General Comment 14, under a section called "Implementation: assessing and determining the child's best interests", the Committee states that two steps should be followed to assess children's best interests. First, give the best interests of the child concrete content within the specific factual context of the case (s. 46(a)). Second, to do so, "follow a procedure that ensures legal guarantees and proper application of the right" (s. 46(b)). The best interests determination, it says, describes the "formal process, with strict procedural safeguards designed to determine the child's best interests on the basis of the best interests assessment." (s. 47)).

The Committee then describes procedural safeguards under the heading "Procedural safeguards to guarantee the implementation of the child's best interests". Specifically, it says that, to ensure the correct implementation of the child's right to have his or her best interests taken a primary consideration, some child-friendly procedural guarantees "must" be put in place and followed. As such, the concept of the child's best interests is a rule of procedure. (s. 85) The Committee then "invites" States and all persons who are in a position to assess and determine the child's best interests to pay special attention to the following eight "safeguards and guarantees":

(a) Right of the child to express his or her own views (ss. 89-91)

(b) Establishment of facts (s. 92)

(c) Time perception (s. 93)

(d) Qualified professionals (ss. 94 and 95)

(e) Legal representation (s. 96)

(f) Legal reasoning (s. 97)

(g) Mechanisms to review or revise decision. (s. 98) and

(h) Child-rights impact assessment (s. 9)

The legal representation section says that the "child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts." We will consider legal representation and its link to other safeguards and guarantees in Part III. With respect to legal reasoning, the Committee states that not only must the best interests decision be explained generally, but if the decision differs from the views of the child, the reasons for that must be clearly stated.

A Focus on Article 12 and the Child's Right to Express Views and be Heard

It will be noted that ensuring the right of the child to express his or her own views is only one of the eight safeguards/guarantees. It addresses Article 12 of the Convention, the one which is most well-known. Article 12 states:

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

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

The Committee on the Rights of the Child has made several observations about the operation of and implementation of Article 12. Among them are the following.[52] The Committee confirms that in cases of separation and divorce, "the children of the relationship are unequivocally affected by decisions of the court."[53] The Committee states that "communicating with children to facilitate meaningful child participation and identify their best interests" is one of the essential procedural safeguards. Such communication should include informing children about the process and possible sustainable solutions and services, as well as collecting information from children and seeking their views.[54]

It encourages ongoing participation which includes information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.[55] The Committee indicates that States should encourage the child to form a free view and should provide an environment that enables the child to exercise her or his right to be heard.[56]

The Committee supports a low threshold for a child being given the opportunity to express his or her views, saying that the requirement should be seen not as a limitation,

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52 A Child Rights Approach *supra* note 38 at pp. 175 TO 178.

53 General Comment 12, *supra* note 48 at para 51.

54 General Comment 14, *supra* note 49 at para 89. See also General Comment 12, *ibid* at para 13.

55 *Ibid* at para 3.

56 *Ibid* at para 11.

but rather an obligation to assess capacity to form an autonomous opinion to the greatest extent possible:

> Research shows that the child is able to form views from the youngest age, even when she or he may be unable to express them verbally. Consequently, full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences.[57]

There is no presumption of incapacity. Article 12 imposes no age limits and the Committee discourages the introduction of limits that would restrict the child's rights to be heard.[58] By requiring that due weight be given to a child's views in accordance with age and maturity, Article 12 makes clear that age alone cannot determine the significance of these views. Research has shown that information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacities to form a view.[59] "Maturity" refers to the ability to understand and assess the implications of a particular matter. The greater the impact of the outcome on the life of the child, the more relevant the appropriate assessment of the maturity of that child.

Simply listening to the child is insufficient; the views of the child have to be seriously considered when the child is capable of forming her or his own views. If the child is capable of forming her or his own views in a reasonable and independent manner, the decision maker must consider the views of the child *as a* significant factor in the settlement of the issue.[60] The Committee views Article 12 as directly—"inextricably"—linked to Article 3(1), which makes a child's best interests a primary consideration in all actions.[61]

Participation includes recognition that: participation is a process, not a momentary act;[62] the child can choose to participate in a proceeding either directly or through a

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57 General Comment 12, *supra* note 48 at para 21.

58 *Ibid* at paras 20–21.

59 *Ibid* at para 29.

60 *Ibid* at paras 28 amd 44,

61 General Comment 14, para. 43.

62 General Comment 12, at para 13.

representative;[63] a child has the right to be informed about all aspects of the process;[64] and a child should not be interviewed more often than necessary, especially when harmful events are being explored, as the "hearing of a child is a difficult process that can have a traumatic impact on the child".[65]

The Committee recommends a five-step implementation process: (i) preparation, including being informed of the right to be heard and the process to be followed at the hearing; (ii) the hearing, the context of which must be enabling and encouraging; (iii) assessment of capacity; (iv) being informed about the weight given to the views of the child; and (v) complaints, remedies, and redress when their right to be heard and to have their views given due weight is violated, including access to an appeals process in the context of judicial proceedings.[66]

The Committee also suggests nine basic requirements for the implementation of the right to be heard to avoid tokenism. Participation processes must be: (i) transparent and informative—children must be provided with full, accessible information about their participation rights; (ii) voluntary; (iii) respectful; (iv) relevant to children's lives; (v) child-friendly; (vi) inclusive; (vii) supported by appropriately trained adults; (viii) safe and sensitive to risk—children must be aware of their right to be protected from harm and where to get help, if needed; and (ix) accountable—a commitment to follow-up and evaluation is essential.[67]

3. The Legal Status of the Convention in Canada

While the Convention is not incorporated into B.C. family law directly, our laws, including the common law, and our policies and procedures, should conform to the child rights principles found in it. Those principles inform every aspect of the work judges do, from encouraging settlement at Case Conferences, to the interpretation of statutes, policies and practices, and in the development of and application of the common law, including the law of evidence, making credibility assessments, and in the analysis leading to the ultimate decision. Child rights principles are at the core of contextual analysis – understanding children's lived realities.

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63 *Ibid* at para 35.

64 *Ibid* at para 25.

65 *Ibid at* para 24.

66 *Ibid* at paras 40–47.

67 *Ibid* at para 134.

Canada has taken and continues to take the position that it is not necessary to implement the Convention through legislation because its laws already comply with it.[68] The British Columbia Court of Appeal has commented on the legal status of the CRC in Canada in July 2018, in *obiter* remarks in *J.E.S.D v. Y.E.P*[69] With respect to the presumption of conformity, the Court said that it is well settled that international obligations can inform the interpretation of domestic statutes, even when those obligations have not been implemented in domestic law. If possible, courts will avoid statutory interpretations that place Canada in breach of its international obligations and will prefer interpretations that reflect the principles of international law: at para. 32. This is a rebuttable presumption that can be rebutted by the clear words of the statute under consideration. Where the provisions of the statute are not genuinely ambiguous or require clarification, it is inappropriate for the court to look to international law for guidance: at paras. 32 and 33.

With respect to General Comments, the Court stated that while commentaries are not binding, they can shed light on the correct interpretation of the articles of the UNCRC: at para. 38. The Court also cautioned that the Convention applies across diverse legal systems and care must be exercised in interpreting the provisions of international conventions. A purposive approach is required, and it would be a mistake to assume that words in the convention necessarily correspond to specific concepts established in the Canadian legal system: at para. 35.

The Court notes that General Comment 12, para. 35, emphasizes that giving the child the opportunity to be heard directly, as was done in the case with which the Court was dealing, is the best option: at para. 35 of the decision. The Committee, in para. 35 of the General Comment, recommends that, wherever possible, the child must be given the opportunity to be directly heard in any proceedings.

PART II – SECTION 211 CONTEXT COMPARISON – ISSUES THEN (2012) AND NOW (2019)

In our Introduction we referred to the NJI Community Consultation on Family Violence in 2012 which had a focus on s. 211 reports. We summarized many of the negative experiences and concerns about those experiences that women serving organizations were noticing, ones they felt were inconsistent with women's substantive equality rights. We noted that in 2019 we have found that many of the same concerns exist. The purpose of this Part is to elaborate on those concerns by comparing the situation in 2012 with the present. We do so by first identifying some overarching concerns identified then and now. We next compare specific issues within the same time frames.

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68 See A Child Rights Approach, *supra* note 38 at p. 169.

69 2018 BCCA 286

Where appropriate, we refer to other research, and international Codes and Guidelines that address those concerns.

We have obtained our current B.C. information from a number of sources. One is West Coast LEAF which has continued to monitor parenting assessments since its 2012 report. A second is Rise Women's Legal Centre, which has identified ongoing concerns relating to s. 211 reports as part of a three-year project funded by Status of Women Canada. As part of that project, a roundtable discussion took place on October 29, 2019. A third is the B.C. Committee for the Coordination of Women's Safety, an organization supported by government and administered by the Ending Violence Association of B.C. The Committee includes government members, police, Crown counsel, other lawyers, women serving groups from all parts of B.C. and others (including the two authors). It has created a working group to consider s. 211 reports as a result of continuing concerns being reported throughout the province. The fourth is related experiences at the Surrey Women's Centre. The fifth is input from a very experienced family law lawyer who specializes in cases involving family violence.

A. OVERARCHING CONCERNS

2012

Those who participated in the 2012 Consultation[70] felt, overall, that for the most part, parenting assessments did not treat violence against women and children seriously. Women's claims of violence could be disbelieved. This was viewed as a significant gender inequality issue.

A second report released in June 2012 (after the Consultation Report release) was produced by West Coast LEAF and written by Shahnaz Rahman and Laura Track. It was entitled, "Troubling Assessments: Custody and Access Reports and their Equality Implications for BC Women"[71] (*Troubling Assessments*). Among the report's overall conclusions were these: There are no binding guidelines or directives that govern the preparation of the reports; many low-income women cannot afford legal representation and do not qualify for legal aid in these important cases. Without a lawyer, challenging a problematic report is extremely difficult; demand for publicly funded assessments consistently outstrips supply, leading to significant delays. At upwards of $8,000 (that cost is easily doubled in recent times), the cost of a privately prepared assessment is out of reach for most families. The Report concluded that a rights-respecting system of

[70] The NJI Consultation, *supra* note 9.

[71] Shahnaz Rahman and Laura Track (2012). "Troubling Assessments: Custody and Access Reports and their Equality Implications for BC Women", West Coast LEAF.

family law – one that promotes best outcomes for children and families - must invest in women's equality.

The broader concerns registered re problems with parenting assessments in 2012 are consistent with the work of the second author completed in 2004.[72] Fifteen years ago she reported that clear biases in the child protection and court processes were found in the reports which impacted the decision-making outcomes. Biases such as stereotypes of motherhood, victim blaming and the myth that both parents should always have access to children in order that their best interests can be achieved existed then as well. The credibility of the mother was often challenged in how the mother's reality was disbelieved, in some cases to the point of alleging that the mother was engaging in parental alienation tactics. One question to be explored is, what has really changed since that time?

2019

The Director of Law Reform at West Coast LEAF[73] summed up, in 2019, what has and has not changed from the time the West Coast LEAF project was completed: "…the issues with custody and access reports that we identified in our 2012 report, "*Troubling Assessments: Custody and Access Reports and their Equality Implications for BC Women"*, persist despite the noteworthy improvements in the aim and language of the 2011 *Family Law Act.* The Act's emphasis on addressing family violence and the new language regarding expert assessments has not resulted in any significant change in the way expert assessments are prepared or relied upon by the courts. In large part this is due to the fact that assessors lack the training to be able to accurately assess a parent's ability to meet their child's needs in contexts of family violence. In fact, many assessors do not know how to screen for family violence and make problematic assumptions about women's behaviour particularly when disclosure does not occur from the outset".

One of the co-authors of the report, who is also the Executive Director of Surrey Women's Centre[74], notes as well that the costs of retaining a court ordered psychological testing /assessments range from $3000 to $18,000. Women have reported going into debt because of these assessments, only to find out that they are not believed and diagnosed with many disorder labels. These expensive assessments have created huge financial implications for women who are already struggling with post separation poverty.

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[72] Jackson, M. (2004). "The Invisibility of Abuse in Custody and Access Assessments", presentation at the Feminism, Law, and Social Change Workshop, UBC, May 7, 2004.

[73] Elba Bendo

[74] Shahnaz Rahman

A senior family law lawyer[75] with an expertise in family law raised concerns about systemic failure to address gendered violence:

> As a family law lawyer, I am deeply concerned that between the ongoing gaps and lack of comprehensive and consistent interpretation and analysis of gendered violence, specifically violence against women in the legal system and the nexus of this with psychological systems that also have evidence a failure to address the impact of gendered violence in such standardized assessment such as the s. 211 reports that systemically both institutions – legal and psychological – are failing women survivors of violence.

Kim Hawkins, the Executive Director of the Rise Women's Legal Clinic, expressed the concern that there are no legislated regulations or requirements for what information should be included in a section 211 report or what methods should be used to gather the underlying data.

B. SPECIFIC CONCERNS

In this section, we compare more specific concerns raised in 2012 with the situation in 2019. Those concerns include, first: a lack of qualifications of the assessors.

1. Lack of Family Violence Qualifications

In 2012, both the NJI Consultation and the *Troubling Assessments* report highlighted the fact that many assessors were not qualified to do an assessment when family violence is or could be an issue. They also noted that there are no standards, guidelines or regulations about the need for such qualifications for assessors. This was so even though regulations to the FLA required that mediators, arbitrators and parenting coordinators have a minimum of 14 hours training relating to family violence.

In an appendix to *Fair and Impartial Parenting Assessments,* Dr. Allan Wade sets out criteria which should be considered to qualify someone as an expert witness.[76]

In 2019 this continues to be viewed as a major concern for West Coast LEAF, Rise, and the B.C. Committee for the Coordination of Women's Safety (CCWS). As Elba Bendo put it, in large part the lack of significant change referred to above, is due to the fact that

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[75] Zara Suleman

[76] Dr. Allan Wade, "Criteria for Qualifications as Expert Witnesses in Interpersonal Violence and Family Law," Family Violence and the Family Law Act – Responses to Post-Program Participant Questions, "The FLA: Protecting the Safety, Security and Well-Being of Children and Other Family Members – Changing Legal Frameworks and Professional Responsibilities,", BCCLE – The Family Law Act - Everything you Always Wanted to Know, January 2013, at pp. 5.5.14 – 5.5.17, as included in "The Family Law Act and Family Violence: Independent and Impartial Parenting Assessments", The Honourable Donna Martinson, QC, LLM. (at p.29)
(2013). http://www.fredacentre.com/reports/reports/

assessors lack the training to be able to accurately assess a parent's ability to meet their child's needs in contexts of family violence. In fact, many assessors do not know how to screen for family violence and make problematic assumptions about women's behaviour particularly when disclosure does not occur from the outset.

Dr. Linda Neilson, author of a *Judicial Bench Book* on domestic violence, states that "*Many mental health and parenting evaluation experts do not have specialized domestic violence expertise…*[in the absence of such expertise there can be a *considerable risk that child safety will be ignored*].[77]

The Association of Family and Conciliation Courts created Model Standards in 2007 which address qualifications in domestic violence cases. 5.11 states:

> Evaluations involving allegations of domestic violence require specialized knowledge and training as well as the use of a "generally recognized systematic approach to assessment of such issues as domestic violence…"

The AFCC also created Guidelines for Examining Intimate Partner Violence in 2016 as a supplement to the Model Standards. It too emphasizes the importance of specialized qualifications:

> *Ensuring an Informed, Fair and Accountable Process*
>
> *3. <u>Knowledge and Skill</u> A child custody evaluator needs in-depth knowledge of the nature, dynamics and impact of intimate partner violence.*

Courts in Australia have also recognized the importance of specialized qualifications: *Australian Standards of Practice for Family Assessments and Reporting, a publication developed by the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia.* The Standards State:

> e. Family assessors must have detailed knowledge and understanding of the nature, dynamics, cycle, impact and relevance of family violence and conduct assessments, as per the Family Court of Australia and Federal Circuit Court of Australia Family Violence Best Practice Principles – edition 3.1 (2013) and the Family Violence Policy of the Family Court of Western Australia.

Courts in the United States have recognized them as well: *Navigating Custody and Visitation Evaluations in Cases with Domestic Violence: A Judge's Guide* – (the National Council of Juvenile and Family Court Judges and the State Justice Institute). The Guide states:

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[77] Neilson, L. (2017). "Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases", in CAN LII Docs 2, section 4.3.

Choose the Expert (page 16)

First and Foremost, Training and Experience in Domestic Violence Domestic violence is its own specialty. Qualification as an expert in the mental health field does not necessarily include competence in assessing the presence of domestic violence, its impact on those directly and indirectly affected by it, or its implications for the parenting of each party. And even though some jurisdictions are now requiring custody evaluators to take a minimum amount of training in domestic violence, that "basic training" by itself is unlikely to qualify an evaluator as an expert, or even necessarily competent, in such cases.

Ideally, your jurisdiction will already have a way of designating evaluators who have particular competence in domestic violence. Where that is not the case, you might test the evaluator's level of experience and expertise, despite the difficulties inherent in any such inquiry, by asking:

• whether the evaluator has been certified as an expert in, or competent in, issues of domestic violence by a professional agency or organization; • what courses or training (over what period of time) the evaluator has taken focused on domestic violence; • the number of cases involving domestic violence in which the evaluator has been appointed; and • the number of cases in which the evaluator has been qualified as an expert in domestic violence.

2. <u>Overuse and Misuse of Expert Reports</u>

<u>2012</u>

The overuse and misuse of psychological testing together with a lack of understanding of trauma and its impact on women was raised as a problem in the Consultation. This can result in the inappropriate pathologizing of women.

In the 2012 *Troubling Assessments* report, Dr. Allan Wade states that, "I am concerned about the use and misinterpretation of psychological tests in custody and access reports because some widely used tests are wrongly used to claim that the non-offending parent is mentally ill and therefore not a competent parent" (*Troubling Assessments*, p.32).

<u>2019</u>

Zara Suleman described similar concerns which still exist:

> *Section 211 Reports, by virtue of their standardized psychological testing and framework often negatively impact women and children facing violence. The so called "neutral" measures, in my experience have the disproportionate effect of labelling survivors of violence as the "problem" parent.*

There continues to be a lack of applying a fulsome and intersectional analysis of the dynamics of gendered violence during these assessments.

False Positives

Kim Hawkins, the Director of the Rise Clinic, feels there can be inherent problems with the validity of certain psychological tests:

… psychological tests that are frequently administered are known to give false positives for some type of diagnoses for women experiencing violence.

In 2016, the Atira Women's Resource Society in Vancouver produced a report entitled, *The Limits of Psychological Testing in Parental Capacity Assessment Reports: A Literature Review*[78]. (Note: additional references for this section are found in this paper's Appendix). It addressed two questions: Are there issues of gender or cultural bias in applying psychological tests? Are these tests appropriate for use in Parental Capacity Assessments?

For the first question, several important points were made. One was the fact that according to Hagen & Castagna (2001), '…(t)here is a body of research indicating that female victims of domestic abuse receive elevations in the MMPI-2 violence, (a psychological test)…used in 84% of child custody evaluations' that measures paranoia and schizophrenia Erickson (2005) (p. 2). Morrell et al. (2001) earlier identified that the composite profile 'typically interpreted as a chronic schizophrenic profile' matches the average profile of a female survivor of domestic abuse (p. 2). Further, Saunders (2015) found that evaluators conducting Parental Competency Assessments "who only used psychological tests had less danger and IPV screening knowledge and 'were more likely to believe that mothers make false allegations and to award sole or joint custody to the father in the vignette" (p. 3) (footnotes omitted).

For the second question, it should first be noted that Bala (2007) found no psychological test has been 'scientifically validated for its predictive reliability for outcomes in child-related disputes' (p. 5). This is supported by Choate et al.(2009) and Galatzer-Levy et al. (2010). Additionally, tests created specifically for use in parental assessments have 'little normative data' around them, meaning that 'adequate reliability and validity cannot be established' (Rohrbaugh (2008). Emery et al. (2005) examined several of the most commonly used child custody specific tests and found none of them are backed up by sufficient data to qualify as having 'scientific support' (p. 5) (footnotes omitted).

[78] Goddard-Rebstein, H. (2016). "The Limits of Psychological Testing in Parental Capacity Assessment Reports: A Literature Review", Atira Women's Resource Society (reviewed and edited by Amber Prince, Lawyer). Other references for this section are found in an Appendix to the paper.

The authors conclude that these psychological tests may also misrepresent members of minority groups with cultural systems that diverge from the majority as having elevated levels of psychological issues (p.4).

3. Lack of Trauma Informed Practice

This issue was raised in the Committee for the Coordination for Women's Safety Working (CCWS) Group on s. 211 Reports (October 2017):

Around the province there is a concern about *Assessors' understanding of trauma and violence – lack of appreciation that the dynamics of power and control can last even after relationship breakdown.*

There have been numerous diagnoses described of women leaving violence as "borderline personality disorder" but never suffering "trauma from violence/abuse".

These diagnoses are often used by one spouse (typically the one with more resources) to discredit the other.

In BC in 2016, there were two government developed guides/manuals created which focused on trauma-informed practice. The first was a guide released by the BC Ministry of Child and Family Development, entitled, *Healing Families, Helping Systems: A Trauma-Informed Practice Guide for Working with Children, Youth and Families*[79]. The second was a training manual, out of the BC Ministry of Public Safety and the Solicitor General (MPSSG), *Trauma-informed Practice Training for MPSSG Victim Services and Crime Division*[80].

In 2018, the Federal Department of Justice released a report in its Research Digest[81] which spoke to the need to implement trauma-informed approaches across sectors to provide a common conceptual framework that enhances efforts to develop integrated multi-sectoral responses for children and adults. These approaches also create opportunities for systems, and those who work within them, to improve the services they provide to people impacted by violence.

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[79] The first MCFD guidebook can be found at: http://trauma-informed_practice_guide(2).pdf

[80] The second training manual for MSSPG can be found at: http://endingviolence.org/event/trauma-informedpractice-training-mpssg-victim-services-crime-prevention-division/

[81] Ponic, P., Varcoe, C. & Smutylo, T. (2018). *Trauma- (and Violence-) Informed Approaches to Supporting Victims of Violence: Policy and Practice Considerations,* in Research Digest #9*:* https://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd9-rr9/p1.html

4. Impartiality/Credibility Assessments

2012

It was thought at that time that some psychologists are not neutral, and have preconceived biased notions about parenting that favour father's significant participation in children's lives, even when domestic violence exists, and even when well-founded research shows that such contact puts children at risk. They said that there are also numerous examples of lawyers telling clients that they should choose a particular psychologist because he favours fathers; subsequent analyses of these experts have confirmed this bias.

2019

This issue about the bias of assessors continues to raise significant concerns. The co-author of *Troubling Assessments* observes that there now appears to be a mobilization of psychologists to be seen as the most appropriate assessors for the reports, along with an increase in the (number of) judges ordering the reports from psychologist assessors.

5. Lack of Cultural Competence

Elba Bendo, Director of Law Reform, West Coast LEAF (2019) stated:

For Indigenous and racialized women, the shortage of professionals with cultural competency training, including a thorough understanding of the way that intergenerational trauma impacts one's behaviour and life circumstances, leads to reports that mislabel and misdiagnose women and understate their abilities to care for their children. In so doing, custody reports can further perpetuate harmful myths and stereotypes faced by the most marginalized women in family law proceedings. In turn, these women's ability to challenge the conclusions of a custody report is quite limited given that most are unrepresented in family law proceedings.

Cultural Competence Recommendations Regarding Assessment of Indigenous Peoples in Canada

A report released in 2018 by the Canadian Psychological Association and the Psychology Foundation of Canada[82], provides guidelines for how assessments of Indigenous Peoples should be made (p.12). Some of the guidelines clearly have relevance for family competency assessments.

[82] "*Psychology's Response to the Truth and Reconciliation Commission of Canada's Report",* May 2018.

It is argued that psychology in Canada has a responsibility to promote the development of more locally normed and culturally appropriate and grounded psychological tests and procedures. That the psychological assessment of Indigenous Peoples should avoid framing an individual in a Western diagnostic context, which often includes quantification, professional jargon, and abstraction from experience. It is recommended that psychologists administering assessments must emphasize Indigenous knowledge within community-based assessments, include community supports and focus on the Indigenous person's lived experience.

Language Competence Challenges Remain for Assessments of Women who speak another language and are being/have been abused

The co-author of *Troubling Assessments,* Shahnaz Rahman*,* reports that experiences of racism, minimizing of violence and westernized notions of "appropriate" parenting are used as measured norms in assessments. For example: In one situation, a mother who read stories to her children in her native language (Farsi) was perceived as not helping her child assimilate in the western society. Her inability to read stories in English were viewed as a mark against her parenting.

Non-English speaking women are further disadvantaged through these assessments. Interpretation support is not allowed in the psychological assessment process. Women fear being perceived as "uncooperative"…they are disadvantaged in how they express themselves in trying to care and protect their children.

She argued that now there are fewer advocates available as well to support these women because of funding limitations.

6. Minimization/Disappearance of Violence Generally

In the same LEAF Report, *Troubling Assessments* (2012), it was noted that women's experiences and abuse at the hands of their husbands have been ignored by assessors and, in some cases, used to paint women as "hysterical" or "vindictive".

"One particularly troubling finding from this study was that less than one-third of assessors agreed with the statement that adults rarely lie when they say their ex-spouse has sexually assaulted them. These results suggest that when a woman discloses abuse to a custody and access assessor, there is a very good chance the assessor will not believe she is telling the truth" (p.20).

In another way of explaining the minimization problem, Dr. Linda Coates and Dr. Allan Wade put forth a framework entitled, "The Interactional and Discursive View of Violence

and Resistance"[83], '…for critical analysis and research, prevention and intervention that takes into account the conditions that enable personalized violence, the actions of perpetrators and victims, and the language used in representing those actions' (p.511).

Their argument is a linguistics one which argues that by using highly conventional language, used daily, violence can be misrepresented, whether it be in written assessments or in the courtroom itself. "…the most harmful and abhorrent acts of violence can be represented in the most ordinary and benign terms. The conventionality of these terms endows violent acts with an air of acceptability and obscures their real nature from the victim's point of view (p.522).

7. Family Violence and Alienation Cases

2012

There were concerns in 2012, which continue today, that some women do not report violence because they are concerned about being accused of alienation and losing their children.

2019

In 2019, there are understandable concerns registered when one parent deliberately and inappropriately tries to alienate a child from the other parent/guardian in a separation situation. This becomes confounded as an issue when the separation is said to have occurred as a result of alleged abuse by one partner either only against the other partner or against both the non-abusive parent and the child(ren). Even when the abuse is just against the non-abusive parent, it has been documented that the child(ren) will be negatively affected, both in the short and long term. The latter adverse outcomes have been focused upon in the legal education literature.

While assuming maximum contact with both parents (consistent with the "friendly parents" idea) is frequently viewed as in the best interests of the children, and thus very important, there has been a lack of focus in legal education on the implications of the parental alienation concern when there are allegations of family violence in those situations.

Those family violence concerns can be minimized or ignored for a variety of reasons that have significant implications for the safety, security and wellbeing of victims of violence and their children. These are many of the same reasons which had also been identified in the 2012 Consultation, that is, many women are afraid to raise concerns about family violence and its impact on them and the children because they fear that if they do, they won't be believed or they will be accused of alienation and lose their

[83] Coates, L. & Wade, A. (2007), in *Journal of Family Violence*, vol.22, pp.511-522.

children. In fact, some lawyers have been reported to have advised their clients not to raise family violence/alienation issues for the same reasons.

As mentioned in Part I, it recently became known in Canada that the World Health Organization (WHO) was considering a proposal to add the index term of "parental alienation" (Code of QE.52) as a "caregiver-child relationship problem" to the ICD-11, the *International Classification of Diseases 11th Revision*. Concern was first registered to this proposal by representatives of academics, counselors, family violence agencies, and others who argued that there had not been any prior consultation in connection with gender equality issues associated with the concept. The main concern was from a women's safety and child development, health and safety point of view, as well as from research and science perspectives.

Dr. Linda Neilson, Professor Emerita[84], University of New Brunswick, Canada, and Research Fellow of the Muriel McQueen Fergusson Centre for Family Violence Research organized a letter of protest[85] to the addition, with the support and assistance of representatives from the above groups and, as noted above, the endorsement by over 1000 institutions and individual professionals and experts from 35 different countries, including Canada. This is clearly not just a problem confined to BC, but is of international concern.

The letter of protest requested removal of all references to "parental alienation" and related concepts in ICD-11 for the reasons set out below: Research and experience in court has demonstrated that the medical/mental health construct of parental alienation, which is at best controversial, is frequently employed to divert attention from domestic violence and abuse and other evidence relevant to the best interests of the child. Social context information can be misrepresented in the decision-making surrounding guardianship and safety issues.

Empirically verified problems associated with the application of parental alienation theory include:

- Limited support for the concept in scientific research on children
- Gender bias in the application and effects of parental alienation claims
- Deflection of attention from scrutiny of parenting practices and parent-child relationships in favor of assuming primary-care parental blame when children have poor relationships with the other parent

[84] Linda C Neilson (2018). Canada. Parental Alienation Empirical Analysis: http://www.fredacentre.com/wp-content/uploads/2018/02/Parental-Alienation-Linda-Neilson.pdf
[85] The letter can be found at: http://learningtoendabuse.ca/WHO.22April-1.pdf

- Deflection of attention from scrutiny of child risk and safety factors in family violence cases
- Imposition of equal time, joint custody presumptions or equal shared parental responsibility
- Deflection of attention from thorough analysis of the best interests of children criteria
- The silencing of women and children such that evidence of family violence and of negative parenting is not presented.
- The discounting of the perspectives of children and the failure to protect children from parental abuse, contrary to the internationally recognized rights of children set out in the United Nations *Convention on the Rights of the Child*
- Inappropriate assignment of parental blame for normal adolescent behavior
- Deflection of attention from studies that demonstrate child resistance to contact and child harm are better explained by factors other than those proposed by parental alienation theory
- Emerging evidence that parental alienation "remedies" are harming many children
- Negative effect of the theory on evidence and on legal responsibilities to assess children's best interests and safety
- The undermining of knowledge about how family violence harms children and what is needed for their safety and well-being.[86]

Despite these efforts, the proposal was apparently approved by the WHO on May 25, 2019, to come into force January 1, 2022. However, there continues to be concern registered internationally. In May 2019, the Platform of United Nations and regional independent mechanisms on violence against women and women rights voiced its concern for the recent inclusion of 'parental alienation' as a 'Caregiver-child relationship problem' that could be misused if applied without taking into consideration …international standards that require that incidents of violence against women are taken into account and that the exercise of any visitation or custody rights does not jeopardize the rights and safety of the victim or children. Accusations of parental

[86] Additional references for the Parental Alienation Issue:
Isabelle Côté & Simon Lapierre (2019) *L'Aliénation Parentale Stratégie D'Occultation De La Violence Conjugale*? (Ottawa: FemAnVi) Online: http://fede.qc.ca/sites/default/files/upload/documents/publications/rapport_ap.pdf

Julie Doughty (2018, Wales) *Review of Research and case law on parental alienation*: http://orca.cf.ac.uk/112511/1/review-of-research-and-case-law-on-parental-alienation.pdf

alienation by abusive fathers must be considered as a continuation of power and control by stated agencies and actors, including those deciding on child custody."

They were "concerned about patterns across various jurisdictions in the world that ignore intimate partner violence in determining child custody cases". They argued that ignoring IPV against women in such cases could result in serious risks to the children and therefore must be considered to ensure their effective protection. These experts further discouraged the abuse of the term "Parental Alienation" and of similar concepts and terms invoked to deny child custody to the mother and grant it to a father accused of domestic violence in a manner that totally disregards potential risks for the child(ren). "(T)he experts stressed that a holistic and coordinated approach based on existing international and regional standards must be applied..., not only to uphold the principle of the best interest of the child but also the principle of equality between men and women" (quotes and content taken from "Intimate partner violence against women is an essntial factor in the determination of child custody, say women's rights experts", May, 2019).

8. Screening/Risk Assessment and Safety Planning

2012

As noted earlier, "There is often 'no screening'. This should be a requirement."

Again, from the *Troubling Assessments* report (2012): The (Family Law) Act's "general focus on family violence is a welcome and positive development in BC's family law legislation; however, it is essential that the emphasis on the need to consider issues of family violence be extended to all professionals working in the family law system, including the psychologists and other professionals conducting custody and access assessments. But the legislation does not specifically require assessors to undertake an inquiry into potential situations of violence in the home, and it does not direct assessors to consider impacts of family violence on the best interests of the child" (p. 40).

2019

In 2019, concerns continue to be raised about whether there is screening at all, and also whether the screening that does occur is adequate. It was reported there have been challenges with initial assessments in government reports. In addition, there have been discussions about not separating so called screening from some form of risk assessment, e.g., the 19-factor risk guide, employed by the B.C. RCMP and the B.C. Municipal Police, in order that informed decisions about safety planning can be made.

The spirit of the competence rule (FLS *Model Code* R 3.1-2) does…include screening for family violence…(A lawyer) cannot competently give legal advice if she does not have the critical information associated with family violence. Therefore, properly read, the competence rule does include screening for family violence, but given that family lawyers do not screen, the she spirit is not being recognized in practice[87].

9. Over reliance on Reports by Courts

2012

From the 2012 *Troubling Assessments* Report, it was stated that most judges give significant weight to the opinions and recommendations made by assessors, leading to the concerns that they are allowing assessors to usurp their proper decision-making role.

2019

Similarly, in 2019, Elba Bendo commented that left unchallenged, custody and access reports can inappropriately influence the court's decisions because many judges rely heavily on the recommendations and findings reported by assessors, often usurping their own decision-making role.

PART III – SECTION 211 REPORTS AND FAMILY VIOLENCE: INTEGRATING LEGAL PRINCIPLES, JUDICIAL SKILLS AND SOCIAL CONTEXT

This Part incorporates the contextual information found in Part II into the relevant s. 211 legal framework and provides practical suggestions/guidelines. Section 211(1) of the FLA states:[88]

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[87] Deanne Sowter, March 20, 2019, *ablawg.ca*

[88] The remaining subsections state:

(2) A person appointed under subsection (1)

(a) must be a family justice counsellor, a social worker or another person approved by the court, and

(b) unless each party consents, must not have had any previous connection with the parties.

(3) An application under this section may be made without notice to any other person.

(4) A person who carries out an assessment under this section must

(a) prepare a report respecting the results of the assessment,

(b) unless the court orders otherwise, give a copy of the report to each party, and

Orders respecting reports

211 (1) A court may appoint a person to assess, for the purposes of a proceeding under Part 4 *[Care of and Time with Children]*, one or more of the following:

(a) the needs of a child in relation to a family law dispute;

(b) the views of a child in relation to a family law dispute;

(c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child.

The B.C. Supreme Court has developed the jurisprudence under this section in a thoughtful way. For a thorough, up to date paper on s. 211 Report, which contains many of those cases, see the paper, S. 211 Reports, prepared by Morag MacLeod Q.C. in April 2019 for the CLEBC program, A Deeper Dive: The Intersection of Family Law and Psychology. Rather than repeating what is said in that helpful paper we focus particularly on the Court's very significant oversight role with respect to s. 211 Reports. Though much of what we say relates to cases involving family violence, we suggest that the issues that arise in this respect are important for all parenting assessments. We discuss the Court's initial gatekeeper role when considering whether a report should be issued, who should do it if it should, and, in particular, what qualifications are required. If the report does not result in a resolution by agreement, we consider two other important oversight roles: first, the admissibility of the assessor's report and the admissibility of any review/critique report; and second, if the report is found to be admissible, the role of the Court in "assessing the assessment".

Finally, we consider, in the context of s. 211 Reports overall, how the Court might ensure that the safeguards/guarantees required to implement children's rights to be free of violence and to participate in decisions that have such a significant impact upon their lives, discussed in Part I, D., might be implemented; legal representation for children will be referred to in this context. Before dealing with those issues, we set the stage by looking at the Supreme Court of Canada's decision in *White Burgess*, and the gatekeeper/oversight implications of that case in the unique circumstances which arise with respect to expert parenting assessments.

(c) give a copy of the report to the court.

(5) The court may allocate among the parties, or require one party alone to pay, the fees relating to an assessment under this section.

A. S. 211 REPORTS AND THE COURT'S GATEKEEPER/OVERSIGHT ROLE

1. The White Burgess Approach – Experts Generally

White Burgess Langille Inman v. Abbott and Haliburton Co.[89] dealt with the admissibility of a report prepared on behalf of one of the litigants in a professional negligence claim. Specifically, issues were raised about independence, impartiality and absence of bias of the proposed expert. The British Columbia Supreme Court has summarized the *White Burgess* principles in *J.S. v. S.S.* [90] In short, there is a two step approach to admissibility: step one – consider the four Mohan factors which are relevance, necessity, absence of an exclusionary rule, and a properly qualified expert; step two – balance the potential risk and benefits of admitting the evidence to see whether potential benefits justify the risk. Questions of independence and impartiality and the absence of bias can go to admissibility, not just weight, and can arise at both step one and step two.

White Burgess considered the traditional roles of experts with respect to fact-finding; their role is generally not to make findings of fact but to assist with inference that can properly be drawn from proven facts. As the court said at para. 15, "the law recognizes that, so far as matters calling for special knowledge or skill are concerned judges and jurors are not necessarily equipped to draw true inferences from facts stated by witnesses."

2. The Unique Nature of s. 211 Reports

There are unique aspects of the role of an expert who is an assessor engaged in conducting a s. 211 assessment. An obvious and significant one is that, unlike experts retained by parties, the assessor is appointed by the Court. There are however other differences that impact upon the court's oversight. An important one is the fact-finding role that the legislature and courts have, in effect, delegated to the assessor. The investigative, fact finding role of the assessor was initially based on the particular wording of s. 15 of the *Family Relations Act.* That section specifically and only gave the court the discretion to order an investigation: "In a proceeding under this Act, the court may, on application, …direct an investigation into a family matter …". It is under this former section that case law developed concluding that the investigator is the eyes and ears of the court, and that facts found during the investigative process are *prima facie*

[89] 2015 SCC 23.
[90] 2018 BCSC 355.

true. Significant among them is the 2010 British Columbia Court of Appeal decision in *K.M.W. v. L.J.W.*[91]

Section 211 does not specifically provide authority to the Court to direct an investigation; the British Columbia Supreme Court has, however, incorporated these investigative/fact-finding principles based on s. 15 into the analysis of s. 211, concluding that the assessor continues to act as the eyes and ears of the Court, and that the facts found, if not challenged, are *prima facie* true.[92] It is understandable that a court would want to have both assistance in areas outside its expertise, and a broad factual matrix to consider. It also goes without saying that courts want all information relevant to a child's future safety, security and well-being, when making decisions that can have such a profound impact upon the child. Courts are not always provided with that information. This was the conclusion of a B.C. judicial roundtable we conducted in 2015.

As we explained in the resulting report, *Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Court,*[93] all of the judges who participated in the study[94] agreed that in individual family law proceeding (and criminal law proceedings) there is a need to ensure that the decision made about family violence and its impacts is made with all relevant information about the nature of family decision and the risk of future harm in order to make fair and just decisions about the risk of future harm. They agreed that when there are two proceedings, each court should have relevant information about the other court proceedings. At the same time, there was an agreement that there is a significant and concerning disconnect between those goals and what is actually happening. They said that for the most part information about family violence and the risk of future harm is not being provided to the court.[95] Judges and Master may turn to parenting assessors to fill this gap.

What are the obligations of the assessor in assisting the court with respect to fact-finding? Fact finding questions relate to who assessors seek out, what questions they

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[91] 2010 BCCA 572 (CanLII), citing a 1994 BC Supreme Court decision, Goudie and Goudie, [1993] B.C.J. No. 1049 (S.C.) [Q.L.] at paras. 33-4; which in turn cited a 1983 Provincial Court decision, Hamilton v. Hamilton (1983), 50 B.C.L.R. 104 at 109 (Prov. Ct.).

[92] See, by way of example only, *Kwan v. Lai*, 2016 BCSC 1626 at para. 46.

[93] The Honourable Donna Martinson & Dr. Margaret Jackson, Canadian Observatory on the Justice System's Response to Intimate Partner Violence, *Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts* (Research Project for the Canadian Observatory on the Justice System's Response to Intimate Partner Violence, 14 January 2016) online: FREDA Centre for Research on Violence Against Women and Children http://fredacentre.com (Martinson and Jackson Risk of Future Report).

[94] See *Summary – Meeting With B.C. Provincial Court and Supreme Court Judges,* Martinson and Jackson Risk Report *ibid* at p. 83.

[95] Martinson and Jackson Risk Report. *Ibid* at pp. 2-3

ask, and what they do with the information received. Relevancy must be determined within the applicable legal framework. In the case of the FLA, there are very specific requirements that both parents/guardians and the court "must" consider that inform what is relevant. The first author, in *Independent and Impartial Parenting Assessments*, provided a check list for assessors of all the relevant factors which must be considered.[96] An understanding of substantive equality principles and their connection to the lived realities of the people being assessed also inform decisions about relevancy. In the same paper, she described for assessors both the significance of context and examples of contextual information relevant in family violence cases.[97] With respect to the significance of context she stated:

> Social context information is relevant to family violence cases. It can have different purposes. I suggest that in your parenting assessment work it can have three broad purposes:
>
> 1. It adds to the knowledge base you have developed through your life experience.
>
> 2. It can expand your view of what is relevant to a particular case, and in this way assist you in both searching for relevant facts and reaching a just result.
>
> 3. It can assist you in testing for erroneous background assumptions when you make decisions, and when you draw inferences and make credibility findings in the process of making those decisions.

The legislative framework, informed by substantive equality, requires assessors to be fair and impartial when deciding from whom they will obtain information. As noted in *Independent and Impartial Parenting Assessments,* under the heading "Information Gathering", it also applies to front line professionals whose work involved assisting women who allege family violence. Our consultations showed these people were seldom if ever contacted by assessors:[98]

> Information gathering must of course be done fairly and impartially. This also applies to information about the case that you obtain from other professionals. For example, "front-line" professionals, whose work involves assisting women

[96] Independent and Impartial Parenting Assessments, *supra* note 7 at pp. 5-10.
[97] *Ibid* at pp. 12-19.
[98] *Ibid* at pp. 27-28.

> who allege family violence, may well have valuable information to provide to you about the case. Yet, it appears that they are rarely consulted. As an independent assessor, your role is to obtain information and then decide, with, as Chief Justice McLachlin described it, [above], informed impartiality, what significance that information may have, and to explain why it is, or is not, relevant.

This investigative/fact-finding role of the assessor goes far beyond the traditional role of experts. Yet, as we said in Parts I and II, issues relating to family violence are challenging and assessors, like everyone else, may be more likely to be influenced by preferences and biases, ones of which they may not even be aware. In our *Risk of Future Harm Report,* we suggest that the lack of the kinds of relevant information we have just referred can adversely impact upon impartial decision making from a psychological perspective. In short, the "decision-maker/assessor must have sufficient information to make appropriate decisions; the individual may fall back upon existing, but erroneous, personal beliefs (for example, such as those represented in myths and stereotypes about family violence)."[99]

For all of these reasons we suggest that it is particularly important for the Court to critically analyze the investigative and fact-finding processes used by assessors.

3. The Initial Gate-keeper role – Should a s. 211 Report be Ordered?

The rationale for the protections provided by the *White Burgess* admissibility analysis apply equally to the court's discretion to order a report in the first place. Two issues arise: Is a report relevant and necessary at all? If so, in cases where family violence is or may be in issue, what are the qualifications of a properly qualified expert?

Is a Report Relevant and Necessary?

In addition to the investigative role just discussed, section 211 provides the court with a mechanism for obtaining expert insight into the views of the children in relation to a family law dispute, the specific needs of those children, and the ability and willingness of the litigating parents to satisfy those needs: *Dimitrijevic. Pavlovich.*[100] The evaluations "are complex forensic studies of the family, the purpose of which is to identify the needs of the child, determine the capacities of each parent, and describe the resulting fit that is thought to promote the best interests of the child: American Psychological Association 2010."[101]

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[99] Martinson and Jackson, Risk of Future Harm Report, *supra* note 94 at p. 31.

[100] 2016 BCSC 1529.

[101] Jon Amundson and Glenda Lux, *Tippins and Wittman Revisited: Law, Social Science, and the Role of the Child Custody Expert 14 years Later*, FCR, Volume 57, Number 1, January 2019 at p. 88 (Tippins and Wittman Revisited)

We have seen in Part II that concerns were raised that reports can be overused when they are not necessary, with a suggestion that the need for and purpose of the report should be identified; they should not be "rubber stamped". Expert assessments can be 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, intrusive and stressful. In *Independent and impartial Parenting Assessments,*[102] the first author suggested there are questions that may be useful to ask before the Court orders such a report, even when doing so by consent:

- What are the real issues in dispute? Is the assessment 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 assessor being considered have the specific expertise needed?
- Does the assessor have the appropriate cultural competence needed?
- Is the assessor 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 assessor 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?

Nicolas Bala, Rachel Birnbaum, and Carly Watt, in *Addressing Controversies About Experts in Disputes over Children*[103] (Controversies about Experts) also support the

[102] Independent and impartial Parenting Assessment, *supra* note 7 at p. 26.
[103] (2017) 30 Can. J. Fam. L. 71 at p. 74.

view that judges need to play a gate-keeper role when considering whether or not an assessment should be ordered.

What Qualifications are Required by Assessors in Family Violence Cases?

In Part II we raised concerns about whether family assessors have the kind of detailed knowledge and understanding of the nature, dynamics, cycle, impact and relevance of family violence required.[104] Canadian legal academic, Dr. Linda Neilson, in her book, *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases*,[105] states that many 'experts' who conduct parent-child evaluations for courts lack specialized knowledge. She concludes that domestic violence training, for example attendances at conferences or twenty-one hours of domestic violence training such as that required of mediators for certification in Canada, will not qualify an evaluator as a domestic violence expert. She suggests some questions which judges could consider asking when deciding whether a proposed expert has appropriate qualifications (and ultimately the weight to be attached to the expert report, if necessary).

- Has the evaluator been professionally certified as a domestic violence expert? What was the basis of the certification? Is the certifying agency a professional association or an accredited educational body? What standards and assessment criteria were used in the certification process?

- Does the evaluator teach domestic violence educational courses to professionals or to students at an accredited academic institution; does the evaluator supervise graduate students in the domestic violence field at an accredited academic institution?
- Is the expert a tenured or tenure-stream professor in an academically accredited university? (Tenure stream professors are subjected to rigorous academic peer-review processes. This is not always true of non-tenured professors, such as clinical professors. When a professor is non-tenure stream, this does not necessarily mean the person is unqualified, but it does mean that it is important to check for other indications of expertise. Note: associate, assistant and full professor designations were at one time reserved for tenured and tenure-stream academic professors. This is no longer the case. Some universities are now allowing use of these titles by non-tenure stream professionals associated with the university.)

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[104] From *Australian Standards of Practice for Family Assessments and Reporting,* referred to above, in Part II.

[105] *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases*. *Supra* note 78. 10.11.3.9. [Footnotes omitted].

- Is the evaluator recognized as a domestic violence expert by other professionals or academics or government departments or agencies working in the field?
- What research has the expert conducted in the domestic violence field; over what period of time? Has research in domestic violence been the central focus of the expert's work? Has the evaluator published articles or books on domestic violence? On what subjects? Are some of the publications refereed publications?
- What specific courses or programs has the evaluator taken or taught relating to domestic violence? When and over what period of time?
- Alternatively, if the evaluator's expertise is based on professional experience rather than on academic expertise, how many cases involving domestic violence has the evaluator assessed, counselled, treated or evaluated? In what capacities or contexts, over what period of time?
- Has a court qualified the evaluator as a domestic violence expert; in what context or contexts?

4. A Second Gate-keeper Role – Is the S. 211 Report Admissible?

S. 211 itself requires that the assessor give a copy of the report to the court. Supreme Court Family Rule 13-1 (1)(b) states that a copy of the Report be filed with the Court, unless otherwise ordered. While a party has a right to cross-examine the assessor, advance notice is required: (2). As an expert witness the assessor has a duty to assist the court and is not to be an advocate for any party: Rule 13-2 (1). The report itself must contain the assessor's certification that he or she (a) is aware of that duty, (b), has made the report in conformity with that duty, and (c) will, if called on to give oral or written testimony, give that testimony in conformity with that duty: Rule 13-2.[106]

Filing the report makes it available for settlement and case management purposes. However, if a resolution by agreement is not reached, and there is a trial in which the impartiality and reliability of the assessor's investigation, analysis and recommendations are central issues, there should be a *White Burgess* admissibility hearing. As we have explained, there are significant issues which can arise that may significantly affect the validity of the process used and of the recommendations. The *White Burgess* analysis allows the Court to consider all of the *White Burgess* factors, including for this purpose, whether the assessor is properly qualified, and has acted impartially. Holding such a

[106] See: *Dimitrijevic v. Pavlovich*, 2016 BCSC 1529 at paras. 9 – 12.

hearing is the approach the British Columbia Supreme Court has taken: see for example *J.S v. S.S..*[107]

Bala, Birnbaum and Watt are of the view that court should play a gate-keeper role with respect to the admissibility of parenting reports.[108] Rise Women's Legal Clinic's Executive Director, Kim Hawkins, raised the concern that, without such an admissibility hearing, and "when there are no standards to gather underlying data, the assessor is not qualified in family violence, the reports are automatically filed with the court, and critique reports are rare, all of these factors create a perfect storm, in which reports of dubious quality are delivered to the judge without the normal safeguards."

5. A Third Gate-keeper Role – the Admissibility of Critique/Review Report

Rise Women's Legal Clinic is a strong supporter of the use of critique/review reports in appropriate cases. As Kim Hawkins put it, for poorly done reports, cross-examination for the women Rise serves is not a satisfactory answer:

> In the case of a report which is unfair, inaccurate or biased the only remedy which is available to clients, who may be self-represented, is cross examination of an expert. This is a challenging task even for experienced litigators, especially where they are unable to lead contrary evidence.

Bala, Birnbaum and Watt, in Controversies about Experts, also argue that there should continue to be a role for experts retained by one parent, to review or critique a report prepared by a court-appointed or state-retained expert in child related cases; we agree. We agree with them that counsel, judges, and potential expert witnesses need to be aware of the obligation for party-retained experts to provide unbiased and reliable evidence and avoid being "hired guns". There is also a need for party-retained experts to be clear about their role and ethical obligations.[109]

The British Columbia Supreme Court has addressed the issue of the admissibility of reports which critique/review s. 211 reports several times and generally has concluded that though they may be admissible, the circumstances under which they should be admitted are limited. Some emphasis is placed on the fact that the report being critiqued is a court ordered report, not a report submitted by another party to the proceedings.[110] We support the application of the principles of admissibility described by Justice Kent in

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[107] 2018 BCSC 355.

[108] Controversies About Experts, *supra* note 104 at p. 74.

[109] *Ibid* at p. 75

[110] See for example: Hejzlar v. Mitchell Hejzlar, 2010 BCSC 1139; J.N. v. L.G. 2017 BCSC 885; Sandhu b. Bhullar, 2016 BCSC 2020.

Dimitrijevic v. Pavlovich.[111] He identified how these reports could be relevant, concluding that questions of admissibility should be determined by the court in its discretionary gate-keeping role:

> [34] As demonstrated by the cases referred to above, the court has determined on various occasions that critique evidence is neither relevant nor necessary. However, there is at least an arguable case for both relevancy and necessity.
>
> [35] Obviously, the content of any s. 211 report is relevant in family law litigation. Some cases have held, quite rightly in my view, that the author of any s. 211 report can and should be cross-examined on the subject matters commonly raised in critique reports, i.e., the propriety and sufficiency of the testing employed, the time spent on interviews of the parties and collateral witnesses and in observation sessions in the home environment, information that might be said to be missing from the assessment, failing to specifically identify and address the specific needs of the children, et cetera. The purpose of such cross-examination is to call into question any conclusions and recommendations posited by the assessor. If such a line of questioning is considered sufficiently relevant for the purposes of cross-examination, one might rightly ask why it becomes irrelevant in the context of admitting expert evidence on the same subject matter.
>
> [36] As to the threshold requirement of necessity, I would venture to suggest that the nature, extent and validity of psychological testing (let alone the related arcane nomenclature and acronyms) as well as the significance of lapses in accepted methodology (assuming such accepted methodology even exists) would not likely fall within the experience or knowledge of many judges. The same is likely true of "authoritative" social science which may inform the determination of parenting arrangements in the best interests of the children.
>
> [37] In my view, the answer to any questions respecting admissibility of critique reports falls to be determined by the court in its discretionary gatekeeping role, assessing whether such expert evidence is sufficiently beneficial to the trial process to warrant its admission despite any potential harm or prejudice that may result.

Justice Kent then observed that for a number of reasons the use of such reports will be rarely necessary or appropriate.[112] They are: properly prepared and informed cross-examination of the s. 211 author is the usual and preferred process for testing the opinions and conclusions expressed in the report; the authors of critique reports tend to

[111] 2016 BSCS 1529.
[112] *Ibid* at paras. 37 and 38.

be neither independent nor neutral and very often simply present arguments in the guise of expert opinion; there is in fact no standard protocol for s. 211 assessments that has to be exactly followed in every case but rather the authors of the s. 211 reports are free, indeed required, to use their education, experience and expertise as they consider appropriate for the purpose of assisting the courts in determining what is in the children's best interests; where the authors of the critique reports have not themselves conducted any testing or data analytics, they are unable to assist the court with any informed conclusions or recommendations respecting parenting arrangements; allowing critique reports to become a regular feature of custody and parenting litigation will increase the time, expense and uncertainty of a process that is already laden with too much destructive adversity and animosity; and adequate alternatives already exist for securing a second s. 211 report if appropriate, commissioning a competing psychological or parenting assessment, and the presentation through experts of peer-reviewed, authoritative social science on the parenting issues in dispute.

Each of these is unquestionably a reason why a critique/review report may be unnecessary or inappropriate in a specific case. We respectfully suggest however that, particularly when dealing with the unique and complex challenges that arise in family violence and/or alienation cases, the need for such a report should be considered without starting from the position that they should only rarely be ordered. The overarching consideration is whether the report is relevant and necessary to assist the court in the exercise of its oversight role and in ensuring a fair and just outcomes overall. Increased time, expense and uncertainly are important considerations, but they cannot override the objective of achieving appropriate outcomes in cases where the stakes for the future safety, security and well-being of children and other family members are so high.

B. ASSESSING THE ASSESSMENT

If the report is admissible, many of the issues we have identified can arise when the court is determining the weight to be attached to it. Among them are: the nature and extent of the assessors qualifications, generally, and with respect to family violence; the way in which the investigation is conducted and facts are determined, including credibility assessments generally and in relation to family violence; an understanding of the nature of and impact of trauma; the appropriate use of psychological testing, when applicable; whether there has been screening for family violence and, if appropriate, an effective risk of future harm assessment and safety plan; and cultural competence.

In *Independent and Impartial Parenting Assessments*, the first author suggested that the following questions may be considered by a court:[113]

[113] *Supra* note 7 at p. 27.

- What facts has the assessor 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 assessor appropriately considered the views of the child and explained what weight was attached to those views and why?
- Has the assessor 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 found in Part 4 of the Family Law Act?
- Has the assessor acted fairly and impartially overall?

The AFCC 2016 *Guidelines for Examining Intimate Partner Violence: A Supplement to the AFCC Model Standards of Practice for Child Custody Evaluation,* say that not only is intimate partner violence specialized knowledge and training required, but also use of a generally recognized systematic approach to assessment of such issues as domestic violence. The objective of the Guidelines is to help custody evaluators identify intimate partner violence and examine the possible effects on children, parenting, and co-parenting. There are three guiding principles:

- Prioritize the safety and wellbeing of children and parents;
- Ensure an informed, fair, and accountable process; and
- Focus on the individual family.

What follows is a summary of the suggested approach using the guideline principles.

PRIORITZE THE SAFETY AND WELLBEING OF CHILDREN AND PARENTS

Safety First - should make the safety of the child, the parties, and other involved individuals the highest priority in the evaluation process.

Universal and Ongoing Screening - follows an intimate partner violence screening protocol in every case, including those where no allegations or judicial findings of intimate partner violence have been made.

ENSURE AN INFORMED, FAIR AND ACCOUNTABLE PROCESS

Knowledge and Skills - needs in-depth knowledge of the nature, dynamics, and impact of intimate partner violence.

Systematic Approach - adopts and aspires to consistently follow a systemic approach to evaluation whenever intimate partner violence could be involved

Mitigation of Bias - strives to recognize his or her gender, cultural, and other biases related to intimate partner violence, and take active steps to alleviate the influence of bias on the evaluation process.

FOCUS ON THE INDIVIDUAL FAMILY

Explanation and Disclosure - enhances safety by informing parents and collateral witnesses that the information they share about intimate partner violence may be disclosed to the court and the parties by the evaluator.

Information Collection: Challenges – employs a rigorous multi-method and multi-source protocol that anticipates challenges associated with investigating the effects of intimate partner violence on children, parenting and co-parenting.

Challenges to consider:

- A person who uses intimate partner violence many deny or minimize it.
- A person subjected to intimate partner violence may minimize or fail to disclose intimate partner violence even when long-standing and severe. [reasons provided]
- Delayed disclosure of intimate partner violence does not indicate lack of credibility.
- A traumatized party may react or respond unexpectedly to evaluator inquiry.
- Intimate partner violence may not be documented in photos, medical records, police reports, protective orders or through eyewitnesses.

- Coercive controlling behaviours may exist in the absence of post or recent physical violence.
- A child may deny or minimize or react in ways not anticipated by an evaluator.
- A parent subjected to intimate partner violence may engage in protective parenting that is only understood in the context of the intimate partner violence
- Standard psychological testing is not useful for the purpose of identifying whether intimate partner violence has occurred and/or whether a given parent has committed or been subjected to intimate partner violence.

Information Collection: Intimate Partner Violence - to obtain a full understanding of the events and circumstances, an evaluator strives to investigate and collect information concerning:

1. The nature of aggression;
2. The frequency, severity and context of intimate partner violence;
3. Whether one or both parties are responsible for the aggression; and
4. Various risk factors for lethality, future violence, stalking, and abduction.

Information Collection: The Child – collects information concerning:

- The child's experience(s) of past and current intimate partner violence, if any;
- If the child has had such experience(s), the possible impact of the intimate partner on the child's health, safety and wellbeing.

Information Collection: Parenting and Co-Parenting – collects information related to the potential impact of intimate partner violence on each parent's capacity to parent and/or co-parent

Analysis of Information – strives to organize, summarize and analyze the information collected and assess its sufficiency for determining the implications of intimate partner violence for children and parenting

Synthesis of Information – endeavors to explicitly link intimate partner violence with parenting recommendations.

C. SAFEGUARDING THE RIGHTS OF CHILDREN TO BE FREE FROM VIOLENCE WITHIN THE FAMILY

In Part I D we discussed the importance for children of being able to implement their rights to be safe, secure and well, and to participate in decisions that impact them, and the kinds of safeguards/guarantees required to do that; we will refer to those safeguards/guarantees as legal protections. Here we begin by looking broadly at how the legal protections apply to family law proceedings, generally, and when, as is most often the case, a s. 211 report forms a significant part of the evidence. We then, in Section D, consider the ways in which legal representation for children can assist in making sure that those legal protections are in fact afforded to children in family law proceedings.

The Ontario Court of Appeal (June 2018, leave to appeal to the Supreme Court of Canada denied, February 2019) considered the need for legal protections for children in a family law proceeding in which parental alienation featured: *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*.[114] The Children's Lawyer represented the child throughout the proceedings, based on Ontario legislation that provided for such a lawyer to act for the child, and also to conduct investigations. The specific issue was whether the child-client litigation records, which the father wanted produced, were producible. The Court concluded they were not, and in doing so, made several comments relevant to the issue of legal protections for children. (We will say more about their conclusions with respect to legal representation when dealing with that topic.)

The Court said that the *UN Convention on the Rights of the Child*, "to which Canada is a signatory, requires that children be afforded special safeguards, care and legal protection by the courts on all matters involving their best interests". (para. 51) Children are entitled to heightened protection within the law. (para. 56) The preamble to the Convention, the Court noted, directs that special safeguards and care, including legal protection be afforded to children: (para. 74)

> Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child" by reason of his physical and mental immaturity, <u>needs special safeguards and care, including appropriate legal protection</u> before as well as after birth. (emphasis in original).

The Ontario Court of Appeal also stated that children are among the most vulnerable members of society; courts, administrative authorities and legislative bodies have a duty

[114] 2018 ONCA 559.

to recognize, advance and protect their interests. (para. 64) The authors of the re-writing judgment book supported by Lady Brenda Hale, referred to in Part I D, speak about that duty. They state that it is in the courts that children acquire a legal voice (individually, and as a group) that is denied them in other decision making processes; therefore the role of the courts in protecting and securing children's rights, promoting children as *active* legal protagonists, carries greater significance than for other groups.[115] The British Columbia Court of Appeal, in *J.E.S.D.,* referred to in Part I D, in its obiter comments about the Convention, did not consider the issue of legal safeguards for children.[116]

It will be recalled that the eight legal protections identified by the UN Committee on the Rights of the Child and referred to in Part I D. are: (a) Right of the child to express his or her own views; (b) Establishment of facts; (c) Time perception; (d) Qualified professionals; (e) Legal Representation; (f) Legal Reasoning; (g) Mechanisms to review or revise decisions; and (h) Child Rights Impact Assessment. Martinson and Tempesta suggest that those protections apply to family law proceedings in in a number of ways, in "Fully Participating in Family Court Processes: Core Components". [117] All of them are relevant to the s. 211 report judicial oversight role. We have already dealt with the first, ensuring the right of the child to express his or her own views, in Part I D. We now turn to other relevant safeguards.

Qualified Professionals

The using of qualified professionals applies to all professionals with whom children deal in the family justice system. With respect to parenting reports, protecting children from family violence requires that the s. 211 assessor have the qualifications necessary to deal with family violence and its impact.

Establishment of Facts - Gathering information/evidence relevant to just outcomes for children

Whenever the child's best interests are being assessed, relevant information, based on substantive equality principles, must inform the decision. The issue of fair and just fact finding is, as we have said, particularly relevant when considering the court's s. 211 report oversight role. The Committee states that facts and information relevant to a particular case must be obtained by well-trained professionals to establish the elements

[115] *Rewriting Children's Rights Judgements*, *supra* note 39.

[116] Nor did it refer to this case. However, the BCCA decision was issued on July 13, 2018 and the Ontario decision on June 18, 2018, and the latter may well not have been reported.

[117] A Child Rights Approach, *supra* note 38 at pp. 179 – 184.

necessary for the best-interests assessment.[118] A child rights approach includes obtaining evidence that supports the child's views. Critical to the implementation of this legal protection is the need, on behalf of the child, not the parents, to assess potential evidence for admissibility and reliability.

Time Perception – Ensuring Timely Processes

The timeliness protection is particularly important in family law cases. The UN Committee on the Rights of the Child explains the negative impact of delays:

> The passing of time is not perceived in the same way by children and adults. Delays in or prolonged decision-making have particularly adverse effects on children as they evolve. It is therefore advisable that procedures or processes regarding or impacting children be prioritized and completed in the shortest time possible.[119]

Legal Reasoning - Making the Overall Best Interests Decision(s)

Judges have complex decisions to make involving the weighing of various rights and interests against the backdrop of the substantive and interpretative principles supported by the *Charter* and the *Convention.* Children's views may not be determinative; however, they must not only be heard, but taken seriously and given due weight in accordance with the child's age and maturity.

Judges must employ appropriate "legal reasoning" and any decision concerning a child must be "motivated, justified and explained."[120] That motivation should state explicitly all the factual circumstances regarding the child; what elements have been found relevant in the best interests assessment; the content of the elements in the individual case; and how they have been weighted to determine the child's best interests. If the decision differs from the child's views, the reasons for that divergence should be clearly stated, showing how the child's best interests were a primary consideration and why other considerations outweighed the child's views.[121]

Mechanisms to Review or Revise Decisions

A key legal protection identified by the Committee is a mechanism to review or revise decisions. This is particularly important in family law cases because of the significant

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118 General Comment 14, *supra* note 49 at para 92.

119 *Ibid* at para 93. This was echoed by the Supreme Court of Canada in *Catholic Children's Aid Society of Metropolitan Toronto v CM*, [1994] 2 SCR 165 at para 44, 113 DLR (4th) 321.

120 *Ibid* at para 93. This was echoed by the Supreme Court of Canada in *Catholic Children's Aid Society of Metropolitan Toronto v CM*, [1994] 2 SCR 165 at para 44, 113 DLR (4th) 321.

121 *Ibid*.

impact decisions have on children's lives. A child will require significant legal and other assistance in this respect, both to determine where the decision is fair and just, and if it is not, to help in taking the necessary steps to review/appeal it.

D. THE ROLE OF LEGAL REPRESENTATION FOR CHILDREN IN PROVIDING LEGAL PROTECTIONS

The issue of legal representation for children is not without controversy. The first author, together with Caterina Tempesta, senior counsel with the Office of the Children's Lawyer in Ontario, argues, using a child rights approach, that legal representation is not just one of several ways courts can hear from children[122]; rather it is a very important method of ensuring that all of the legal protections we have discussed are implemented for children, especially those children caught up in protracted family law litigation. This would include cases in which s. 211 reports are in issue. The British Columbia Court of Appeal in *J.E.S.D,* though they did not have to deal with the issue directly, as they were considering whether the hearing judge properly applied s. 203 of the FLA, was less enthusiastic about the nature and extent of legal representation for children. The Ontario Court of Appeal, in Children's Lawyer for Ontario, when dealing with more expansive legislation, was more supportive.

We begin by providing some background information about legal representation generally, and legal representation in British Columbia. We then turn to s. 203 and the two cases.

1. Background Information about Legal Representation Generally

The idea of lawyers for children has been supported by the Law Reform Commission of Canada, the UN Committee on the Rights of the Child, the UN High Commissioner for Human Rights, and the UN Human Rights Council. As long ago as 1974 the Law Reform Commission of Canada, in its Family Law Working Paper, said that where the interests of a child will be directly or indirectly affected by a court proceeding, consideration should be given to the appointment of independent legal counsel to represent the child.

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[122] For a different approach to the nature of and extent of legal representation for children, see Nicholas Bala and Rachel Birnbaum, *Rethinking the Role of Lawyer's for Children: Child Representation in Canadian Family Relationship Cases,* 2018, *Cahiers de Droit*. These experienced and knowledgeable academics provide their opinion that legal representation is not needed in every case, particularly given the limited funding that is available, and is one of several ways of obtaining the views of children. They do not engage in a child rights analysis.

The UN Committee on the Rights of the Child states that to "ensure the correct implementation of the child's right to have his or her best interests taken as a primary consideration, some child-friendly procedural safeguards must be put in place and followed." Legal representation is one of those safeguards: [123]

> (e) Legal Representation
>
> The child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by court and equivalent bodies. In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision.

In December 2013 the UN High Commissioner for Human Rights, in a report to the Human Rights Council on Access to Justice for Children, supports legal and other appropriate assistance for children, saying:[124]

> 40. As children are usually disadvantaged in engaging with the legal system, whether as a result of inexperience or lack of resources to secure advice and representation, they need access to free or subsidized legal and other appropriate assistance to effectively engage with the legal system. Without such assistance, children will largely be unable to access complex legal systems that are generally designed for adults. Free and effective legal assistance is particularly important for children deprived of their liberty.
>
> …
>
> 43. While the right to free legal assistance is not explicitly provided for in international law outside the criminal law context, access to legal and other assistance in these matters is essential for ensuring that children are able to take action to protect their rights…

The Human Rights Council, in March 2014, in "Rights of the child: access to justice for children" also supports legal aid for children:"[125] The Council:

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[123] General Comment 14 para. 96.
[124] A/HRC/25/35.
[125] A/HRC/25/L.10

9. *Reaffirms* the need to respect all legal guarantees and safeguards at all stages of all justice processes concerning children, including due process, the right to privacy, the guarantee of legal aid and other appropriate assistance under the same or more lenient conditions as adults, and the right to challenge decisions with a higher judicial authority.

…

10. *Stresses* that children should have their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parent or other legal guardian.

2. Legal Representation in British Columbia

B.C. Child and Youth Legal Centre

The Child and Youth Legal Centre is operated by the B.C. Society for Children and Youth, is supported by the Law Foundation of BC, and was set up to assist BC children in obtaining legal advice and representation from a lawyer. It began as a time limited project but is expected to both continue and expand. There are three full time lawyers, and it has created a roster of lawyers throughout B.C. The Centre is committed to improving the well-being of children and youth in British Columbia through the advancement of their legal rights. The role of the Centre is to advocate on behalf of vulnerable children and youth in BC.

As the website explains[126] the Centre: provides legal help for young people who are experiencing problems relating to family law, child protection, a breach of your human rights and many other legal issues. It helps children and youth who are up to 19 years old. Even if you are older than 19, if the legal problem started before you turned 19, we may be able to help.

"We help children and youth to make sure that their rights, interests and points of view are heard and respected."

BC Office of the Representative for Children and Youth

Long-time Children's Representative, Mary Ellen Turpel LaFond, was a strong advocate for children's legal representation. Bernard Richard, her successor described, in 2017, the concern: "In B.C., lawyers are only ever rarely provided for children or youth in child

[126] https://www.scyofbc.org/child-youth-legal-centre/

protection or child custody matters – in complete violation of Canada's commitment to the principles of the Convention."[127] The exact same sentiment was expressed by our present Representative, Jennifer Charlesworth, speaking in honour of National Children's Day, on November 20, 2018.[128]

Entitlement to Legal Aid

Children in British Columbia are, with the exception of those accused as a young offender, generally not entitled to legal aid. As the National Action Committee on Access to Justice Family Justice Working Group, *Meaningful Change for Family Justice: Beyond Wise Words* put it, "the majority of family cases involve children, who are vulnerable, usually unrepresented non-parties who seldom participate directly in the process."[129]

This is in stark contrast to the entitlement of Ontario children to assistance and representation by a lawyer. The Ontario Office of the Children's Lawyer is funded by the Ontario Government, and, as of 2018, had 25 (total) staff lawyers, a roster of 400 lawyers throughout Ontario, 10 in house social workers, some 250 clinicians throughout Ontario. It covers family cases and child protection cases.

3. The British Columbia Legal Framework

The FLA provision allowing the court to appoint a lawyer in family law cases is narrow.

> 203 (1)The court may at any time appoint a lawyer to represent the interests of a child in a proceeding under this Act if the court is satisfied that
>
> (a) The degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the best interests of the child, and
>
> (b) It is necessary to protect the best interests of the child.

[127] Bernard Richard, Keynote Address, *The UNCRC as Foundational to Competency in Work with Children*, CLEBC, CBABC Children Law Section Access to Justice for Children: Child Rights in Action, Speaking Notes.

[128] The B.C. Society for Children and Youth Night for Rights. Her office is presently undertaking an investigative project expected to lead to a Special Report to the Legislature on legal representation for children and youth.

[129] Family Justice Working Group, *Meaningful Change for Family Justice: Beyond Wise Words* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, April 2013), at p.16.

> (2) If the court appoints a lawyer under this section, the court may allocate among the parties, or require one party alone to pay, the lawyer's fees and disbursements.

Martinson and Tempesta, in A Child Rights Approach, make the argument that legal representation is the most effective way of ensuring that children and their interests and rights are not overlooked or undermined in court processes. They suggest that s. 203 significantly limits the ability of the court to appoint lawyers for children as envisioned by the Convention and the UN Committee on the Rights of the Child. They raise the argument that the section could violate children's rights under s. 7 of the Charter.[130]

J.E.S.D.[131] involved an allegation by the father of alienation. The Supreme Court Judge, applying s. 203, declined to appoint a lawyer for a child who was 15 and wanted to have her own lawyer. The judge instead made an order appointing an amicus to assist the court, using the Court's *parens patriae* jurisdiction, and ordered the Ministry of the Attorney General to pay for the amicus. The case was appealed to the Court of Appeal on those points. There had not yet been a trial on the merits of the allegations of alienation, or an opportunity for the parties or the child to challenge the s. 211 report. Counsel for the child raised the question of the constitutional validity of s. 203 and relied on the *Charter*, the CRC and General Comments of the Committee on the Rights of the Child. The Court found that, as the constitutional argument had not been raised earlier, it should not deal with it.[132] The Court concluded that the hearing judge did not err in his application of s. 203, but did err in exercising his *parens patriae* jurisdiction to appoint an amicus. While amici can be appointed pursuant to the court's power to control its own process, they should be appointed only to deal with specific and exceptional circumstances. The judge did not refer to any such circumstances.

The Court made a number of statements not necessary to the outcome about legal representation. The Court noted that General Comment 14 "invites" state parties to "pay special attention to a number of procedural safeguards to guarantee the protection of the best interests of children, pointing out that one of them is found in para. 96. It then stated that the interpretation of the recommendation is not straightforward; in particular it is not clear what is meant by "legal representation or a "legal representative". The Court suggests that the French version shows the ambiguity by using the term "un conseil juridique". It "appears to indicate" that the level of "representation" contemplated is not a full right to counsel, but rather a right to have the benefit of legal advice". (at paras. 41 and 42).

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[130] A Child Rights Approach, supra note 38.
[131] 2017 BCSC 495 and 2017 BCSC 666.
[132] J.*E.S.D. v. Y.E.P*, 2018 BCCA 286.

The court concluded this analysis by saying that even if it did recognize greater availability of legal representation than what the FLA provides, it could not override the provisions of the statute. The Court cited the Martinson Tempesta article, A Child Rights Approach, saying that the authors adopt an expansive view of the UN Committee's General Comment 14, but recognize the narrow focus of s. 203.

Another obiter statement by the Court expresses an opinion about the impact of including children in contested court proceedings on families:

> [54]…It is essential that S.'s views be before the court. It is not, however, essential that she be cast in the role of an adversarial party in the proceedings.
>
> [55] Adversarial proceedings can easily destroy goodwill between the parties, and impede the development of healthy relationships. It would be invidious and contrary to S.'s interests, to place her in an adversarial role against her father or against experts who have been engaged by the court.

The Ontario Court of Appeal in the Ontario Children's Lawyer case took a more expansive approach to legal representation, applying their much less narrow legislation, in a case which also involved allegations of parental alienation. As mentioned earlier the Children's Lawyer appeared for the child throughout, including the appeal processes, and leave to appeal to the Supreme Court of Canada was denied. The Court determined that the Children's Lawyer is independent from the Ministry of the Attorney General, though funded through it. It commented on the unique role of the Children's Lawyer, describing it as fundamental to the proper functioning of the legal system. (paras. 46 and 53). The Court then linked the role of the Children's Lawyer to the best interests of the child who is entitled to heightened protections within the law and to the importance of the child/lawyer relationship on the administration of justice. (para. 56) The Court cited the predecessor to A Child Rights Approach, in which Martinson and Tempesta[133] say that the Children's Lawyer has been recognized as a model for addressing the challenge for family law courts to find a way for children to express their views without exposing them to further trauma or causing more damage to the family. (paras. 65 and 66)

Finally, the Court stated that the Children's Lawyer not only represents the child's interests; she provides a safe, effective way for the child's voice to be heard. For her to do this she must provide a promise of confidentiality. Children must be able to discuss feelings and facts to the Children's Lawyer that cannot or will not be communicated to the parents. Children's interests can be averse to that of their parents. Feelings of guilt

[133] Legal Representation for Children in Family Law Cases: A Rights-Based Approach, CLEBC and CBABC Joint Conference, Access to Justice for Children, Child Rights in Action, May 2017, Vancouver, B.C.

and betrayal that may influence a child require a safe person for them to speak to (para. 70).

PART IV: DO GENDER SYMMETRY CLAIMS MINIMIZE THE SIGNIFICANCE OF SOCIAL CONTEXT?

A. HISTORY OF THE DEBATE[134]

The concept of gender symmetry in domestic violence has had a long history in the literature. The argument that men and women commit similar rates of violence against one another has found advocates and/or researchers supporting the notion as well as found those who find it challenging, The debate really emerged as a "fierce" (Allen, 2010)[135] topic after the results from the application of the Conflict Tactics Scale (CTS) were published by the developer of the scale, Dr. Murray Straus (Straus, 1990)[136]; Straus (2010)[137]; Strauss, M. (2014)[138]. Steinmetz (1977/78)[139] really set off the debate in 1977 by reporting that the rates of violence by men and women were either 'identical' or 'very similar' or that the violence of wives 'exceeds that of husbands', as quoted by Allen (2010).

However, in more recent times there has been an increase in the numbers of researchers questioning such an outcome. Dr. Linda Neilson in her book, *Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases* (2017 Can LII Docs 2) (section 4.4.2)[140] positions the issue this way, "…nationally and internationally – the social factor most centrally associated with the risk of being targeted (with domestic violence) is being female" (footnote omitted). Despite the

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[134] For purposes of this paper, Part IV provides a brief summary of the various perspectives on the topic of gender symmetry – one which does not intend to be an in-depth analysis.

[135] Allen, M. (2010). "Is there any gender symmetry in Intimate partner violence?", in *Child & Family Social Work,* vol. 16(3): https://doi.org/10.1111/j.1365-2206.2010.00735.x

[136] Straus, M.A. (1990) "Social stress and marital violence in a national sample of American families", in, *Physical Violence in American Families* (eds. M.A. Straus & R.J. Gelles), Transaction Publishers, London.

[137] Straus, M. (2010). "Thirty years of denying the evidence on gender symmetry in partner violence: Implications for prevention and treatment", *Partner Abuse*, vol, 1(3), pp. 332-362.

[138] Straus, M. (2014). "The Corruption of research on domestic violence", in *Domestic Violence Research*: https://honest-ribbon.org/domestic-violence-research/the-corruption-of-research-on-domestic-violence/

[139] Steinmetz, S.K. (1977/78). "The battered husband syndrome", in *Victimology: An International Journal*, vol.2, 499– 509.

[140] Neilson, L. (2017). "Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases", *supra* note 78 (section 4.4.2).

increased scrutiny of the concept, there is other evidence from case law and from the women's own experiences to suggest that in many locations in the legal system and social services, the belief in gender symmetry remains intact and impacts critical decisions for women and their children, as for example, in the assessment of their parenting competency. Therefore, it is worth considering how this argument came about.

The CTS tool itself has played a central role in the debate. Those challenging the method associated with the CTS application indicate a primary criticism of the tool is how it measures the conflict tactics. It is seen as presenting the conflict in "one way in which conflicts get resolved, decontextualized and devoid of any reference to either the motivation or consequences of these actions" (Allen, 2010). Basically, the overarching concerns surround the lack of a contextual analysis.

The non gender symmetry in these types of cases was presented in an article by Dr. Peter Jaffe, Dr. Claire Crooks, and Dr. Nicholas Bala in 2005. As summarized by Justice Donna Martinson (2007)[141], the three authors note that "… while some statistical information may suggest that rates of violence are similar for men and women, that is not so when information is taken together with additional contextual information"[142] (footnotes omitted). Such information identifies important gender patterns in severity, impact and lethality of violence (for further detail of the most recent 2014 statistics in that regard, see the "Research Findings Addendum" section below).

Again, as referenced by Martinson, the authors point out that there is a general agreement that violence is an under-reported crime. In addition, Martinson notes that the Neilson *National Judicial Institute Domestic Violence Benchbook*[143] identifies a lack of disclosure as one of the major issues in cases concerning violence against women. The *Bench Book* observes that women commonly do not disclose violence unless they are asked relevant questions. And finally, it also notes that non-disclosure, partial disclosure or delay in disclosure can be a by-product of harm caused by violence.

On the other hand, the pro gender symmetry researchers argue that in fact the CTS was never intended in the first place to measure contextual factors that are crucial to establishing patterns of cohesive control in the relationship. However, the response to

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[141] Martinson, D. (2007). *Post-Separation Parenting – Submerged Gender Issues*, Emerging Issues – Why Gender Equality Still Matters, The Changing Canadian Family, Joint Conference, National Judicial Institute and the Canadian Branch of the International Association of Women Judges, November 28 – 30, 2007, Toronto.

[142] Jaffe, P., Crooks, C, & Bala, N. (2005). "Making appropriate parenting arrangements in family violence cases: Applying the literature to Identifying Promising Practices", Department of Justice, Family, Children, and Youth Section.

[143] *Supra* note 78, sections 2.1.1; 4.3.1; 5.2.5.1; and Chapter 17.

that by the non gender symmetric supporters is that, if true, the CTS cannot therefore make credible meaning of the results obtained.

Finally, one other factor has recently added another layer of complexity to the debate, that is, traditionally the focus has been on the experiences of women as victims, but there has been more of a shift to an increasing interest in men's victimization in intimate partner relationships[144]. It has been argued in some studies that men have been victimized more than women (Lysova et al., 2019). This was a finding in many of the earlier Straus studies, as well, but has become strengthened as an argument to recommend that resources and supports are funded for male victims too, in a gender-equitable manner.

The overall point is that the gender symmetry debate outcome can obviously also have an enormous impact on decision making in domestic violence cases, and, for example, can be linked to the parental alienation issue as well, since it can suggest that a mother, who herself is capable of DV in a gender symmetric manner, could also be capable of being deceptive and strategic in portraying the father as abusive or a poor parent.

B. <u>METHOD ISSUES</u>**:**

To frame this section, it should first be stated that domestic violence is a particular form of intimate partner violent conduct. Many forms of violence between intimate partners are included, as we will see below, in statistics on violence, including minor isolated violence that is not associated with coercive control as well as violence that is used to resist an abusive relationship (Neilson, 2017)[145].

The interpretation of data gathered to study the domestic violence issue more generally has traditionally used two primary sources: (family conflict) victimization surveys and police official statistics. From the victimization surveys, in particular the CTS, it was suggested that men and women tended to be found equally violent toward each other, while the police data appeared to indicate that in fact it was the men who were the primary aggressor. Most of the literature did focus on violence in heterosexual relationships. These CTS "equally violent" findings resulted in the gender symmetric argument by supporters of the survey approach to IPV measurement.

Specifically, in 2007, the creator of the CTS, gender symmetry's primary proponent, Straus, wrote, along with Dr. Ignacio Ramirez[146], about gender symmetry in physical aggression against dating partners in samples of university students in Mexico and the

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[144] Lysova, A., Dim, E. & Dutton, D. (2019). "Prevalence and consequences of Intimate Partner Violence in Canada as measured by the National Victimization Survey", in *Partner Abuse*, vol. 10(2), p.200.
[145] *Supra* note 78 , section 4.4.3
[146] Straus M. & Ramirez, I.L. (2007). "Gender Symmetry in prevalence, severity and chronicity of physical aggression against dating partners by university students in Mexico and the USA", *Aggressive Behaviour*, vol. 33(4), pp. 281-290.

United States. One of the main reasons stated for the gender symmetry approach in their studies emerge from the analyses of results from the application of the Conflict Tactics Scale (CTS, in this case, the revised CTS2 instrument).

However, it is interesting to point out that while the focus is upon couples, in both the CTS/CTS2, it is always one person in the couple who is reporting on both people's behavior. Straus himself admitted there is significant over reporting of the partner's behavior (Straus & Ramirez, p.287). Thus, there is an underreporting of their own behavior and an over reporting of their partner's. The other point to note here is that the categorization of the behaviours themselves has been viewed as problematic with the "minor violence" category, for example, including such behaviours as slapping and throwing objects.

Another proponent of the gender symmetry approach is Dr. Donald Dutton and his colleagues. In their 2010 article, "The Gender Paradigm in Family Court processes: Re-balancing the scales of justice from biased social science"[147], they argue that IPV is mainly viewed as male-perpetrated against female victims by what he terms the "gender paradigm" proponents. They erroneously, in their view, conflate gender and intimate relationships roles and compress the actual heterogeneity and variance of perpetration and victimization risk within each gender (p.3-4). These proponents, they argue, are able to ignore and discount the incidence of female violence and male victimization (as demonstrated in studies using the CTS) in the population at large. Basically, according to Dutton, the methodology of researchers such as Johnson and DeKeseredy, who challenge the Gender Symmetry argument, is seen to be flawed.

Other authors have written about what they see as the limitations of the very instrument, the CTS or the CTS2,that Dutton and the gender symmetry proponents most often used in the studies about which they write. Two of the earlier articles in this regard were by Drs. Rebecca Dobash, Russell Dobash, Margo Wilson and Martin Daly (1992)[148] and Drs. Walter DeKeseredy and Martin Schwartz (1998)[149]. Dobash et al. summarized the Straus and others' arguments this way:

Among other concerns, Dobash, et al. set out four issues with the CTS instrument, many of which have been also mentioned by others:

Dutton, D., Hamel, J. & Aaronson, J. (2010). "The Gender Paradigm in Family Court processes: Re-balancing the scales of justice from biased social science"[147], *Journal of Child Custody: Research, Issues & Practices*, vol. 7 (1), pp.1-31.

[148] Dobash, R.P., Dobash, R.E., Wilson, M. & Daly, M. (1992). "Myth of sexual symmetry in marital violence", in *Social Problems*, vol. 39(1).

[149] DeKeseredy, W.S. & Schwartz (1998), *Woman Abuse on Campus: Results from the Canadian National Survey.* Thousand Oaks, CA: Sage.

* the instrument's exclusive focus upon "acts", ignoring context of motivations/intentions/interpretations/patterns (as noted above);

* the retrospective reports of past year's events are unlikely to be accurate;

* the formulaic distinctions between "minor" and "severe" violence are problematic (as also noted above); and

* the responses of aggressors and victims have been given identical evidentiary status in deriving incidence estimates, while inconsistencies are ignored (p. 76).

Similar to Dobash et al, DeKeseredy and Schwartz also cite lack of (social) context and motive information for both the CTS and CTS2 which "makes it easy to develop erroneous theoretical, empirical, and political interpretations of the events…". They note too that "many object to the 'rank order' concept that some events are automatically worse than others…". In addition, they reference the fact that underreporting can be a problem with victim surveys, which both the CTS and CTS2 are.

Other problems relate to the issue of memory failure on the part of the respondents, with the survey requiring recall of events, and finally, sampling and non-sampling errors can also provide challenges with the survey approach. Estimates can be generated for the population of interest but those are *estimates* and cannot be considered the "*true"* count that would emerge from analysis of the whole population (UN Manual on Victimization Surveys)[150].

(The gender symmetry advocates) argue that "the existence of an invisible legion of assaulted husbands is an inference which strikes many family violence researchers as reasonable. Two lines of evidence – homicide data and CTS survey results – suggest to those supporting the sexual-symmetry-of-violence thesis that large numbers of men are trapped in violent relationships. These men are allegedly being denied medical, and criminal justice services because of an unwillingness to accept the evidence from homicide statistics and the CTS surveys"(p. 74)[151][152].

Dr. Michael Johnson, in his 2008[153] article about gender symmetry and asymmetry in domestic violence, has yet another perspective about the issue. He argues that it is necessary to distinguish among three types of domestic violence, based upon the

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[150] UN Manual on Victimization Surveys, UN Office on Drugs and Crime (2010), p. 6

[151] *Supra* note 149.

[152] Demarais et al. make this same type of argument for the need for services for male victims in their meta-analysis paper on the prevalence of physical violence in intimate relationships. Demarais, S.L., Reeves, K., Nichols, T. & Telford, R. (2012) "Prevalence of Physical Violence in Intimate Relationships, Part 1: Rates of Male and Female Victimization", Springer Publishing.

[153] Johnson, M. (2008*). A typology of domestic violence: Intimate Terrorism, Violent Resistance and Situational couple violence*, in North Western University Press.

dyadic nature of the violence: the intimate terrorist; violent resistance; and the situational couple. The one he suggests is more gender symmetric in nature is the situational couple category.

These are important to distinguish because he believes they each have different causes, different patterns of development, different consequences and that they require different forms of intervention (p. 290). They ultimately also have different consequences on patterns of reporting. Thus, reports of DV coming from the police or service agencies will likely report higher rates of DV emerging out of the intimate terrorist events and violent resistant ones, while those coming from surveys, such as the CTS represents, will produce more reporting of situational couple violence.

It should be noted, however, that Neilson in her 2017 book, has suggested cautions be used in the use of some of Johnson's categories as they have not yet been empirically validated, researchers are reporting difficulties in distinguishing between them, that the distinctions don't really matter from a harm and safety perspective standpoint, and that this is a particularly salient point when it comes to the categories' impact on children. She states that "If the goal is to understand domestic violence, one cannot rely on statistics documenting primarily minor, isolated, and non repeated acts of violence in non-abusive intimate relationships or on statistics that include the violence that partners ('victims') use to resist domestic violence (footnote omitted).[154]

Similarly, in Lecturer Mary Allen's 2010 article, it was written that she supported Johnson and Ferraro's (2000)[155] earlier four typologies (the fourth category, later dropped, was mutual violence), but with the caveat that women's use of violence as self-defense or retaliation for ongoing abuse by their partner could be misunderstood… if the dynamics of control and the differential experience of fear by abuse women (their social context) were not fully understood by a social worker or counsellor. A lack of such understanding will continue to impact negatively on social workers' ability to make appropriate and effective interventions, and possibly lead to further worryingly poor practice and woman blaming in the child protection system.[156]

In a similar vein, Drs. H.L. Karr & K.D. O'Leary in 2010[157] also argued that most studies do not delineate the categories clearly and finely enough to be able to be able to speak

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[154] *Supra* note 78, section 4.4.3

[155] Johnson, M. & Ferraro, K. (2000)."Research on domestic violence in the 1990's: Making distinctions", in *Journal of Marriage and the Family,* vol.62, pp. 948-964.

[156] *Supra* note 136, Conclusion

[157] Kar, H. & O'Leary, K. (2010). "Gender symmetry or asymmetry in intimate partner victimization? Not an either/or answer", in *Partner Abuse,* vol. *1(*2), pp.152-168.

to the gender symmetry issue because it really all depends on more than the simple prevalence rates of aggression in men and women (that is, for example, the social context is needed as well).

In examining a form of violence other than physical violence, Drs. Eugene Dim & Patience Elabor-Idemudia in 2018[158] focussed upon the ”Prevalence and Predictors of Psychological Violence against Male Victims in Intimate Relationships in Canada”. When Johnson’s recategorization of psychological violence is applied to the data gathered for their study, however, for one finding it was found that females (17%) experienced higher controlling behaviours from their male partners than male victims (9.3%) did from their female partners.

We conclude the quantitative discussion of the relevant research with a description of a recent publication referenced earlier in the paper by Drs. A. Lysova, E. Dim & D. Dutton (2019)[159] which continues the gender symmetry debate. They acknowledge that police statistics reflect only the crimes that came to the attention of the police, and these crimes are likely to be particularly serious – and that victimization surveys capture many other assaults that did not come to the attention of police and thus provide a complementary aspect of IPV, especially with data on men’s victimization experiences. They use the 2014 GSS data on Victimization (Note: a victimization survey, i.e., not police-reported data) and its measurement of physical, including sexual, violence by Statistics Canada follows the revised version of the Conflict Tactics Scales (CTS2) method).

This particular study examined “the prevalence of victimization resulted from physical and/or sexual IPV, controlling behaviors and also consequences of IPV for both men and women in a sample representative of the Canadian population”. Two of the gender symmetric findings were, first, that 35% of male and 34% of female victims of IPV experienced high controlling behaviors - the most severe type of abuse known as intimate terrorism. As well, 22% of male victims and 19% of female victims of IPV were found to have experienced severe physical violence along with high controlling behaviors.

As far as non gender-symmetric findings, the authors conclude that women were more likely than men to be reported as victims of intimate partner homicide, sexual assaults,

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http://dx.doi.org/10.1891/1946-6560.1.2.152

[158] Dim, E. & Elabor-Idemudia, P. (2017). “Psychological Violence against male victims in intimate relationships in Canada”, in *Journal of Aggression Maltreatment & Trauma,* vol. 27(8). https://www.researchgate.net/publication/320681121_Prevalence_and_Predictors_of_Psychological_Violence_Against_Male_Victims_in_Intimate_Relationships_in_Canada

[159] *Supra* note 145.

criminal harassment, and uttering threats in the intimate relationship. This clearly indicates the severity of IPV against women. No gender symmetry here.

On the other hand, interestingly, there was also no gender symmetry found when it comes to experiencing physical and/or sexual IPV in a current relationship in the last 5 years (2.9% of men and 1.7% of women). Apart from that, as far as reporting the violence, it was reported that the odds of men reporting that they were sexually assaulted were 1.7 times that of women and the odds of men reporting that they had experienced severe physical assault were 2.1 times that of women (p. 208).

In looking at qualitative "data" in this area, in contrast to the quantitative, we see that qualitative information can allow for a focus on social context factors which include, most importantly in this case, the voices of the women themselves and how they experience the abuse (consistent with the importance of McLaughlin's idea of "lived realities"). It is hard if not impossible to quantify the many intersectionality factors in a social context. Still, awareness and consideration of factors such as the woman's feelings of fear and worry over safety for herself and her children are important to consider, as well as her challenges with poverty, her and her children's health, and her access to support and safe housing are critical pieces of information for decision making. It was the main principle behind our reaching out to the community in our consultation - to hear about those issues from the women themselves and those who work with them – and this too is the location where gender symmetry claims can be illuminated.

In that regard, Pamela Cross[160] provides further information about the value of qualitative social context information from her own experiences as a practitioner. She indicates that she has a sense of the context of Family Violence and "when I try to help people understand the lack of gender symmetry in FV, I talk about fear; who is afraid? Who is not afraid? This always seems to help them get it; most people realize that most men are not afraid of their female partner, even if those partners are engaging in physical violence of some sort "(2019).

To summarize this section of Part IV of our report: we have dealt with the controversial topic of gender symmetry in intimate partner violence situations. Tracing the history of the stream of relevant studies and arguments over the years, it does seem that much of the debate revolves around the value and validity of victimization survey data and analysis as opposed to data gathered and analyzed from police-based sources. Basically, the main criticisms of the primary instrument used, the CTS, suggest that it fails to provide meaningful social context for the findings. It should be acknowledged,

[160] Pamela Cross is a Canadian legal advocate/practitioner, who is the Legal Director of Luke's Place.

however, that certain researchers do argue that the revised CTS2 properly accounts for the context of violence, and for example, is able to separate incidents of play fighting and actual assault[161].

As we have seen throughout this report, meaningful social context is essential information for assessors to be both aware of and informed by, to make assessments and decisions for parenting capacity, child protection and guardianship issues. In that sense, then, the answer to the opening question, is yes, gender symmetry claims do minimize the significance of social context in these cases. Finally, and in addition, this conclusion has obvious wider import for justice policy and procedure in the courts, that is, in order to ensure equality-based outcomes for women and their children and to achieve an informed impartiality in reaching those decisions, a gender symmetry approach is not sufficient.

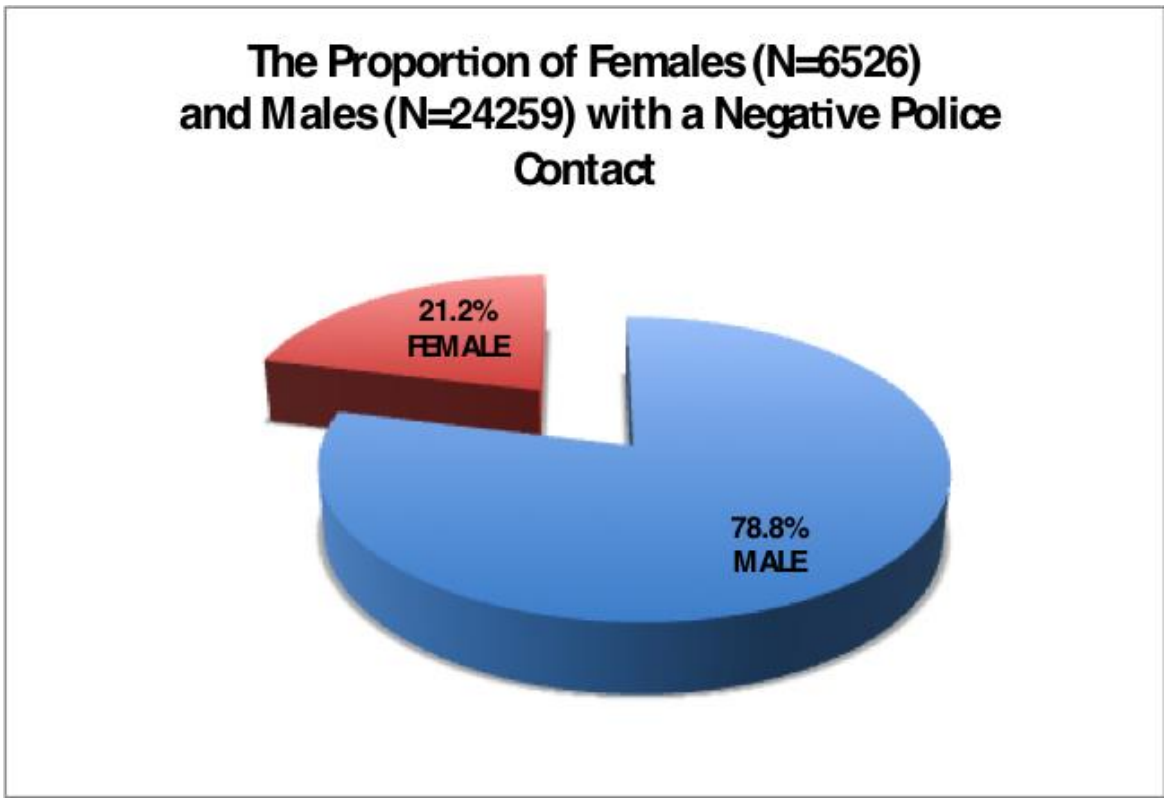
C. RESEARCH FINDINGS ADDENDUM – BC, National, US & The UN

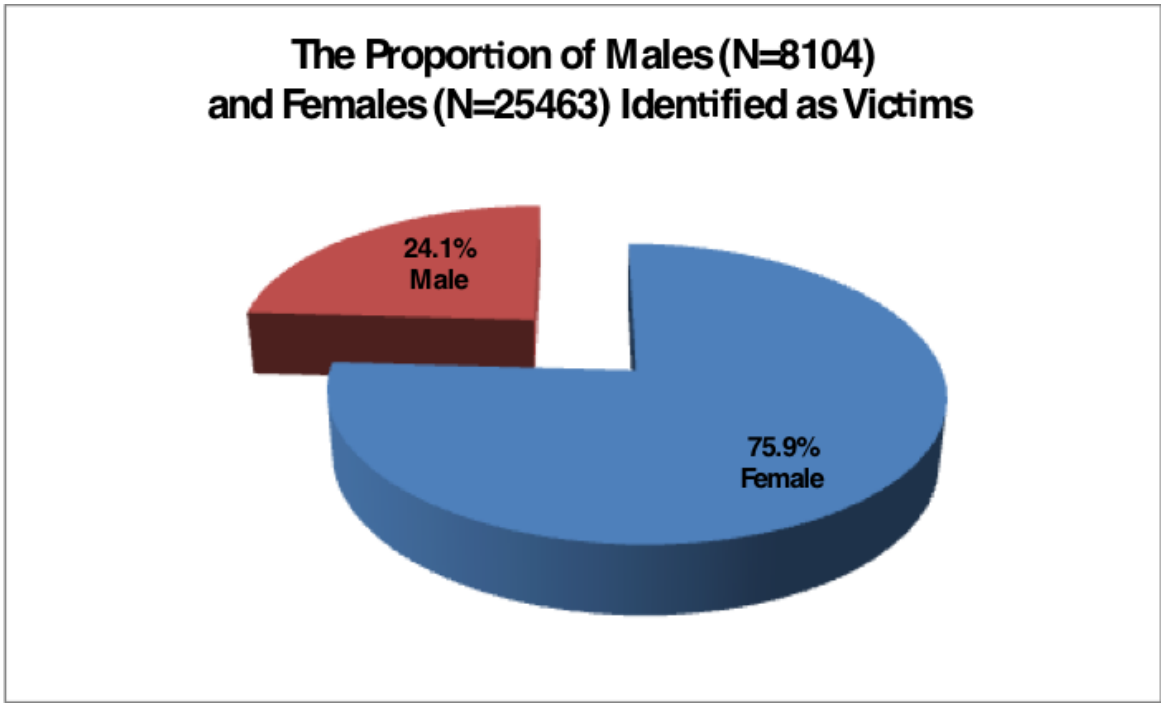
In reflecting back on the opening discussion in the report of the importance of social context in domestic violence cases, it should be remembered that while it is the individual acts of abuse which are used for the assessment of family competency and the social context which can make meaning of the acts of abuse in that assessment, the acts themselves can form an abusive pattern over time. Both the acts and patterns of acts and the social context interact together within the relationship. The abusive acts and pattern of abusive acts (which may change over time, e.g., escalate/deescalate) must be considered within the social context (which itself may also change over time, e.g., increased poverty of mother, decreasing health and well-being of mother/child) in order to understand the gendered impact on the assessment of parenting competency.

Note: None of the reports that follow indicate gender symmetry in their findings.

The British Columbia EVA, RCMP, and FREDA Centre PRIME STUDY on IPV (C. Giles and M. Jackson, 2014) – using the PRIME police database:

[161] *Supra* note 145, p. 214.





The research focused upon victim roles and negative police contact roles (NPC).

- Note: NPC roles were defined as: arrested, charged, suspect chargeable and suspect roles for people associated with an event.

- The time frame for this research was a 4-year interval that included the years 2009, 2010, 2011 and 2012.

Status of Women Canada – 2016 Report: Setting the Stage for a Federal Strategy Against Gender-based Violence: Vision, Outcomes, & Principles

The report states that while violence affects people of all genders, ages, cultures, ethnicities, religions and geographic locations, as well as individuals from a range of socioeconomic backgrounds, women and girls are more at risk of many forms of violence. It notes that some women are more vulnerable than others and emphasizes the particular challenges they heard from Indigenous women and girls, although the perspectives of young women, women and girls with disabilities, LGBTQQI2S people (lesbian, gay, bisexual, transgender, queer, questioning, intersex, two-spirit and gender-non conforming) were also sought.

https://www.google.com/search?client=firefox-b-d&q=status+of+women+setting+the+stage+2016

StatsCan 2018 – Using 2017 reporting data[162]:

Intimate partner violence (IPV) includes violent offences that occur between current and former legally married spouses, common-law partners, dating partners and other kinds of intimate partners. In 2017, IPV represented close to one-third (30%) of all police-reported violent crime in Canada, affecting almost 96,000 victims aged 15 to 89. In comparison, 33% of violent crime victims had been subjected to violence by a person they knew other than an intimate partner or family member, and 26% had been victimized by a stranger.

Women were overrepresented as victims of IPV, accounting for almost 8 in 10 victims (79%). IPV was the most common kind of violence experienced by women (45% of all female victims aged 15 to 89).

A criminal incident is considered cleared when a charge is laid or recommended, or when it is dealt with by police in another way (for example, through referral to a diversionary program). When it came to incidents that were cleared, dating violence was more likely to result in a charge than violence by a spouse. In cases of physical assault, 91% of dating violence victims saw charges laid in relation to the incidents in which they were involved, compared to 78% for spousal violence.

[162] Footnotes and tables not reproduced)

Homicides: Intimate partner homicides occur within complex interpersonal contexts that often involve a history of violence. When it came to homicides between spouses specifically,- almost two-thirds (62%) of those which occurred between 2007 and 2017 were preceded by a history of family violence. The primary motive in these cases was most often an argument or quarrel (50%), frustration, anger or despair (24%) and jealousy (17%), a range of emotions typical of offenders exerting control over victims. Analyses of police-reported motives are important for violence prevention policy. Between 2007 and 2017, an argument or quarrel was the most common primary motive for intimate partner homicides occurring between 2007 and 2017 (39%), including those involving spouses as well as dating partners. This was followed by frustration, anger or despair (27%) and jealousy (19%). Of the 933 intimate partner homicides which occurred between 2007 and 2017, a large majority (79%) involved female victims. Most female victims of intimate partner homicide were killed by a current or former legally married or common-law husband (75%), and boyfriends were responsible for the other quarter (25%) of female victims' deaths. Most male victims were also killed by current or former legally married or common-law wives (59%) and girlfriends (27%), but a notable proportion were killed by same-sex spouses or dating partners (14%).

https://www150.statcan.gc.ca/n1/daily-quotidien/181205/dq181205a-eng.htm

2019 National Femicide Report: The first annual report by the Canadian Femicide Observatory for Justice and Accountability — titled ".CallItFemicide":

One goal of the report, at least in part, is to acknowledge that the circumstances and motivations (the social context) surrounding women's violent deaths differs from those of men so that femicide can be better understood and prevented.

"The context in which women and girls are killed is vastly different because they're most often killed by people they know, and that's in contrast to males who are most often killed by acquaintances and strangers," Myrna Dawson, the Director, said.

"Calling it for what it is and recognizing the distinctiveness underscores the fact that we need different types of prevention."

Fifty-three percent of the women were killed by intimate partners.

The report said 148 women and girls were killed in 133 incidents in 2018, with 140 people accused in their deaths. In 12 of the 133 incidents, no accused has been identified. Some cases involve multiple accused.

More than 90 per cent of those accused were men.

https://www.cbc.ca/news/canada/toronto/femicide-canada-report-1.4998359

2019 US Center for Judicial Excellence – US Divorce Child Murder Data (2008 to Present)

Of 679 children murdered by a divorcing/separating partner, the relationship of the killer was as follows:

73% of the time, it was the father

14% of the time, it was the mother

4% of the time, it was the stepmother, and

8% of the time, it was "other"

https://centerforjudicialexcellence.org/

2018 UN Study – "Home is the most dangerous place for women"

Out of an estimated 87,000 women killed last year, some 50,000 -- or 58% -- were killed by partners or family members, according to the 2018 report on gender-related killing of women and girls by the United Nations Office on Drugs and Crime (UNODC)..

UNODC Executive Director Yury Fedotov said women "continue to pay the highest price as a result of gender inequality, discrimination and negative stereotypes" and that gender-based homicide is a "lethal act on a continuum of gender-based discrimination and abuse."

The study, released on the International Day for the Elimination of Violence Against Women on November 25, looked at homicide data related to gender violence and "femicide," a term understood as a gender-based hate crime perpetrated by men.

https://www.cnn.com/2018/11/26/health/home-most-dangerous-place-for-women-un-report/index.html

CONCLUDING OBSERVATIONS

We have considered a number of themes relating to judicial education which we respectfully suggest should be addressed by judicial educators in the future. Attention should be paid to: (1) judicial understanding of the complexities of family violence and its impact generally, and the particular issues that arise when parenting assessments are ordered, using a contextual analysis based on substantive equality principles; (2) the need to include women and children (and their voices) and organizations which advance their equality rights, in judicial education programming development and delivery to assist in identifying the relevant concerns and to provide direct information to judges about those concerns; and (3) overall the importance of ensuring that such education is a professional requirement for judges (and for everyone else whose work has an impact upon the safety, security and well-being of women and children). As was

noted in both Judges as Equality Guardians, and The Shifting Landscape, such education, to be comprehensive, in-depth, and credible to both judges and to the public, must be more than a one-off judicial program on family violence. Being competent to judge these cases requires ongoing education on family violence - continuing throughout a judge's judicial career.

We have suggested that such education is essential to address concerns raised about continuing discriminatory experiences of women and of children in family justice processes - ones which can act as barriers to just outcomes. We have seen that among the concerns are the continuing use of unfounded assumptions - myths and stereotypes about family violence, its impact, and responses to it - which can have a negative impact upon credibility assessments of both women and children and the lack of understanding more broadly of the lived realities of women and of children. With respect to violence against women specifically, there is a concern that the nature of and impact of violence by men against women can be minimized, creating the impression that there is "gender symmetry" when such analyses ignore or undervalue the significance of the social context and empirical reality of gendered violence.

Parenting assessments have become a common feature of contested family law proceedings. It appears that they are almost always a feature of the many concerning contested trials which occupy much of the time of the courts. We have identified the overuse and misuse of parenting assessments as a significant justice system concern, with a focus on: the routine approval of such reports without determining whether they actual will assist; the lack of expertise about family violence and its impact by assessors; the ways in which family violence can be ignored or minimized, or otherwise overshadowed by presumptions about the importance of joint parenting which can be contrary to the provisions of the FLA. These concerns can be exacerbated by a tendency on the part of some judges to defer to such experts, without fully engaging in their judicial oversight role. We have made practical suggestions to assist judges in exercising that judicial oversight role.

We have also raised an issue which causes us considerable concern: claims of parental alienation in family violence cases, often against mothers who have raised family violence as a future and/or current safety, security and well-being issue for both their children and themselves. As we earlier stated, the index term of parental alienation has apparently now been approved by the WHO for inclusion in the *ICD-11*, and will come into force in January 2022. This continues to be a significant justice issue.

While deliberate, malicious efforts by one parent, to unfairly turn the children against the other parent certainly must be effectively addressed by the justice system, there also must be due attention paid to the issue of the dynamics of the social context of the family, and especially its power and control factors. A full analysis of this complex issue

is well beyond the scope of this paper; however we wish to flag three matters we suggest that those grappling with the challenges in the future must address to ensure just, equality based outcomes in these important cases.

First, while claims of alienation must be fairly considered, they should be assessed as part of the broader legal and factual matrix of the particular family being judged, including allegations of family violence and its potential negative impact on the future safety, security and well-being of women and children. As discussed, there have been efforts by some to inappropriately elevate the notion of parental alienation to, in essence, a medical/mental health concern. The development of the criteria for such a label will involve the formation of a list of symptoms, possible treatments, and complicating factors. The focus of proceedings can then change dramatically from one which would include the concerns of women, and of children, about family violence and its impact, to a focus on whether the mother meets the criteria and thus should be subjected to treatment.

Women can then potentially come to be seen as the abnormal actor - not the abusive father - the one whose conduct must be explained by an expert, should be treated by an expert, but certainly not considered to be seen as credible in a courtroom or appropriate to parent. As a result, the legitimate concerns about the safety of the women and their children set out by the women can fade relative to the perceived need and priority to treat the medical/mental health issue in the woman. Doing so can place mothers and children at further risk of harm.

Second, great care must be taken in considering/assessing “research” which suggests that false and inappropriate efforts by mothers to alienate fathers are common and increasing. This conclusion is challenged qualitatively and empirically by women’s equality advancing professionals and organizations as well as academic researchers in Canada and internationally. Third, it is well known that, in Canada, the reporting rates by women of gendered violence, including family violence, are low. This is in part attributable to concern that some women believe they will not be fairly treated in the justice system. We find concerning reports that some women have chosen not to raise family violence concerns in family court proceedings because of fears of not being believed and instead being found to be an alienating parent and lose their children. It is even more concerning that some lawyers find it necessary to suggest that the issue not be raised for that reason.

Finally, we have said throughout our work that the goal of any justice proceeding is to achieve a result that provides a just result for all; it is the process of analysis, using a substantive equality lens, that matters. But, we reinforce what we said at the conclusion of our article, Judges as Equality Guardians: justice for all includes justice for women and for children.

APPENDIX

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