



Family Violence & Family Law Brief

Failure to Protect:
Social & Institutional Factors
That Prevent Access to Justice in
Family Violence/Family Law Cases

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Muriel McQueen
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ALLIANCE OF CANADIAN
RESEARCH CENTRES
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ABOUT THIS PROJECT:

Supporting the Health of Survivors of Family Violence

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

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Introduction

It is well known that those who engage in coercive family violence make use of litigation abuse tactics (also called systems abuse) in family law cases in order to harass, manipulate, confuse and exert continuing coercive control over adult partners and family life (Nonomura et al. 2022; Nonomura et al. 2021; Neilson, 2020). What is perhaps less well known is that the litigation tactics reflect the characteristic behaviour patterns of those who engage in family violence (coercive control, entitlement, lack of empathy, possessiveness, manipulation, minimization, denial, projection of blame and domination). These patterns are associated with control of former partners, children, other family members, service providers, lawyers, judges and the whole of the legal system (Neilson, 2020). While protecting victimized adults from continuing harassment and coercive control is important, focusing only on the protection of adults fails to respond to the full range of litigation tactics employed in these cases and does little to prevent the use of similar tactics to control children, services, litigation processes and the courts.

Identifiable litigation tactics evolve and change but the characteristic patterns of thought and behaviour that give rise to them do not. Thus, the first step toward effective responses is gaining an understanding of these thought and behaviour patterns. But this is merely a first step. Effective legal responses also **require a response to the socioeconomic factors and attributes of the legal systems** that support the success of litigation tactics.

Consequently, this Brief will ground an outline of litigation abuse tactics in a discussion of the social and institutional factors that reinforce the coercive control of abusers. None of the currently proposed solutions – enhanced public access to the justice system, promotion of conflict resolution, parenting presumptions in family violence cases, altered legal rules, enhanced understanding of domestic violence and child safety – alone or in combination are likely to resolve problems in family law responses to abused women and children unless the social and institutional factors that deny women and children “the equal benefit of the law without discrimination based on ... race, colour, .. sex, age or mental or physical disability” (section 15 (1) of the *Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11*) are addressed.

In order to explore this issue, the Brief begins with an outline of thought and behaviour patterns that are characteristic of those who engage in family violence. The patterns are then connected to litigation tactics used in legal systems to exert control. The Brief then situates these tactics in a discussion of the **social, psychological, and legal institutional factors that prevent access to justice** and that, instead, encourage the success of litigation tactics. Finally, the Brief makes recommendations for change.

Characteristic Abuse Patterns that Give Rise to Litigation Tactics

Although a number of authors, such as Amy Holzworth-Munroe & Jeffrey Meehan (2004) and Donald Dutton (2007), have identified psychological profiles associated with specific types of family violence, those who engage in abuse do not have a single identifiable psychological (or socioeconomic) profile (Gondolf and White, 2001; Heckert & Gondolf, 2004). While rates of family violence tend to be higher among those who are economically disadvantaged (Cotter, 2021), abusers may be well-educated, affluent, and successful professionals.

Coercive Control

Evan Stark teaches us that coercive control has two elements: coercion and control. Coercion is the use of force or threats to produce a particular response. Control refers to “structural forms of deprivation, exploitation, and command that compel obedience indirectly” (Stark, 2007, p. 229). In a legal system context, coercive threats include claims that threaten the personal identity and security of the person, such as seeking sole parenting control of children from the parent who has been the children’s primary care provider. Controlling behaviour can include depletion of the resources needed by the primary care parent to engage effectively in negotiation and litigation processes. Once resources are depleted, abused women are isolated from sources of help (such as lawyers and family violence experts). The result amounts to legal system entrapment, where abused women are forced to respond to repetitive legal claims without access to adequate litigation resources (Hrymak & Hawkins, 2021; Nonomura et al., 2022).

Entitlement

Entitlement is “the belief that one has special rights and privileges without considering reciprocal responsibilities” (Bancroft & Silverman, 2002, p. 7). Neilson found that abusive fathers tended to focus, during research interviews, on rights and entitlements with little discussion of responsibilities to children (Neilson, 2004). Lundy Bancroft and Jay Silverman report: “The typical

Common Characteristics of Abusers

Nonetheless, family violence research has identified a collection of perceptions and behaviours that are characteristic of those who exert abusive control over intimate partners and children. In addition to coercive control, these include:

1. **Entitlement**
2. **Lack of Empathy**
3. **Belief in Superiority**
4. **Possessiveness**
5. **Manipulation**
6. **Denial**
7. **Minimization**
8. **Victim Blaming**
9. **Externalization**

The same patterns are replicated in the tactics abusers use to manipulate and control professionals, community services and the legal system. Let us begin by taking a brief look at the characteristic abuse patterns and then connect those patterns to litigation tactics (systems abuse) employed in Canadian family violence, family law cases.

(Katz 2022; Bancroft, Silverman and Ritchie, 2011)

perpetrator defines his abusive behaviors as efforts to protect his own rights and defines his partner's attempts to protect herself as abuse of him" (Bancroft & Silverman, 2002, p. 8).

In a legal system context, examples of entitlement include an insistence on the right to equal parenting without accepting responsibility to repair poor relationships with children caused by abuse; repetitive applications to courts to increase parental control while failing to adhere to legal disclosure and support obligations (Neilson, 2020 at Chapter 7.4; Mazzuocco, 2017).

Lack of Empathy

Empathy is the ability to understand and respond to another person's needs and interests from the other person's perspective. In the legal system, examples of lack of empathy may include lack of respect for children's views and making claims that undermine children's parenting preferences.

Possessiveness

Many of those who engage in family violence exhibit high levels of jealousy and engage in monitoring to ensure fidelity and control. In a legal system context, reflections of possessiveness may include a view of parenting as a right and the use of parenting time to monitor and control the other parent's activities.

Manipulation

Quoting from Lundy Bancroft and Jay Silverman (2002) at pages 15-16:

"Our clients shape the public image of their partners as well, describing them to others as controlling, demanding, and verbally abusive at the same time as they paint themselves as caring and supportive partners who are earnestly trying to make things at home go well. Our clients are commonly able to lie persuasively, sounding sincere and providing an impressive level of detail while sometimes weaving together multiple fabrications".

Examples of manipulation in the legal system include claims against the targeted parent that reflect the abusing adult's own behaviour; presenting false or misleading evidence; and/or presenting the other parent's attempts to protect the children as evidence of attempts to alienate the children. A well-documented example of manipulation is the erratic or infrequent exercise of parenting time, followed by a legal claim that the other parent is not complying with the parenting order after the children's activities have been rearranged in order to shield the children from the abuser's neglect.

Denial & Minimization

Adults who engage in family violence are known to deny and/or minimize their own abuse and violence to therapists, researchers and to judges (Dutton, 2006; Bancroft & Silverman, 2002; James et al., 2003). Nonetheless, despite considerable empirical evidence of these denial and minimization patterns, Canadian courts continue to display skepticism about family violence

claims in favour of accepting the validity of denials (Lapierre, 2021; Sheehy & Boyd, 2020; Zaccour, 2020).

Externalization & Projection of Responsibility

Those who engage in family violence avoid acceptance of responsibility. When children are harmed by violence in the home, the cause may be attributed to the other parent's poor parenting, rather than to the perpetrator's own abuse or violence. Bancroft and Silverman (2002) report at pages 17 and 18:

Our clients take the same attitude toward the effects on their children of exposure to domestic violence, attributing their difficulties to the mother's poor parenting or to the inherently weak character of the children. If his abusive behaviour drives his children away from him emotionally, he is likely to accuse the mother of 'alienating' the children.

In a Canadian legal context, instead of accepting responsibility for harm to children and taking steps to make amends, adults who engage in family violence will often externalize responsibility by claiming that the children resist their parenting because the other parent has failed to "support the development and maintenance of the child's relationship" with them (s. 16(3)(c) of the *Divorce Act*). Empirically, parental alienation claims are common in family violence claim cases (Lapierre, 2021; Neilson, 2018; Sheehy & Boyd 2020; Zaccour, 2020). Legal acceptance of such claims in a family violence context rewards deflection of responsibility patterns.

Abusive Litigation Tactics

Litigation becomes a useful tool to maintain contact, to harass and intimidate and to exert continuing domination and control over former partners and children (Nonomura et al., 2021; Neilson 2020, at Chapter 7.4). In many family violence cases, abusers engage multiple legal systems (family courts, appeal courts, child protection agencies, police, civil protection systems, and access to information processes) in the crusade to regain control (Department of Justice, 2014; Neilson, 2014; Jackson & Martinson, 2015). Australia's *National Domestic Violence Bench Book* characterizes this phenomenon as "systems abuse."¹ Some authors assert that the misuse of litigation to harass and control serves as a form of family violence. A number of Canadian courts agree. Refer, for example, to *A.N.H. v. L.D.G., 2022 BCCA 155* wherein British Columbia's Court of Appeal endorses, at paragraph 49, Justice Cole's conclusion that misuse of court processes to intimidate and harass constitutes family violence pursuant to British Columbia's *Family Law Act, S.B.C. 2011 c. 25*. See also: *Dworakowski v. Dworakowski, 2022 ONSC 1270*.

¹ Refer as well to Heather Douglas (2018). Legal systems abuse and coercive control. *Criminology & Criminal Justice*, 18(1), 84-99. <https://doi.org/10.1177/1748895817728380>.

Protracted litigation not only forces the targeted parent to have continuing contact with the domestic violator, but it also depletes litigation resources, increases stress, and interferes with the surviving adult and child's recovery from family violence. Depleted economic and psychological resources reduce targeted parents' ability to respond effectively to efforts to exert coercive control over the entire legal system. The litigation abuse phenomenon is well documented in Australia (National Domestic Violence Bench Book, 2022) and the United States (Mandel et al., 2021) as well as in Canada (Nonomura et al., 2021; Neilson, 2020). David Mandel and colleagues (2021) report from the United States:

Domestic violence perpetrator manipulation of systems is a critical problem that undermines responses to family violence and deeply impacts adult and child survivors in many ways. Perpetrators manipulate systems to bolster their own power and abuse, and to control adult and child survivors further. For example, they use false allegations of criminal behavior, parental alienation, and "failure to protect" to target survivors, their children and the professionals involved with the family. Perpetrators' successful manipulation of systems compounds reinforced and legitimizes their power., increasing both the survivors' sense of their own powerlessness and the perpetrators' seeming omnipotence. Sadly, the perpetrators' use of these systems is often successful: Adult survivors can lose their freedom, their children, and their physical and mental health. Harassment via repeated reporting and /or litigation can also deplete survivors' finances in addition to wasting public resources. As a result, adult and child survivors often lose trust in the systems that are supposed to protect them (2021, pg. 2).

Illustrations of 'systems abuse' or 'litigation abuse' can be found throughout Canadian case law (Neilson, 2020 at Chapter 7.4).²

The litigation tactics employed in these cases mirror the aforementioned characteristic patterns of thought and behaviour associated with perpetrating family violence (i.e., coercive control, entitlement, lack of empathy, possessiveness, manipulation, minimization, denial, projection of blame and domination). Between 2002 and 2020 the author (Neilson) reviewed every Court of Appeal family law and child protection case reported on the Canadian Legal Information Institute (CanLII) web site, supplemented by cases reported by QuickLaw, in order to empirically assess judicial responses to family violence claims across Canada in order to write three editions of a domestic violence bench book for Canadian judges on behalf of the National Judicial Institute and, subsequently, in order to revise and update the content in order to create the Canadian Legal Information Institute e-book on the same topic (Neilson, 2020). Chapter 7 identifies 36 common litigation abuse tactics found in family law and child protection cases (see s. 7.4.1). It became clear,

² For an extreme illustration, refer to Appendix A of: *Doncaster v. Chignecto-Central Regional School Board*, 2013 NSCA 59 as well as to the subsequent *Doncaster v Field* cases in Nova Scotia including *Doncaster v. Field*, 2014 NSCA 39; *Doncaster v. Field*, 2015 NSCA 83; *Doncaster v. Field*, 2016 NSCA 81 and 89; *Doncaster v Field*, 2019 NSCA 61; and *Doncaster v. Field*, 2020 NSSC 257.

when assessing litigation patterns in the case law, that the same behaviour patterns documented by family violence researchers as characteristic of those who engage in family violence were being used in litigation to control negotiation and litigation processes. While the suggested responses set out in Chapter 7 of Neilson 2020, 2nd ed. are Canadian, the litigation abuse tactics themselves are not specific to geographic location. Table 1 below connects litigation tactics to characteristic abuse patterns identified in the family violence research.

Table 1

Litigation Abuse Tactic	Characteristic Patterns	Legal System Effect
Protracted litigation	Coercive-control, Entitlement	Undermines and isolates the other party; depletes emotional and financial resources required to support litigation; controls the pace of litigation; produces legal system entrapment
Presents evidence of wrongful 'victim' conduct (e.g., removes insurance on the car and presents evidence that the targeted parent is transporting the children without car insurance)	Manipulation, Deflection of responsibility	Misleads the legal system, creates confusion; undermines and threatens/coerces the other party
Insists on the 'fairness' of mutual protection orders	Coercive-control, denial/minimization, projection	Manipulates and misuses the legal system to continue to control the targeted adult
Fails to adhere to protection orders	Entitlement, Denial/minimization	Intimidates; depletes legal system resources
Dismisses the validity of child preferences, claims the other parent is responsible	Coercive-control, Entitlement, Deflection of responsibility	Silences women and children; undermines evidence from children; manipulates courts
Fails to disclose financial records and to honour financial obligations	Coercive-control, Entitlement, lack of empathy	Puts the onus on the other party while denying access to evidence needed for proof; forces repetitive applications to court; depletes litigation resources; undermines independence, creates legal system entrapment

Presents, in the family case, evidence of victim recant in the criminal case. (Recant is often the result of manipulation or intimidation: Neilson, 2013, Part 9, 2020 2 nd ed. At 4.5.2)	Manipulation of legal system, Coercive-control, Denial	Silences; removes court access to evidence; misleads legal system
Presents mirror claims	Coercive control, projection, manipulation	Creates confusion, delay, obstruction
Presents evidence of harm from abuse as evidence of other's instability	Manipulation	Misleads the legal system
Presents evidence of misuse of alcohol or drugs by other party (despite having initiated or encouraged such use for control purposes)	Coercive-control, projection	Manipulation, undermines the other party's evidence; misleads the legal system
Provokes & presents evidence of targeted adult violence. (Victim resistance violence is common. See 4.4.6 through 4.4.11 of Neilson, 2020, 2 nd ed. for discussion of the concept)	Manipulation, projection of responsibility	Undermines the other party's evidence; confuses and misleads the legal system
Presents one-sided evidence	Coercive-control, minimization	Manipulation and confuses legal system
Subtle intimidation during legal processes	Coercive-control	Misuse of legal process to intimidate; silences targeted parent(s) and children.
Presents good character evidence	Manipulation	Confuses
Claims abuse was a first/one-time occurrence	Denial/minimization	Creates confusion; manipulates presumption of innocence
Asserts claims made for the first time in litigation are, on that basis, suspect	Manipulation	Manipulates skepticism of family violence claims

Presents evidence of child harm from family violence as evidence of other's poor parenting	Coercive-control, lack of empathy for child, denial, projection	Creates confusion; manipulates the legal system
Seeks to present direct evidence from the child	Coercive-control, entitlement, lack of empathy for child	Attempted use of the legal system to control the child
Claims the other party is poisoning child's mind	Entitlement, lack of empathy for child, denial/minimization, projection	Reverses the onus of proof; undermines evidence from children; results in legal system entrapment
Manipulates denial of contact (e.g., does not exercise parenting time until child activities are rearranged and then claims denial)	Entitlement, lack of empathy for child, manipulation	Manipulation of the legal system; generates bias against the targeted parent
Presents evidence of good parenting during observed supervision	Possible manipulation, denial/minimization	Misleads courts
Tests the limits of orders & agreements	Entitlement, coercive-control	Depletes legal system resources
Insists on parenting entitlements (e.g., shared or joint parenting) while failing to adhere to parenting responsibilities	Coercive-control, Entitlement, lack of empathy for child	Repeated claims create legal system entrapment that abused women and children are unable to escape
Spurious child abuse claims	Coercive-control, manipulation, lack of empathy for child	Creates confusion; deflects responsibility and depletes system resources
Encourages paternal grandparent claims against the targeted parent	Coercive-control	Attempted control over children and the family through third parties. When successful, creates entrapment.
Insists on police enforcement of contact with child	Coercive-control, Entitlement, lack of empathy for child	Misuse of the legal system to coerce and control children

Threatened or actual child abduction	Coercive-control, entitlement, lack of empathy for child	Instills fear, potentially harms or isolates the child
Settlement/mediation	Control	Creates delay; increases opportunities for contact and manipulation
Complaints made against professionals; threatens anyone who attempts to assist the targeted parent and child	Coercive-control, entitlement	Isolates targeted adult from sources of help
Claims own lawyer's incompetence	Coercive-control, entitlement	Creates delay; undermines settlement discussions; depletes legal system resources
Claims judicial bias	Coercive-control, entitlement	Attempts to coerce judicial 'compliance'; depletes judicial energy and legal system resources
Parallel claims in multiple court systems	Coercive-control, manipulation	Manipulation of systems; generates opportunities for confusion; depletes resources, ensures legal system entrapment
Records child and targeted parent behaviour out of context	Coercive-control, manipulation	Misleads courts; intimidates
Seeks help as a tactic	Manipulation	Manipulation (when seeking help is not genuine)
When the abuser is a police officer, lawyer, or judge	Coercive-control, manipulation	Creates fear; undermines the other party's confidence in the legal system
Seeks return of child pursuant to the 'Hague Convention'	Coercive-control, Entitlement, lack of empathy for child	Use of the legal system to regain control

While it can't be said that every litigant who engaged in family violence will also employ litigation abuse tactics, nor should it be assumed without careful scrutiny of the surrounding circumstances

that every behaviour identified in the first column of Table 1 is, in fact, a litigation tactic, the research has repeatedly documented the use of litigation abuse tactics in family violence cases. Robert Nonomura and colleagues, for example, offer multiple illustrations of the devastating consequences of systems abuse for abused women and children in Nonomura et al (2021) [online](#) and Nonomura et al (2022) [online](#). When litigation tactics are successful, abused women and children become ensnared in a legal system that, as a result of the gender-related social and institutional factors discussed throughout the remainder of this Brief, offers little hope of escape to freedom.

Let us turn now to a discussion of ecological, social, economic, psychological, and legal factors that encourage the success of litigation abuse tactics.

Social Context

Gender and Socioeconomic Factors that Affect Access to Justice

Legal systems do not exist in isolation; they operate within the social, economic and cultural context in which they were created and are maintained. Let us begin this discussion with an examination of gender-related socioeconomic factors that affect access to justice in Canada.

Considerable research has been conducted over many years comparing the socioeconomic impacts of separation and divorce on women and on men. Consistently, the research tells us that women, as a social group, experience higher levels of negative social and economic effects from separation and divorce than men do (De Vaus et al., 2015; Stewart & McFadyen, 1991; Department of Justice, 2016; Pelletier et al., 2019; Statistics Canada, “Portrait of Children’s Family Life in Canada in 2016”, 2017; Statistics Canada, “Children Living in Low-Income Households”, 2017). Susan Boyd (2003) outlines the disproportionate responsibilities and costs to women for childcare. For an analysis of research on this issue up to the year 1992, review [Moge v. Moge \(1992\)](#). The research findings discussed in the case have persisted over many years. The economic costs of separation and divorce are particularly pronounced among women with children, and even more so among socially disadvantaged women, and women subjected to family violence.

These results are reported internationally, as well as in the United States and Canada. For example, in 2020 Professor Dimitri Mortelmans published an international review of research studies on the economic consequences of divorce. He concluded that women, as a social group, tend to lose financially while men display diverse patterns of gains and losses as a consequence of spousal separation. He concluded at page 28:

The most important divide in the financial consequences of relationship dissolution is clearly between women and men.

In assessing the possible reasons for the persistence of the gender divide, Mortelmans (2020) concluded, as did the majority of the Supreme Court of Canada many years earlier in *Moge v. Moge* (1992), that following marital breakdown, women will often have less human capital than men, especially when women's labour market skills are depreciated as a result of staying home to care for the home and children. Mortelmans (2020) also concluded that support payments seldom reflect, much less outweigh, the full economic costs of raising children. And women are disadvantaged more than men in connection with economic recovery strategies. Many women and men escape poverty and or financial loss following divorce by re-partnering but Professor Mortelmans informs us that studies that have taken re-partnering into account have observed "different patterns by gender, with men, on average, re-partnering faster and more frequently than women (Mortelmans, 2020, pg. 30, citing Coleman et al, 2000).

In connection with re-employment, Mortelmans (2020) notes (as did the majority of the Supreme Court of Canada in *Moge, supra*), that women are more likely than men to be at a disadvantage as a result of staying home to care for children at a cost to their own careers. Indeed Mortelmans' review found that women with children are particularly disadvantaged. He concluded at page 33:

All of the studies that have examined the financial consequences of relationship dissolution have found that the income declines are greater, and the recovery periods are more difficult and more protracted among parents (especially mothers) than among childless individuals (e.g. Jarvis & Jenkins, 1999; Mortelmans & Jansen, 2010).

Similarly, the Research and Statistics Division of Justice Canada (2016) reported in *Just Facts* that the median after tax income "was \$51,800 for male-led lone parent families and \$39,400 for female-led lone parent families." Family debt was also reported to be higher and net worth lower for lone parent families headed by women. Fox and Moyser (2018) expand on this finding, reporting that in 2016 women still performed approximately 61% of unpaid work, even when they were employed full-time, and that the net worth of lone mothers was less than half that of lone fathers. In addition, and consistent with the data from other countries, the Research and Statistics Division of Justice Canada (2016) reported that women's incomes suffered more than men's following divorce and, although some women's incomes eventually rose as a result of re-partnering or changes in labour force participation, women with dependent children were less likely than men to attain pre-divorce income within six years following divorce. Thus ***Canadian data are consistent with international data in concluding that separation and divorce have a disproportionately negative effect on the economic well-being of women, particularly women with children.***

In connection with family responsibilities, Susan Boyd (1997, 2003, 2013) has documented women's continuing disproportionate assumption of household duties and childcare during marriage. She demonstrates that Canadian law has consistently disregarded empirical evidence of

gender imbalance in favour of imposing assumptions about gender equality and the benefits of equal parenting by men and women.

In 2019, Rachele Pelletier, Martha Patterson, and Melissa Moyser wrote about the persistent, albeit narrowing, wage gap between men and women in Canada. Discouragingly, the Royal Bank of Canada concluded in 2020, that as a result of women's assumption of unpaid responsibility for family life,

*“Wage gaps between men and women and white, Indigenous, and visible minority groups persist, despite a wide range of federal and provincial legislation to close them”
(Schirle & Sogaolu, 2020, p. 1).*

elder care, and childcare, progress on closing the gender wage gap has stalled. Similar findings were reported by Nichole Fortin (2019) and by Tammy Schirle & M. Sogaolu (2020). While in the private sector, the unadjusted wage gap between men and women had narrowed from 27 % in 2000 to 19 % in 2019, Schirle and Sogaolu, report that, when the wage gap is adjusted for demographic characteristics (such as age, marital status, young children, education, and residence), the gap is actually larger than 19 %, at 21%. Social factors, such as culture and minority status, compound the negative effect of gender on earnings. Schirle and Sogaolu note that the largest gender gap is “between Canadian-born white men and Indigenous women in Canada” and “the gap between Canadian-born white men and recent immigrant white women was 47 percent, for immigrant visible minority women it was 61 percent” (2020, pg. 1-12).

In other words, empirically, it is without question that women, as a social class, experience serious economic disadvantages as a consequence of gender, family life and divorce in Canada. The impact of the gender gap is particularly severe for women with children and is magnified for women whose social and cultural circumstances (First Nations women, women of colour, immigrant women, abused women, women with disabilities) compound the effects of gender disadvantage (Schirle & Sogaolu, 2020; Brisebois et al., 2018). Limited access to resources reduces women's capacity to present evidence and to respond to litigation abuse tactics. Yet the gender-related economic inequalities women, and particularly women with children, bring with them upon entering the legal system are overlooked and compounded, in family violence cases, by gender-related vulnerabilities associated with family violence.

Gender and Family Violence

In early 2021, Statistics Canada released several reports on family violence in Canada, documenting increases in police-reported family violence.³ In addition, Statistics Canada released a series of reports inclusive of data derived from its *2018 Survey of Safety in Public and Private Spaces*. These reports collected information from Canadians on experiences with intimate partner violence (IPV)

³ Shana Conroy (2021), “Family Violence in Canada: A Statistical Profile, 2019”, *Juristat*, Catalogue 85-002-X, ISSN 1209-6393, released March 2, 2021; Statistics Canada (2022), “Victims of Police-Reported Family and Intimate Partner Violence in Canada, 2021” online.

since the age of 15 and during the 12 months preceding the survey. The reports document a broader range of IPV than recorded in police data and include information about IPV not reported to police.⁴ In connection specifically with adult intimate partner violence, Statistics Canada (2021) reported that:

The large majority (79%) of victims of intimate partner violence were women, and this held true regardless of the type of intimate partner relationship (pg. 29).

It is important to keep firmly in mind that IPV is seldom reported to the police.

For Example, in Connection with Disabilities:

Consistent with previous findings, the vast majority (91%) of women with disabilities said that the violence did not come to the attention of the police – a proportion similar to that of women without disabilities (92%).

Few (4%) visible minority women who experienced IPV in the past 12 months said the police became aware of the violence, a proportion not statistically different from that of non-visible minority women (7%) (Statistics Canada, 2021, p. 7; Connection with Visible Minority Women in 2021c at page 8).

Thus, while police incident reports tell us something about gender in connection with the small number of criminal IPV cases that come to the attention of the police, police incidence reports seriously underreport the magnitude of the IPV problem for women in Canada. For more accurate information about the number of Canadian women targeted by IPV, we must turn to self-reported data, such as the reports derived from 2018 survey data mentioned above.

Divorced of context and harm, surveys documenting incidents of IPV show that men and women self-report IPV at similar rates. Nonetheless, closer scrutiny reveals that women disproportionately experience the more severe incidents of IPV (such as being choked, assaulted, threatened with a weapon, or sexually assaulted), and at higher frequencies, and with more serious effects (Cotter, 2021).

⁴ Adam Cotter, Canadian Centre for Justice and Community Safety Statistics. “Intimate Partner Violence in Canada, 2018: An Overview”, *Juristat* Catalogue 85-002-X; Loanna Heindinger (2021) “Intimate Partner Violence: Experiences of First Nations, Métis and Inuit Women in Canada, 2018”, *Juristat*, Catalogue 85-002-X, ISSN 1209-6393, released May 19, 2021; Laura Savage (2021), “Intimate Partner Violence: Experiences of Women with Disabilities in Canada, 2018”, *Juristat*, Catalogue 85-002-X, ISSN 1209-6393, released April 26, 2021; Adam Cotter (2021) “Intimate Partner Violence: Experiences of Visible Minority Women in Canada, 2018”, *Juristat*, Catalogue 85-002-X, ISSN 1209-6393, released May 19, 2021.

In connection with diversity and vulnerability, Statistics Canada reports on IPV experienced by Indigenous women, visible minority women and women with disabilities confirm the need to adopt a gendered and intersectional lens to fully

Among people who had ever been in an intimate partnership, more than half (55%) of women with disabilities reported experiencing some form of IPV in their lifetime compared to 37 % of women without disabilities (Statistics Canada, 2021, pg. 2).

understand the nature and magnitude of IPV in Canada. Importantly, intersectional analyses take into account cultural and social vulnerability in addition to gender.

Women with a disability were twice as likely as other women to report sexual or physical assaults by an intimate partner, and four times more likely than other women to have been sexually assaulted by an intimate partner in the past year. The rates were particularly high among those with mental health or cognitive disabilities and among those with three or more disabilities. More than one-half of female respondents reported fear and feeling trapped or controlled. Rates of IPV for disabled men were also high. More than 4 in 10 (44%) of men with disabilities reported experiencing IPV during their lifetime. Nonetheless, while IPV rates against men with disabilities are also a major concern, the rates for women within this vulnerable population were higher at 55% than the rates for men (44%).

In connection with First Nations, Métis, and Inuit women, Heidinger (2021) reports:

Indigenous women and girls are at disproportionate risk and face among the highest rates of violent and non-violent victimization of all population groups in Canada (at pg. 3).

In connection specifically with IPV Heidinger (2021) reports:

A significantly higher proportion of Indigenous women (44%) compared with non-Indigenous women (25%) experienced either physical or sexual abuse by an intimate partner in their lifetime (at pg. 5).

It is also important to consider the compounding influence of various social factors that increase vulnerability. For example, in a Statistics Canada report, Heidinger (2021) reports that “a significantly larger proportion of Indigenous women with a disability (74%) experienced IPV in their lifetime compared with Indigenous women without a disability (46%)” (pg. 6). Rates of IPV for women were also found to increase with reduced household income (under \$20,000); minority sexual orientation; early experiences of child abuse; and among youth (age 15-24) (Cotter, 2021).⁵ In other words, IPV or domestic violence in Canada is clearly a serious and widespread gender-

⁵ In connection with enhanced rates of IPV against women and increased legal needs, largely unaddressed, during the covid epidemic, refer to Jennifer Koshan, Janet Mosher and Wanda Wieggers (2021) “Covid 19, the Shadow Pandemic, and Access to Justice for Survivors of Domestic Violence”, *Osgoode Hall Law Journal*, 57(3), article 8.

related phenomenon, targeting primarily women and particularly socially and or culturally disadvantaged women. As a result, women enter the family law process at a distinct disadvantage not only as a result of limited economic resources but also as a result of enhanced vulnerability and needs associated with family violence. The Supreme Court of Canada has recognized the negative impact of socioeconomic factors and family violence on women's access to justice. In *Michel v. Graydon*, 2020 SCC 24, Justice Martin (on behalf of herself and SCC Chief Justice Wagner) commented on how battered women must weigh personal risk factors when deciding whether to claim support for themselves and their children (at para. 86). The judgment also acknowledged the intersecting practical problems women face in family violence cases (such as unstable housing, including potential homelessness; loss of financial security; lack of legal and financial resources to advance legal claims; fear and inability to engage with the past abuser). In connection specifically with access to justice for women, and particularly for abused women, Wagner C.J. and Martin J remarked:

*Given these circumstances, women will often face financial, occupational, and emotional disadvantages. Moreover, access to justice in family law is not always possible due to the high costs of litigation. In this larger social context, women who obtain custody are often badly placed to evaluate their co-parent's financial situation and to take action against it. Measures that place further barriers on their ability to claim and enforce their rights, like a jurisdiction bar, inhibit their ability to improve their circumstances and those of their children. Yet, as this Court stated in *Hryniak v. Mauldin*, 2014 SCC 7 at paragraph 1: "without an effective and accessible means of enforcing rights, the rule of law is threatened" (*Michel v. Graydon*, *supra*. para. 96).*

Nonetheless, while acknowledging gender inequality is important, this does not create tangible remedies. So let us turn now to the legal system itself to see how the legal system addresses or fails to address gender inequality.

Legal System

Response to Gender-Related Economic Inequality

The Supreme Court of Canada decision, *Moge v. Moge* [1992] 3 S.C.R. 813 is a useful starting point when discussing gender inequality and the legal system. The importance of *Moge* extends beyond the case's central legal ruling (which requires courts to promote the equitable sharing of the economic consequences of marriage and divorce when determining support issues). The case also represented an important milestone in that it requires courts to consider the socioeconomic realities of gender, family life and divorce when interpreting and applying spousal support legislation. In fact, the case recognizes that *feminization of poverty* is an entrenched social phenomenon, noting that "***the general economic impact of divorce on women is a phenomenon the existence of which cannot reasonably be questioned and should be amenable to judicial notice***" (La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ in *Moge*, *supra*, pg. 81).

As previously discussed, social science research conducted since *Moge* indicates that the gender-related socioeconomic realities identified in *Moge* continue today. Yet, within the legal system, an examination of appellate case law across Canada during the three year period prior to September of 2022 (see Appendix A) revealed a worrying trend. Appeal courts are applying *Moge* principles vis a vis the parties' particular economic circumstances divorced from a gender-based analysis and without a consideration of the parties' broader gender-related socioeconomic context. With the exception of Supreme Court of Canada cases, the vast majority of appeal decisions canvassed did not include discussion or gender-based analyses of social context (much less the sort of gender and intersectional analysis that would enable courts to take into account and redress the social and economic inequalities female litigants face in family law cases as a result of gender-related intersectional factors, such as poverty, ethnicity, race, sexual orientation, family violence, assumption of responsibilities for children during cohabitation).

On the one hand is the argument that it is not the role of family courts or of 'private' litigation to respond or attempt to remedy social inequalities associated with gender. On the other hand is the reality outlined by SCC Justice Abella on behalf of Wagner, C.J., Moldaver, Karakatsanis, Martin and Kasirer JJ at paragraph 47 of *Fraser v. Canada (Attorney General)*, 2020 SCC 28 (CanLII) that ***"facially neutral treatment may 'frequently produce serious inequality,'" citing Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at p. 164. "This is precisely what happens when seemingly 'neutral' laws ignore the 'true characteristics of [a] group which act as headwinds to the enjoyments of society's benefits'"*** (Abella J in *Fraser, supra* at para. 47, citing *Eaton v. Brant County Board of Education, [1997] 1 S.C.R. 241 at para. 67; Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624 at para. 65*).

Legal System Response to Socioeconomic Inequality Associated with Family Violence

In addition to the gender-related socioeconomic inequality that is associated with family violence, women who are coerced and controlled in family violence cases will often lack timely access to the family income and property needed to finance litigation. The problem is particularly pronounced for Indigenous women. Loanna Heidinger (2021) reports that:

Indigenous women were almost three times more likely to experience financial abuse by an intimate partner in their lifetime compared with non-Indigenous women.

Specifically, 16 % of Indigenous women (compared to 3 % of non -Indigenous women) were kept from having access to a job, money or financial resources (at pg. 5).⁶

In addition to financial abuse during intimate relationships, abused women (Indigenous and non-Indigenous) are commonly subjected to financial litigation abuse tactics. Canadian case law illustrates the considerable use of financial coercive-control tactics during litigation of family violence cases, including failure to pay or delayed payment of support obligations, failure to pay costs, failure to comply with financial disclosure obligations, declarations of bankruptcy, and dissipation of joint assets.

In a coercive, controlling family violence context, failure to comply with legal financial obligations enables abusers to control the pace of litigation processes as well as the other party's ability to participate by depleting the resources needed to finance litigation. Not only are women prevented from accessing the family's resources, but they are also forced to engage in time-consuming, expensive litigation to obtain financial information and to enforce legal obligations. Refer, for example, to Legal Aid Ontario (2019) [Legal Aid Ontario's Domestic Violence Strategy](#) for a discussion of some of the financial barriers women encounter when attempting to access justice in IPV cases. In coercive-control situations, any assumption that a woman (even a woman whose family has appreciable property and income) will have timely access to resources to finance litigation is likely to be wrong. In the face of limited resources and litigation tactics, many abused women must choose housing, food, and clothing over financing litigation. This issue was acknowledged by Martin J. and Wagner C.J. in *Michel v. Graydon, supra* at paras. 95-104. The net effect is to place the cost of family litigation outside the financial reach of many women, particularly women with children.

Legal System Response to Litigant Needs in Response to Family Violence

In addition to socioeconomic disadvantage and lack of access to resources, family violence compounds women and children's legal needs. These cases tend to occur over long periods of time (years) and, as discussed in more detail below, are often characterized by high rates of litigation in multiple court systems. As a result, abused women and children require access to legal specialists who not only understand family violence and the harm it does to women and children but who are also able to respond to repetitive litigation tactics over extended periods of time in multiple legal systems (Martinson and Jackson, 2017; Neilson, 2013).

⁶ See also Karla O'Regan et al. (2022). "Addressing Poverty & Family Violence in Family Law Proceedings", *Family Violence & Family Law Brief 17*.

We know from medical, psychological and sociological family violence research, that the effects of domestic violence extend far beyond immediate physical and psychological injury. Being subjected to domestic violence is associated in medical research with a host of long-term medical problems (Brain Injury Canada; Dutton & Green et al., 2006; Fitzpatrick et al., 2023; Varcoe et al., 2011; Wathen, 2012; World Health Organization, 2012), including psychological and social problems such as clinical depression, psychological trauma, loss of self-esteem, panic and anxiety disorders, post-traumatic stress, traumatic brain injury, social isolation, and an inability to work (Zhang et al., 2013; Bowlus and Seitz, 2002; 2003; Fitzpatrick et al., 2023; Neilson, 2020 2nd ed., Chapter 5; Riger & Staggs 2004). These harms have a negative impact on the psychological resources women need to engage effectively in negotiation and litigation processes.

In these situations, access to specialized lawyers and family violence experts who have the expertise necessary to present evidence and explain to courts the needs of the child(ren) and the complex behaviour and parenting patterns associated with family violence, becomes essential. We turn now to two related evidence issues that affect women and children's access to justice: **access to family violence experts** and **court access to evidence about the best interests of children**. Let us begin with a brief look at access to experts.

Legal System Response to Access to Family Violence Experts

In order to put the need for access to family violence experts into context, it is important to appreciate the fact that few parent-child evaluators who present evidence in family law cases are specialists in the family violence field (Martinson & Jackson, 2019; Neilson 2020 2nd ed., at 10.11). Yet, specialized expertise is required to interpret parent and child behaviour and to assess parenting and child well-being, harm and trauma, in order to convey accurate information to courts (Martinson and Jackson, 2019). From the United States, Davis, O'Sullivan, Susser and Fields (2011) remark:

Most custody evaluators are mental health professionals, not experts in domestic violence. Lacking specialized knowledge of the dynamics and impact of domestic violence, they may instead rely on overarching clinical theories, such as family systems, cognitive-behavioral, or psychodynamic perspectives, and perhaps knowledge of child development to inform their assessments and recommendations. Experts in domestic violence, however, regard many of these commonly utilized clinical theories as inappropriate for assessing domestic violence... and prefer the power and control model... as the most appropriate foundation for understanding the perpetration of domestic violence and its impact on the family. Some evaluators apply the construct of Parental Alienation Syndrome (PAS), despite the rejection of PAS by professional organizations such as the American Psychological Association and the National Council of Juvenile and Family Court Judges... Anecdotal evidence of dire outcomes for battered mothers abounds” (at pg. i-ii).

Empirical research tells us that assessors who lack specialized family violence expertise fail to address woman and child safety in family violence cases (Davis et al., 2011; Saunders et al., 2011; Saunders, 2017). In Canada, the fact that these cases are highly complex and difficult for non-specialists to interpret was acknowledged by the Supreme Court of Canada more than 30 years ago in *R. v. Lavallee*, [1990] 1 S.C.R. 852. When family violence is alleged, as Martinson and Jackson (2019) report, due process requires that parent-child assessments be completed by those who have specialized expertise in the family violence field.⁷

Family Violence Experts in Cross-Claim Cases

In January of 2023, in connection with preparing this Brief, the author conducted an updated analysis of 94 recent cross-claim cases (i.e., cases in which both family violence and parental alienation were claimed).⁸ One of the goals was to see if the pattern of favouring reports on alienation over expert reports on family violence changed following the implementation (March 1, 2021) of new family violence provisions in the *Divorce Act*. While we know that *family violence claims and evidence will be underreported in parental-alienation-claim cases, because alienation claims are known to silence and discourage the presentation of claims and evidence of abuse* (Birchall and Choudhry, 2022; Abrahams, 2021; Neilson, 2018), the case law can give us some information about judicial practices and responses when family violence and alienation claims with associated evidence *do* reach judges.

Family Violence Experts & Parental Alienation Claims

In a national analysis of Canadian cases involving parental alienation claims (claims that the child resists parenting because the other parent inappropriately manipulated or influenced the child), the author (Neilson, 2018) found that, **when family violence and parental alienation were both alleged**, the case reports indicated that a **specialized family violence expert report was ordered or considered in merely 4 (2.8%) of the 142 cases**. It is likely that this was a reflection, at least in part, of limited access to resources. We might contrast limited court resort to family violence experts reported in these cases with the fact that in 62 of the 142 reported cross-claim cases (44%) a parental alienation evaluation was explicitly ordered or considered by the court. The majority of family violence claimants were women, and the majority of alienation claimants were men.

⁷ Refer as well to *A.H. v. R.M.*, 48 R.F.L. (4th) 314, 177 Sask. R. 285, (SKCA), leave to appeal to Supreme Court of Canada refused in *Haider v. Malach*, (1999), 189 Sask. R. 319.

⁸ As reported on the CanLII website during the one year period up to January 18, 2023.

The updated analysis revealed that 81 (83.5%) of the more recent alienation claims were advanced by fathers and 16 by mothers in the cross-claim cases. In contrast, 15 of the family violence claims in the cross-claim cases were advanced by fathers and 89 (85.6%) by mothers.⁹ On a positive note, the updated cases revealed a continuing degree of judicial skepticism when alienation claims were advanced by those accused of family violence. (The courts made positive findings of alienation in 33 % of the cross-claim cases in 2022, a figure comparable to the 36.7% positive alienation finding in cross-claim cases reported by the author at page 34 of the 2018 report).

In connection with expert reports and court recommendations for counselling or therapy, in 2022, as in 2018, reports on alienation and or recommendations for alienation or reunification therapy were ordered by courts far more often (28 cases) than expert reports or recommended treatments for family violence (4 cases) when cases included both alienation and family violence claims. In other words, the earlier reported *judicial tendency to devote more attention to assessments of alienation than to expert assessments of parenting concerns associated with family violence appears to be continuing, despite changes to the Divorce Act*. Limited court resort to family violence experts presents yet another gender-related systemic hurdle that abused women and children must overcome in order to access justice. In 2022, the United Nations Human Rights Special Rapporteur on violence against women and girls expressed concern about the abuse of the concept of parental alienation and announced an investigation into the international use of parental alienation claims in family law cases. See also the work of Dr. Simon Lapierre and colleagues at the University of Ottawa on this issue.

Legal System Access to Evidence about Children in Family Violence Contexts

Social and institutional factors that constrain the ability of abused women to present evidence to family courts on an equal basis with men has a direct bearing not only on abused women but also on the legal system's capacity to protect children's well-being, safety, liberty, and security of the person. Children are seldom parties in family law cases. Instead, evidence on children's behalf is often presented to courts by parents.¹⁰ When parents subjected to family violence (most of whom

⁹ Twenty-five cases were excluded from the analysis. Eighteen cases were excluded because while alienation and family violence criteria were both mentioned, the claims were focused on other issues- such as unrelated mental health or substance abuse issues. Seven cases were not included because the alienation or family violence claims were against people or institutions other than a parent.

¹⁰ For an informative discussion of the need for enhanced recognition of children's independent rights as human beings in family law cases, including the right to lawyers, refer to Martinson and Tempesta (2018).

are women) are denied equal capacity to present evidence in family law cases with men, children are denied legal rights to have their needs and best interests fully heard and considered.

IPV Witnessed by Children Seldom Reported to Authorities

Violence by parents and guardians witnessed by children is seldom reported to authorities. Statistics Canada reported in 2017 that, according to self-reported data from the 2014 General Social Survey on Victimization:

- About 10% of Canadians say they witnessed violence by their parent or guardian against another adult during childhood.
- Seven in ten (70%) of the children who reported witnessing adult violence against another adult also reported that they, too, had been the victim of childhood physical or sexual abuse.
- The vast majority of those reporting childhood physical or sexual abuse (93%) did not discuss their abuse experiences with police or child protection services before age 15; two-thirds (67%) did not mention the abuse to anyone.

Consequently, when the legal capacities of abused women to present evidence on behalf of children (as a result of limited resources and/or limited access to family violence experts) are compromised, child abuse and the reasons children resist contact with a parent may never be brought to the attention of the family court.

Domestic violence against mothers is not merely an adult gender and safety issue. Children are directly harmed when abuse and violence are directed against another family member in the home (Jaffe et al., 2014; Katz, 2022; Neilson, 2020, Chapter 6 & Supplementary Reference Bibliography). Additionally, while domestic violence against a child's caregiver in the child's home is a legally recognized form of child abuse in Canada (Standing Senate Committee on Legal and Constitutional Affairs, 2019; Neilson and Boyd, 2020), domestic violence is also associated with high rates of other forms of abuse directed at children (Jaffe et al. 2015; Jaffe et al., 2012; Katz, 2022; Lévesque, Clément and Chamberland, 2007; Tutty and Rothery, 2002; Cunningham and Baker, 2004).

In addition to undisclosed child abuse, post-separation parenting research in the family violence field tells us that the domination, coercion-control abuse patterns discussed earlier are often replicated in post-separation parenting practices (Katz, 2022; McLeod and Flood, 2018; Clements et al., 2022).¹¹ Children are complaining that service providers, parent-child evaluators, and even their own lawyers and family courts are ignoring concerns about negative parenting, and their safety and wellbeing in the care of parents who engaged in family violence (Lepri et al., 2022; Nonomura et al. 2021; FREDA Centre, 2021 webinar; Humphreys and Hegarty, 2018; Fortin, Hunt

¹¹ Refer to Neilson (2020, 2nd ed.) at 11.1.10 for red flag parenting practices documented in family violence research after parental separation.

& Scanlan, 2012). When abused women are prevented, as a result of gender, limited resources and the legal system itself, from being able to present evidence in family law cases on an equal basis with men, children's well-being and security of the person interests are adversely affected along with those of their abused parents (primarily mothers).

Legal System Complexity in Family Violence Context

In addition to gender-related inequalities affecting access to justice, the complex structure of the legal system works in tandem with the absence of dedicated information-sharing practices across legal systems (criminal, family, child protection, civil protection) (Neilson with Boucher, Robichaud and Dugas-Horsman, 2022) to produce legal system fragmentation in family violence cases. Canadian legal systems do not respond to family violence or to the needs and best interests of children in a coordinated fashion. In addition, the absence of information-sharing policies and practices prevents courts from accessing risk and danger information (Neilson, Boucher, Robichaud & Dugas-Horsman, 2022; Jackson and Martinson, 2015). In 2013–2015 the Canadian Department of Justice and legal-system experts wrote a series of lengthy reports on the problems families face when families are involved in multiple legal systems with a view to offering solutions (Department of Justice, 2014; Di Luca, Dann & Davies, 2014; Neilson, 2014; Bala and Kehoe, 2014; Jackson and Martinson, 2015).

Nonetheless, in practice, legal system fragmentation continues to result in evidence of family violence and risk factors for women and children not reaching judges. Some of the hurdles affecting the flow of evidence from community risk assessment services to and among courts are documented in Neilson with Boucher, Robichaud and Dugas-Horsman, 2022. We found that 51 % of the domestic violence cases in multiple court legal systems were associated with high to extreme risk and danger indicators but that the courts were seldom aware of the risk and danger levels in these cases. Moreover, when a court did have information and evidence pertinent to risk and danger, the courts lacked legal mechanisms to share it with other courts hearing cases involving the same family. In practice, incomplete court access to family violence evidence appears to be more the rule than the exception.

In addition to problems directly related to the flow of information across the complex structures of the legal system, and in addition to the litigation tactics discussed earlier, women and children involved in multiple court systems face several additional hurdles:

- Repeatedly having to convey traumatic, deeply personal, embarrassing information about their lives to multiple sets of professionals in multiple systems.

- Legal responses that operate at cross purposes in family violence cases (criminal systems that focus on the due process rights of accused and decide cases on the basis of proof beyond a reasonable doubt; child protection systems that tell women they must protect children from abusers or their children may have to be removed from their care; family law systems that prioritize child contact with both parents and tell abused women that they could lose primary care of their children if they do not “support the development and maintenance of the child’s relationship with the other spouse” (s. 16(3)(c) *Divorce Act*).
- Understandings of family violence differ in each legal system. For example, the criminal system understands and responds to family violence on the basis of criminal charges associated with incidents; yet, in order to protect women and children, child protection and family law systems must respond to complex patterns of behaviour and the effects of those patterns on family members. These two types of analysis (analysis of incidents and analysis of complex patterns of behaviour and their effects) can produce dramatically different conclusions about responsibility for family violence.
- Lack of understanding of types of family violence and particularly victim resistance violence.¹²
- Lack of understanding in the legal system that primary aggressor analysis (which focuses on responsibility for recent incidents) should be replaced by dominant aggressor analysis (which focuses on control of the onset and pattern of abuse).
- Contradictory court orders that cause confusion and compromise safety.
- Considerable confusion in the legal system about which court order takes priority when court orders are in conflict
- Lawyers who are specialists in one system may not fully understand law and legal processes in other legal systems.
- Depletion of professional time and resources when family lawyers have to grapple with litigation tactics in multiple systems
- Lack of cross-court sector information-sharing protocols governing the collection, admission, sharing and shielding of risk and danger information and judicial findings and orders across legal systems when members of the same family are involved in multiple court processes.

¹² For an explanation of the victim resistance concept, refer to Neilson (2013).

- Criminal crown prosecutors and defense lawyers who agree on criminal orders enabling accused's contact with children. In addition to problems with conflicting orders, such orders can result in pressure being placed on the children to have mothers retract criminal complaints.
- Disclosure obligations in each legal system that can have unintended negative consequences for women and child safety in other court systems.
- Lawyers and judges/justices in one legal system who may not be aware of the existence of pertinent evidence, orders and agreements in other legal systems.
- Financial barriers, unrepresented litigants, and complex legal evidence rules.
- The potential for unintended use of evidence generated in one legal system for one purpose to be used in another legal system for a different, unintended purpose.

Nonomura et al. (2021) characterize the problem as secondary victimization and illustrate the critical importance of access to knowledgeable, supportive lawyers in these complex cases. In short, there are an enormous number of extra-legal needs that arise when abused women and children are involved or have family members involved in multiple legal systems.

How can we expect abused women and children, grappling with harm from family violence and limited resources, to navigate complex legal systems that challenge even lawyers and judges? In addition are the practical realities that abused women with children face when confronting a complex, fragmented system: obtaining time away from work, locating childcare and transportation, addressing safety concerns, attending multiple meetings with assessors and evaluators, keeping track of the times and dates and implications of multiple legal proceedings. These are not cases that abused women and children can navigate without considerable specialized legal and expert assistance, over extended periods of time. Without resources and access to specialists, opposing litigation tactics can be next to impossible. The end result has been documented repeatedly by researchers: abused women with children being forced to accept unsafe parenting and the continuing domination and control of abusers over family life despite continuing concerns about child safety (Hrymak and Hawkins, 2020; Nonomura et al., 2021, 2022; Neilson et al., 2001).

Legal System Response to Unequal Access to Litigation Resources

In thinking about how the legal system contributes to the success or to the failure of litigation tactics in family violence cases, it is important to consider the gender-related social and legal context in which the litigation tactics occur. We know, as previously discussed, that, in comparison with men, women with children enter the legal system at considerable socioeconomic

disadvantage. We also know, as previously discussed, that family violence targets women more than men and that targeted women with children who enter the legal system are likely to be grappling with harm from family violence which can affect the presentation of evidence. And we know that family violence cases, particularly those that involve multiple legal systems, are associated with long-term, complex legal needs. We have also seen that access to experts has tended to favour male litigants over female litigants. Given these multiple layers of gender-inequality, what steps has the Canadian legal system taken to ensure gender equality in access to justice?

In thinking about this, let us take a look at two issues: **legal policies associated with private and public litigation** and **gender-related assumptions associated with post-separation parenting**.

The Private Public Divide

Susan Boyd and other feminist legal academics have been arguing for decades that distinctions in law and in socio-legal policy associated with the private and public domains of law are both artificial and provably discriminatory against women (Boyd, 1997; Boyd, 2003; Law Commission of Canada, 2003). The Canadian classification of law as private (litigation between individuals) or public (litigation involving a Canadian government) has a major impact on governmental responsibilities to offer access to litigation resources. Generally, government responsibilities – to offer access to state-funded lawyers (*Gosselin v. Quebec (Attorney General)*, 2002 SCC 84; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307; *New Brunswick (Minister of Health and Community Services) v. C. (J.)*, [1999] 3 S.C.R. 46) and to interpretation and translation (*R. v. Tran*, [1994] 1 SCR 951, 1994 CanLII 56 (SCC); *Anand v. Anand*, 2016 ABCA 23; *Burnaby (City) v. Oh*, 2011 BCCA 222, application for leave to appeal dismissed with costs: *Serena Oh v. City of Burnaby*, 2011 CanLII 79128 (SCC)) are reduced when litigation is classified as private (between individuals) and the state is not a party. While the distinction is important to prevent the unfairness of requiring private individuals to engage in litigation against governments that have considerable access to litigation resources, in family violence cases the distinction reinforces systemic gender-related inequality. The legal needs of women and children associated with section 7 (the right to life, liberty and security of the person), section 14 (the right to an interpreter), and section 15 (equality rights) of the *Charter of Rights & Freedoms* are most likely to arise in family law litigation, traditionally classified as private (Track et. al., 2014; Law Commission of Canada, 2003). The practical effect is that, in addition to pre-existing socioeconomic disadvantage, gender-related vulnerabilities associated with harm from family violence, and enhanced legal needs, abused women also encounter reduced government responsibility to ensure access to litigation resources. As Laura Track et al., (2014) have commented:

United Nations Committees monitoring the Convention on the Elimination of Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) have all raised alarm about access to Justice in Canada.

Canada has been criticized by the United Nations for its failure to fulfill its human rights obligations to women and children, particularly to Indigenous women, and for its failure to offer adequate protection from domestic and family violence (Human Rights Committee, 2015; Inter-American Commission on Human Rights, 2014).

Yet the legal system's continuing endorsement of the distinction between *Charter* rights in private (family law) litigation and 'public' litigation not only fails to reduce gender inequality in the legal system, it actually contributes to it. Criminal cases involve the state. As such, criminal cases are classified as public. Justice Canada reports in 2021 that far more men (75 %) than women are charged with criminal offences. The end result, in a family violence context, is that while men are accorded state-financed access to litigation resources, including the right to legal representation to defend themselves against criminal charges (including charges for family violence against female partners), their female partners face limited state responsibilities to ensure access to litigation resources (such as state-funded lawyers and access to experts) in 'private' family law cases.

In thinking about this from a gender-informed socioeconomic and family-violence point of view, it is important to consider the actual implications of gender. Hon. Donna Martinson and Professor Emerita Margaret Jackson (2017) argue that judges have a duty to be equality guardians in family law cases, particularly in cases that involve family violence. Similarly, Micah Rankin (2012) argues that lack of access to lawyers undermines judicial impartiality and tests the limits of the impartiality of courts. When Canadian governments and the legal system fail to ensure that men and women in Canada have equal access to lawyers and experts and thus equal capacity to present evidence, judges and justices have limited capacity to ensure that women and children have equal access to family law justice.

The Sentencing of Women & Children to Coercive Control

When we turn specifically to the family law system itself, we encounter additional issues that obstruct access to justice. The wording of Canadian family law statutes creates legal assumptions of gender equality despite the empirical reality of inequality. While women assume most of the responsibility for childcare in Canada (Gu, 2022; Johnston et al., 2020), family law statutes throughout Canada are framed in gender-neutral terms as if these gender-related parenting differences do not exist. Similarly, family violence provisions are framed in gender-neutral terms (Boyd, 2007; LEAF, 2019).

In connection with parenting, Gu (2022) reports, on behalf of Statistics Canada, that Canadian women continue to devote much more time to unpaid childcare than men do (60% of the total, 52 hours per week in comparison to 30 hours per week for men). Gender inequality in responsibility for unpaid childcare has increased during the Covid-19 pandemic (Johnston et al., 2020; Fortin, 2019; Schirle & Sogaolu, 2020). While it is important to avoid gendered terms in legislation that could prove exclusionary of non-binary persons, it is also important not to impose legal assumptions of gender equality in the face of inequality.

Subsection 16(3)(c) of the *Divorce Act* illustrates the problem. The subsection lists ***“each spouse’s willingness to support the development and maintenance of the child’s relationship with the other spouse”*** as a best interest of the child consideration when deciding parenting matters. Not only is the provision framed in gender-neutral terms, but it also potentially penalizes women for behaviour that is consistent with empirical social reality. Women who assume most of the responsibility for childcare may be penalized for their failure to promote the development and maintenance of children’s relationship with the other spouse. Yet surely it is the responsibility of each parent/spouse – not the responsibility of the other spouse/parent - to ensure the development and maintenance of a positive relationship with each child. Leaving aside the inappropriateness of imposing a legal duty on one person to ensure the development and maintenance of a relationship between two or more other people, the provision will often be inappropriate in a family violence and/or child abuse context. In these situations, a parent’s first responsibility is to protect the child.

On a positive note, the presumption of maximum contact with both spouses was removed from the *Divorce Act* in March of 2021 (Neilson and Boyd, 2020). The *Act* now states that courts are to give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child. In other words, parenting time is no longer subject, pursuant to statute, to a presumption of maximum contact with both parents. The ultimate focus is on the individual child. Nonetheless, subsection 16(3)(c) may be producing the same result. Nicholas Bala and Yakin Ebsim (2022) are reporting that shared parenting orders are now the legal norm in Canada, suggesting that the removal of the maximum contact presumption did not result in a retreat from imposed gender-equality in post-separation-and divorce parenting.

In connection with family violence, keeping in mind that alienation claims and evidence filtering processes limit evidence of family violence presented to judges, ***recent cases that do report evidence of family violence, show a willingness among some Canadian courts to shield children from coercive control and abusive parenting.*** Examples include:

- Supervision of parenting time (*Sullivan v Sullivan*, 2022 ONSC 557; *Shea v. Shea*, 2022 ONSC 1786 – in connection with the mother)
- Protection of children’s rights to shield personal counselling records in some circumstances (*J.R.D. c S.B.*, 2023 ONSC 46; *L.S. v. B.S.*, 2022 ONSC 5796)
- Restrictions on overnight parenting (*Rezwan v. Rezwan*, 2022 ONSC 7289; *J.B.-S. v. M.M.S.*, 2022 NBQB 18)
- Respecting children’s rights to make decisions about parenting contact (*Jumale v. Mahamed*, 2022 ONSC 566; *Boucher v Walker*, 2022 ONSC 934 *J.R.D. v. S.B.*, 2023 ONSC 46; *M.M.B.(V) v. C.M.V.*, 2022 ONSC 770; *J.L.D. v. W.J.D.*, 2022 BCPS 272)
- Criticism of a lower court’s failure to hear from the child and to explore reasons other than alienation for the child’s resistance to parenting (*A.E.H.M. v. K.A.F.*, 2022 BCSC 403)
- Criticism of an ‘expert’ witness for failure to make enquiries about the causes of the mother’s posttraumatic stress disorder and failing to consider family violence in connection with parenting recommendations (*Ting v Ting*, 2022 ABQB 229)
- Recognition of litigation abuse as a form of family violence (*A.N.H. v. L.D.G.*, 2022 BCCA 155)
- Granting sole-decision-making authority to the non-abusive parent (*D.F. v. T.F.*, 2023 ONSC 115; *J.R.D. v. S.B.*, 2023 ONSC 46; *J.L.D. v. W.J.D.*, 2022 BCPS 272; *A.N.H. v. L.D.G.*, 2022 BCCA 155; *C.L.T. v. D.T.T.* 2022 NBKB 239; *A.W. V. N.P.*, 2022 SKQB 150; *Green v. Green*, 2022 NSSC 164; *L.M. v. K.M.*, 2022 BSSC 689; *Seyyad v. Pathan*, 2022 ONCJ 501)
- Suspension of parenting time (*Raj v. Raj*, 2022 BCSC 110 ; *A.L.F. v. C.D.F.*, 2022 NBKB 177; *J.S. v. M.S.*, 2023 NBKB 12; *L.M. v. K.M.*, 2022 BSSC 689). In *Droit de la famille – 22454*, 2022 QCCS 1098, at paragraph 312, Justice Marie-Claude Armstrong suspended the children’s contact with the father until the father had “undergone seriously and successfully therapy to allow him to acknowledge his violent and controlling behavior as well as the negative impacts it had on his spouse and children during the marriage.”

In Ahluwalia v. Ahluwalia, 2022 ONSC 1303, Mandhane J., of Ontario’s Superior Court of Justice, recognized a tort of family violence, awarded the mother \$150,000 in damages, and recognized at para. 67:

the overarching imperative to remove the economic barriers facing survivors that try to leave violence relationships and access to justice. At present, the negative financial and social impact of family violence is almost exclusively borne by the survivor.

It is important to note, however, that Ahluwalia is a trial level decision. It remains to be seen how the ruling will be interpreted by appellate courts.

- Ordering that parenting occur at the discretion of the non-abusive parent and only in a public place (*Green v. Green*, 2022 NSSC 164). See also: *K.T. v. N.Z.*, 2022 BCPC 70.
- Avoidance of shared parenting and shared decision-making provisions in high conflict and family violence cases, particularly when such orders would enable continuing control (*Dayboll v. Binag*, 2022 ONSC 6510; *Seyyad v. Pathan*, 2022 ONCJ 501; *C.B. v. N.I.*, 2022 NSCS 290; *Shokoufimogiman v. Bozorgi*, 2022 ONSC 5057; *McIntosh v. Baker*, 2022 ONSC 4235; *A.W. v. N.P.*, 2022 SKQB 150).

Nonetheless, even in cases reporting family violence evidence, we still see **orders that sentence abused women and children to continuing control**. Examples include:

- Ordering the child or children to attend reunification programs (*Jumale v. Mahamed*, 2022 ONSC 566).
- Imposed shared parenting (by an arbitrator) despite the concerns of children (*MAS v CGL*, 2022 ABQB 281).
- Removing supervised parenting protections for children despite findings of continuing abuse and failure to adhere to court conditions (*Droit de la famille -2315*, 2023 QCCS 41; *J.L.D. v. W.J.D.*, 2022 BCPS 272).
- Requiring the abused parent to consult with or to share decision-making with the abusive parent (*Seyyad v. Pathan*, 2022 ONCJ 501; where the mother was granted sole decision after reasonable consultation with the father; *K.H.D. v. O.O.M.*, 2022 BCSC 1525 with leave to apply to apply to vary in the event of more abuse; *A.W. v. N.P.*, 2022 SKQB 150 in connection with religion and culture- the mother was granted decision making authority on other issues).
- Requiring the abused parent to report on child activities to the abuser (*Fernandes v Fernandes*, 2023 ONSC 564; *A.W. v. N.P.*, 2022 SKQB 150).
- Denying restraining order protections on the basis of narrow interpretations of restraining order criteria, requiring proof of imminent harm (*Fernandes v Fernandes*, 2023 ONSC 564) or on the basis of the existence of criminal no-contact provisions (*Akyuz v. Sahim*, 2023 ONSC 1024).
- Limiting the mother and children’s residential location to a location near that of the father (*D.F. v. T.F.*, 2023 ONSC 115).
- Deciding that shared parenting can be appropriate despite family violence (*JDL v. HAL*, 2022 ABQB 427; *T.M. v C.V.M.*, 2022 BCSC 1783).

- Imposing interim shared parenting and ordering the parents to attend co-parenting counselling despite having not yet assessed the family violence claims (*Gill v Kaur*, 2023 BCSC 178).
- Suspending parenting contact with the family violence claimant mother until a psychological report confirms that the mother acknowledged that it was not in the best interests of the children to discuss alleged abuse claims or concerns about safety (*KAB v. RMB*, 2022 ABQB 542).
- Directing that it is the duty and responsibility of the family violence claimant mother to insist on children’s relationship with the abusive spouse and to overcome children’s resistance to the other spouse’s parenting (*K.M.F. v. A.S.*, 2022 BCSC 238, where the father was, however, ordered to attend therapy for anger, control and parenting issues).

While family law responses to family violence may be improving, family courts are still sentencing children and abused parents to continuing control.

Conclusion

While there are glimmers of hope for some abused women and children in Canadian family case law, few abused women and children can be expected, in practice, to gain access to that hope. In order to present evidence to Canadian family courts that might be receptive to offering women and children freedom from the coercive control of their abusers, abused women must overcome layers of gender-related obstruction that stand in the way of access to justice. These include coercive, controlling litigation tactics; lack of access to economic resources; medical and psychological harm from family violence; lack of access to specialized experts and state-funded lawyers; institutional complexities associated with multiple legal systems; legal policies and practices that reinforce systemic gender inequality while imposing gender equality; and family law practices that sentence women and children to continuing control.

These are just some of the reasons that the legal system is often depicted as a tangled Maze Map in family-violence educational presentations. These are also some of the reasons why, as explored in this Brief, none of the currently proposed solutions to improve access to family law justice, alone or in combination, are likely to ensure that abused women and children gain access to family law justice on an equal basis with men. Genuine access to justice requires attention to the social and institutional factors that deny women and children “equal benefit of the law without discrimination based on ... sex, age or mental or physical disability” (s. 15 (1) of the *Charter of Rights & Freedoms*). In addition to legal system education specific to family violence, is the need to educate judges and lawyers on the effects of gender, social inequality, and litigation tactics in family violence cases. In addition, is the need to ensure that experts who assess women and children in family violence

cases are, in fact, family violence experts. Public/private law distinctions will need to be abandoned in family violence cases and legal aid programs expanded in order to offer women and children enhanced access to publicly-funded specialized lawyers and to family violence experts who have the capacity to represent and assess women and children in context. Decisive action is also required to enable courts and court services to share and shield information about family violence in order to enhance safety. Only then will abused women and children begin to achieve genuine access to family law justice.

Appendix A – Cases included in author’s (Neilson) examination of appeal court cases during the three year period prior to September of 2022

A.L. v M.L., 2019 SKCA 61.

Barendregt v Grebliunas, 2021 BCCA 11.

Bone v Bone, 2020 ABCA 323.

C.E.D. v C.J.D., 2021 PECA 2.

Choquette v Choquette, 2019 ONCA 306.

Cook v Cook, 2021 BCCA 194.

Dancy v Mason, 2019 ONCA 410.

Dring v Gheyle, 2018 BCCA 435.

Droit de la famille – 192292, 2019 QCCA 1023.

Droit de la famille – 192617, 2019 QCCA 2186.

Droit de la famille – 20874, 2020 QCCA 868 is an exception in that the case does include analysis of gender in social context as do Supreme Court of Canada decisions such as *Michael v. Graydon*, 2020 SCC 24.

Droit de la famille - 211143, 2021 QCCA 1031.

Duggan v White, 2019 BCCA 200.

Dungey v Dungey, 2020 SKCA 138.

Gibbons v Livingston, 2018 BCCA 443.

Joudrey v Reynolds, 2020 NSCA 60.

Kassian v Kassian, 2019 SKCA 101.

Kelfenz v Klefenz, 2019 NSCA 6.

Lux v Lux, 2019 ABCA 454.

Nicholl v Nicholl, 2020 BCCA 173.

N.K. v M.H., 2020 BCCA 121.

Plese v Herjavec, 2020 ONCA 810.

P.M. v S.M., 2019 SKCA 111.

Rayworth v More, 2021 NBCA 6.

Santelli v Trinetti, 2019 BCCA 319.

Thomson v Pitchuck, 2020 NSCA 65.

Thompson v Thompson, 2019 ABCA 7.

Tyacke v Tyacke, 2021 SKCA 80.

Volcko v Volkco, 2020 NSCA 68.

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Ahluwalia v Ahluwalia, 2022 ONSC 1303.

Akyuz v. Sahim, 2023 ONSC 1024.

A.L.F. v C.D.F., 2022 NBKB 177.

Anand v Anand, 2016 ABCA 23.

Andrews v. Law Society of British Columbia, 1986 1 SCR 143.

A.N.H. v L.D.G., 2022 BCCA 155.

Anand v. Anand, 2016 ABCA 23.

A.W. v N.P., 2022 SKQB 150.

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