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Preventing Domestic Violence - Traditional Courts: Square Peg, Round Hole

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Significant public discussions on how to address domestic violence against women and children, and the need to identify the risk of harm, including death, are now taking place in British Columbia. In our recently published article, ***Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases***, we conclude that significant changes are required in the structure of B.C. courts and the qualifications and roles of judges dealing with family law cases, in order to achieve fair, just, equality based outcomes for victims of domestic violence. These victims are most often women and children:

<http://www.fredacentre.com/wp-content/uploads/2010/09/Martinson-Jackson-20171.pdf>

Traditional court structures and approaches used in B.C. and elsewhere in Canada cannot properly respond to domestic violence for two reasons: the lack of comprehensive judicial education about family law and domestic violence for many judges; and the absence of all of the information about violence needed to assess risk. The article is based on legal and social science research and consultations in B.C. with lawyers, judges, and advocates working with women who have experienced domestic violence, over the last five years, with a focus on the *Family Law Act*.

In the traditional approach, non-specialized judges with backgrounds in all areas of law deal with not only family law cases but every type of case. A lawyer who dealt with corporate mergers the day before becoming a judge can judge a family law case the day after. Education time for judges is limited so non-specialized judges have to fit their education about family law and domestic violence in with education on all the other areas of the law, limiting their exposure to the former. Ongoing judicial education in any area of the law, including family law and domestic violence, is not mandatory.

Yet understanding the complexities and multi-faceted nature of domestic violence, including its causes, frequency, nature and impact, and the discriminatory myths and stereotypes that can be applied to it, is not intuitive. In-depth, comprehensive, ongoing education, including education about the social context - the lived reality of the victims

of violence, is critical. The stakes for women and children are extremely high. Effective decision making can address the risk of harm. Ineffective decision making can exacerbate it.

Also, in the traditional approach judges often make decisions based only on the evidence and legal arguments provided to them, even though they may be missing important information and significant legal principles needed to properly assess whether there has been domestic violence, and if so, its nature, impact and the risk of future harm. Still, most of the judges in our exploratory study felt that the principles of judicial independence required them to only decide cases based on the information that is given to them.

This is the case even though the judges, lawyers and advocates in our study all said that judges do not always get the information they need about family violence and that they should have it. And, if domestic violence is also being considered by a criminal court or a child protection court at the same time, with the same family, the judge in the family court case usually does not even know about the other case(s), let alone what information is available in the other proceeding(s) about domestic violence and risk, creating a dangerous disconnect.

Judicial independence is often raised as the reason for these two traditional approaches to judging. However, modern views of the concept recognize that judicial independence is not an end in itself, but a means of achieving impartiality, which in turn is linked to the understanding of and application of equality principles found in our **Charter** and in many other human rights instruments. They, together with the equally important concept of judicial accountability to the public, require judicial competence through education and a proactive judicial role, to obtain the necessary information about domestic violence and risk.

In 2013 specialized judges with knowledge about family law and domestic violence, were recommended by the National Action Committee on Access to Justice in Family and Civil Matters, led by the Supreme Court of Canada. B.C. Justice Summits on family law and on “Better Responses to Violence against Women” in 2014 also had specialization of judges and judicial education as themes. These initiatives recognize that while addressing domestic violence is complex and requires a multi-pronged approach, specialization and judicial education would be a major step forward.

The National Action Committee report also said in 2013 that we need action not just words. We “cannot put off, to another day, formulation and carrying out of a specific and effective action plan”.

In 2018 the time for action is long overdue.