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

Report Highlights
Report Brief

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Family Violence and Parenting Assessments: Law, Skills and Social Context

The Honourable Donna Martinson Q.C. and Dr. Margaret Jackson

http://www.fredacentre.com/wp-content/uploads/2010/09/D.-Martinson-and-M.-Jackson-Report-Family-Violence-and-Parenting-Assessments-Law-Skills-and-Social-Context.pdf

REPORT HIGHLIGHTS

(References/Citations in Original Report)

Our Report considers the substantive equality rights of women and children in family law cases involving family violence, with a focus on challenges that arise when a court orders a parenting assessment pursuant to s. 211 of the British Columbia *Family Law Act* (the FLA), and how to address those challenges.

We have used an approach to legal competency developed by the Canadian Judicial Council which for many years has used a three-dimensional approach to effective education with each part being essential: substantive content; skills development; and social context awareness – understanding the lived reality of those being judged. Though our Report focuses on women and children, we understand that the goal of any justice process is to achieve a just result for all – it is the process of analysis, applying substantive equality principles, that matters. Our analysis can be used in all such cases. The parenting assessment evaluation process we suggest applies to all parenting assessments, not just those involving allegations of family violence.

The Report covers three broad areas: contextual experiences of women and children involved in s. 211 parenting assessments; integrating legal principles, skill and social context; and considering s. 211 parenting assessments from the perspective of children. Here we provide key findings from the Report. It is followed by a Report Brief, which focuses on our major Report analyses; the Report Brief has page references to the full Report, where more information and the references/citations can be found.

Contextual Experiences of Women and Children

We identified several areas of concern, drawing from our own work in British Columbia with women and women serving organizations in 2012 and again in 2018-2019, and from research and other experiences in British Columbia and elsewhere. Among them are: assessor qualifications; exercising the gate-keeping role of lawyers and judges; the use of misuse of psychological testing; and impartiality of the assessor, as it relates to claims of gender symmetry; and family violence and alienation claims.

Assessor Qualifications

Some assessors have inadequate family violence qualifications. Though international guidelines require assessors to have “in-depth knowledge of the nature, dynamics and impact” of family violence, there are either no or limited family violence expertise requirements in British Columbia; significant concerns were raised about the lack of such specific qualifications. Simply being qualified as, for example, a psychologist or a

social worker, is not enough. This can lead to the lack of a "fulsome and intersectional analysis of the dynamics of gendered violence". Three other consequences identified were: a lack of screening for family violence, failure to do a risk assessment, and failing to address safety planning. Lack of knowledge can also contribute to a lack of impartiality, discussed below. Other necessary qualifications that can be missing are cultural competency, including an understanding of Indigenous cultures, and an understanding of the implications of trauma.

Exercising the gate-keeping roles of lawyers and judges

Judges have an oversight obligation to ensure that parenting assessments are done fairly and impartially; lawyers must both exercise their own oversight role, and, when appropriate, advocate to ensure that judges exercise theirs. Several concerns arose here. Parenting assessments can be overused; they should not routinely be undertaken. While they can serve an important function, given their high cost, intrusive nature and potential negative impact, their necessity should not be assumed by lawyers, or "rubber-stamped" by judges; the specific purpose and the qualifications needed to achieve that purpose should be identified. The requirements of a fair and equality-based assessment process should be discussed at the time an assessment is being considered.

There were also concerns that once an assessment is obtained, some lawyers and judges rely too heavily on the assessors' conclusions. They should instead engage in in a meaningful analysis of whether the report is admissible, whether a critique report is warranted, and the weight that should be attached to the conclusions. (The legal framework for that analysis is discussed below).

Use and Misuse of Psychological Testing

Significant concerns were expressed about psychological testing be used when doing so is not warranted. Just as concerning was the use of specific types of tests which have been discredited in this context, and specific types of testing that has no relevance to the issues at stake, and all of which can then be used to inappropriately pathologize women.

Impartiality of the Assessor – Ensuring a Lack of Bias

Many concerns were raised about assessor impartiality in family violence cases, particularly with respect to fact-finding broadly and credibility assessment of women's claims of violence. There continues to be a view among some that women often lie about claims of violence to gain an advantage in court proceedings; this unproven, and erroneous assumption raises equality concerns for women. Other myths and stereotypes deal with the nature of and impact of family violence, leading to its minimization or disappearance. Among them are assumptions, made without contextual analysis: that because the relationship has ended, the family violence has/will end; and inferences that the absence of disclosure of family violence including reports to the police or child welfare authorities, means that the family violence did not happen or that it has been exaggerated. Of particular concern were the

minimization/disappearance of violence when there are allegations of parental alienation and views about “gender symmetry” that fail to take into account context.

Claims of Gender Symmetry

Gender symmetry assumptions made in family violence cases can represent a form of gender bias, based upon erroneous gender-based stereotypes. From victimization surveys, in particular the Conflict Tactics Scale (CTS), it has been suggested that men and women tend to be found equally violent toward each other, while police data appear to indicate that in fact it was the men who were the primary aggressor. The CTS tool itself has played a central role in the gender symmetry 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). The overarching concerns relate to the lack of a contextual analysis.

Making findings of fact about family violence in individual cases requires an analysis of all contextual factors, without applying an erroneous assumption about the existence of gender symmetry, no matter what the circumstances; otherwise, gender bias will influence the decision. Therefore, information about the actual context of the conduct being assessed is essential so that allegations are not inappropriately minimized or overlooked.

Family Violence and Parental Alienation

Also of concern are claims of parental alienation in family violence cases, often against mothers who allege family violence as a future and/or current safety, security and well-being issue for both their children and themselves. While deliberate, malicious efforts by one parent to unfairly turn the children against the other parent must be effectively addressed by the justice system, attention must also be paid to the dynamics of the social context of the family, and especially, as noted above, its power and control factors.

We identified three matters that need to be addressed to ensure just, equality based outcomes in these cases. The first is the inappropriate elevation by some of parental alienation to a medical/mental health problem. This can dramatically change the focus of the proceedings from the outset. It can shift the focus from properly assessing claims of alienation 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, to one in which the focus from the start becomes whether the mother meets the alienation “criteria” and if she does, the kind of “treatment” or other form of intervention required.

The second is the need to take great care in considering/assessing “research“ which suggests that false and inappropriate efforts by mothers to alienate children are common and increasing and that mothers often make false allegations of family violence. Such conclusions are challenged both qualitatively and quantitatively by

academic professionals and women's rights organizations nationally and internationally (see our Report for more information). Third, it is well known that, in Canada, reporting rates by women of gendered violence, including family violence, are low. This is attributable in part to the fact that some women feel they will not be treated fairly in the justice system, and may in fact, in a family law proceeding, be found to be an alienating parent and have their children taken from them. Reports that some lawyers suggest family violence not be raised for that very reason are particularly concerning.

Section 211 Reports and Family Violence: Integrating Legal Principles, Skills and Social Context

Part III of our Report incorporates the contextual information discussed above into the relevant s. 211 legal framework and provides practical suggestions /guidelines in doing so. S. 211 gives the court the authority to appoint an assessor to assess the needs and views of a child and/or the ability and willingness of a party to a family law dispute to satisfy the needs of a child. Because our emphasis is on family violence, a primary focus is on the assessor's independence, impartiality and absence of bias; we apply the Supreme Court of Canada *White Burgess* analysis in this context, which considers these issues applying a two-step admissibility process.

S. 211 assessors are unique in that they are appointed by the Court, not by one party and because, unlike other experts, they have a fact-finding function as the "eyes and ears of the court". As a result, it is particularly important to ensure that the assessors act impartially, without bias, when considering whether there is family violence and if so its impact. Assessors, like everyone else can be influenced by such biases. We consider three areas in which Court's gate-keeping role is important in this respect.

The first is the initial gate-keeping role. Requests for reports should not be rubber-stamped; judges have an obligation to determine whether they are necessary - their purpose. If they are necessary, the court should ensure that the assessor is appropriately qualified to understand the nature, dynamics, cycle, impact and relevance of family violence. As noted above, in-depth knowledge and experience are required, beyond just a professional designation, and there is a legitimate concern that some assessors are not properly qualified in this respect. This section of our Report provides: practical questions lawyers and judges can ask when considering this issue generally, prepared by the first author, Donna Martinson; guidelines on family violence qualifications by the Association of Family and Conciliation Courts (AFCC); and specific questions that can be asked to determine whether a proposed assessor has the necessary family violence qualifications, prepared by Canadian legal academic Dr. Linda Neilson.

The second judicial gate-keeping role is to consider whether, if the content and conclusions of the report are contested, the report is admissible. The B.C. Supreme Court has confirmed that a *White Burgess* admissibility hearing is required. A third gate-keeping role relates to the admissibility of critique reports. We agree with the view of Nicholas Bala, Rachel Birnbaum and Carly Watt in *Controversies about Experts* that

there should continue to be a role for a party to retain an expert to review/critique the report, and, when appropriate, to admit such a report. The BC Supreme Court has concluded that while such reports may have a role, they will rarely be necessary or appropriate. We respectfully suggest 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 assessed without starting from the position that they should be rarely 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 fair and just outcomes overall. Increased time, expense and uncertainty are important considerations, but they cannot override the objective of achieving appropriate outcomes in cases where the stakes for the present and future safety, security and well-being of children and other family members are so high.

The concerns we have raised, relating to family violence qualifications, and independence, impartiality and absence of bias apply to the determination of weight if the report is found to be admissible. Our Report contains suggested questions for lawyers and judges, provided by the first author, Donna Martinson, as well as detailed assessor guidelines prepared for family violence cases by the AFCC.

Considering Section 211 from the Perspective of the Child

Our report considers a shift in thinking about children's participation in family law proceedings generally, and in those involving s. 211 reports in particular. It is a shift from viewing children as non-actors in judicial processes, other than to have their "views" presented, usually once, by third parties, to that of viewing children as people with rights, who are entitled to have those rights advanced and respected throughout court proceedings. Here we highlight: child rights and their implementation through safeguards; the role of independent legal representation generally and when there is a s. 211 report; and how to involve an independent children's lawyer in court processes.

Child Rights and their Implementation

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*." Lady Brenda Hale, Chief Justice of the United Kingdom Supreme Court.

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 their dependence, lack of maturity and actual or perceived voicelessness. Access to justice of children is about building a system that recognizes these difficulties, but nonetheless gives children participatory rights. It is not about paternalism. It is about empowerment. Chief Justice of British Columbia, Robert Bauman, 2017 CLEBC Access to Justice for Children Conference.

As Chief Justices Hale and Bauman state, a child has separate rights, including the right to be free from violence within the family, pre and post separation, and the right to participate in decisions that affect them, and to have their views taken seriously. The

child must also have a way of enforcing those rights, with the assistance of adults, including lawyers and judges.

The *United Nations Convention on the Rights of the Child* created in 1989 and ratified by Canada in 1991. The United Nations Committee on the Rights of the Child was created by Article 43 of the Convention to implement it by way of General Comments and regular compliance reviews. They provide international standards which apply to the family law work that B.C. lawyers and judges do, identifying children's rights and the importance of legal guarantees and describing how to implement children's rights in judicial proceedings. They require the implementation of <u>all</u> of the following procedural safeguards.

The first is to ensure that the views of the child are accurately presented and properly considered by the assessor, initially, and then the court. The second is that decision-makers, which includes assessors and the court, must have all facts relevant to the child's best interests, not just those parents/guardians choose to present; the evidence of the parents/guardians must be tested for relevance and weight from the perspective of the child, and the evidence must include evidence, if it exists, supporting the views of the child. A third is ensuring that the overall proceedings, (which would include the preparation of the s. 211 report) are conducted and decisions/results given, in a timely fashion.

A fourth is the importance of independent legal representation: The child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies...: General Comment 14, para 96. A fifth, referred to as "legal reasoning", requires the assessor and the court to apply relevant legal principles, including child rights principles, to all of the relevant facts, including those supporting the child's views. There is a specific requirement that the decisions maker must explain how the child's views were taken into account, particularly when the result differs from the child's views. The final relevant safeguard is that the child has a right to be advised about the legal correctness of the decision, and, if appropriate, appeal the decision.

<u>The Role of Independent Legal Representation</u>

The Supreme Court of Canada has stated that the ability to access a lawyer to advance and protect legal rights without interference is a fundamental aspect of Canada's legal system. Children, like adults, should be able to take advantage of this fundamental right. Though the idea of independent legal representation for a child is not without controversy, there is strong support for it. That support includes not only the UN Committee on the Rights of the Child's legal representation safeguard, described above, but also from the UN High Commissioner on Human Rights, the Human Rights Council and international human rights instruments including the International Covenant on Civil and Political Rights. They conclude that while the right to legal representation is not found explicitly in the wording of Article 12 of the Convention, it is implicit in the Article 12 right of the child to be heard in legal proceedings.

Legal representation includes general information about legal rights, confidential legal advice about how general rights apply in particular cases, and assistance in implementing, advancing, and protecting rights in court processes. Legal information includes information about their legal rights generally; their rights to participate and the choices available; the way the court processes work; and the role of the judge. This information can but does not have to be provided by a lawyer. With respect to legal advice, where lawyers provide specific advice relevant to the child's specific circumstances, lawyers have professional obligations to, in a confidential setting, investigate facts, identify issues, determine client objectives, consider possible options and develop and advise the client on appropriate courses of action.

For children in family law cases legal advice would include, for example: exploring relevant facts; exploring children's views; explaining that they have a right to both provide their views and a right to have the court take them seriously; advising them generally on potential options and their pros and cons, including options about presenting their views; suggesting appropriate options about how views should be heard and who should participate; and, more generally, explaining the child's options to advance and develop their rights in court processes, including settlement options.

Legal Representation in Court Proceedings

Learning about legal rights and obtaining legal advice from a lawyer will not assist the child in implementing those rights in court processes if the lawyer cannot participate in settlement discussions and contested hearings/trials. A lawyer can be very helpful in facilitating a resolution during settlement discussions of all kinds. At a contested hearing/trial the lawyer can participate on the child's behalf:(1) in the presentation and testing of evidence; (2) with respect to s. 211 parenting assessments: (a) in the decision about whether one is necessary; (b) if it is, the qualifications of the expert and the method used; (c) its admissibility. (d) the appropriateness of a critique report; (3) in guarding against unreasonable delay; and (4) by advancing and protecting children's rights during final submissions, including submissions on the relevant law, how the child's views are weighed, and the weight to be given to the parenting assessment in the context of all of the evidence.

Once the court's decision is provided, a lawyer can also: explain the decision to the child; review the ultimate decision for correctness; and recommend appealing the decision if appropriate.

How to Involve an Independent Lawyer for a Child in Court Processes.

B.C. Supreme Court cases support children obtaining advice from a lawyer outside the Court process but say that Court approval is required for that lawyer to participate in court proceedings. Section 203(1) of the FLA gives the court authority to appoint a lawyer to represent the interests of a child in the proceeding 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 in the best interests of the child. This is a difficult test to meet and arguably applies when the judge determines that a child should have a lawyer in a situation where the child does not already have one.

The court can also, based on s. 201(2)(b), permit a child to make, conduct or defend a proceeding with a lawyer retained/obtained by the child (such as a lawyer with the Children's Legal Centre) to act in the proceedings on behalf of the child. The view that s. 201(2)(b) can be used as described has emerged since our Report was released in June 2019. We therefore elaborate on the reasons for it in our Report Brief, below at pp. 26-30, considering: the plain wording of the section, which allows a child under 16 to make, conduct or defend any FLA proceedings; the context of the section within the FLA as a whole, including its relationship with s. 203 and its relationship to other sections such as s. 202 and s. 211; the ways in which a child rights analysis applies to the exercise of a judge's discretion; and relevant B.C. and Ontario case law.

REPORT BRIEF

References/Citations in Original Report:

http://www.fredacentre.com/wp-content/uploads/2010/09/D.-Martinson-and-M.-Jackson-Report-Family-Violence-and-Parenting-Assessments-Law-Skills-and-Social-Context.pdf

As noted in our Report Highlights, above, this Report Brief focuses on our majory Report analyses. It has page references to the full Report, where more information and the references/citations can be found. This Brief has four parts: Section 211 Reports, Then (2012) and Now (2019); Section 211 Reports and Family Violence: Integrating Legal Principles, Judicial Skills and Social Context; Considering Section 211 from the Perspective of Children; and S. 211 Reports and Fact-Finding: and a Focus on Credibility Assessment.

SECTION 211 CONTEXT COMPARISON – ISSUES THEN (2012) AND NOW (2019)
(Our Report, pp. 27-41)

In our Report Introduction we referred to the National Judicial Institute 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 Part II of our Report was to elaborate on those concerns by comparing the situation in 2012 with the present. We first identified some overarching concerns identified then and now. We next compared nine specific issues within the same time frames. Where appropriate, we referred to other research, and international Codes and Guidelines that address those concerns.

OVERARCHING CONCERNS (Our Report, pp. 28-31)

Those who participated in the 2012 Consultation felt, overall, that parenting assessments did not treat violence against women and children seriously. Women's claims of violence could be disbelieved, without appropriate analysis. 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" (Troubling Assessments). Among the report's conclusions were these: there were no binding guidelines or directives that governed the preparation of the reports; many low-income women could not afford legal representation and did not qualify for legal aid in these important cases - without a lawyer, challenging a problematic report could be extremely difficult; and demand for publicly funded assessments consistently outstripped supply, leading to significant delays

In 2019, the Director of Law Reform at West Coast LEAF, Elba Bendo, stated that not much has changed since 2012 when Troubling Assessments was concluded: "…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".

NINE SPECIFIC CONCERNS

In this section, we compare more specific concerns raised in 2012 with the situation in 2019: (1) Lack of Family Violence Qualifications; (2) Overuse and Misuse of Expert Reports; (3) Lack of Trauma Informed Practice; (4) Impartiality/Credibility Assessments; (5) Lack of Cultural Competence; (6) Minimization/Disappearance of Violence Generally; (7) Family Violence and Alienation Cases; (8) Screening/Risk Assessment and Safety Planning; and (9) Over reliance on Reports by Courts.

Lack of Family Violence Qualifications (Our Report, pp. 30-32)

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.
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*].

Overuse and Misuse of Expert Reports (Our Report, pp. 32-34)

In 2012, 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.

Zara Suleman described similar concerns which still exist in 2019:

> *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.*

<u>Lack of Trauma Informed Practice</u> (Our Report, p. 34)

This issue was raised in the B.C. Committee for the Coordination for Women's Safety Working 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.

<u>Impartiality/Credibility Assessments</u> (Our Report, p. 35)

It was thought in 2012 that some psychologists were not neutral and had preconceived, biased notions about parenting that favoured father's significant participation in children's lives, even when domestic violence exists, and even when well-founded research shows that such contact can put children at risk.

In 2019 the issue of 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.

<u>Lack of Cultural Competence</u> (Our Report, pp. 35-36)

Elba Bendo, Director of Law Reform, West Coast LEAF (2019) identified challenges relating to a lack of cultural competence on the part of some assessors. She 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.

The co-author of *Troubling Assessments,* Shahnaz Rahman, now reports that experiences of racism, minimizing of violence and westernized notions of "appropriate" parenting are used as measured norms in assessments.

Non-English-speaking women are 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.

Minimization/Disappearance of Violence Generally (Our Report, pp. 36-37)

In the same LEAF Report, it was noted that women's experiences and abuse at the hands of their husbands had 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).

Family Violence and Alienation Cases (Our Report, pp. 37-40)

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

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, however, becomes confounded as an issue when there are allegations of family violence by one partner against the other partner or against both the non-abusive parent and the child(ren). Legal education has tended to focus

primarily on how to identify genuinely alienating conduct, and what to do about it, without giving meaningful consideration to either the ways in which allegations of domestic violence by one parent, usually the mother, and allegations of alienation may be linked, or the adverse consequences that can arise when issues of violence and its impact are minimized or ignored.

In addition, there is a concern about the inappropriate elevation by some of parental alienation to a medical/mental health problem. This can dramatically change the focus of the proceedings from one in which claims of alienation are 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, to one in which the focus from the outset becomes whether the mother meets the alienation "criteria" and is seen to need "treatment" or other forms of intervention. (See our Report's Concluding Observations at p. 79)

Of relevance in this regard, is a proposal said to be approved by the World Health Organization (WHO) on May 25, 2019, to come into force January 1, 2022. (See our Report at pp. 37 to 40) In it, the index term of parental alienation was defined as a caregiver-child relationship problem and would be included in the International Classification of Diseases, 11th Revision (ICD-11). These steps were taken without any consultation with organizations in numerous countries concerned about violence against women and children. This proposal is highly controversial and there has been international concern registered about it. In May 2019, the Platform of United Nations and regional regional independent mechanisms on violence against women and women rights voiced its concern about the inclusion of 'parental alienation' as a 'Caregiver-child relationship problem'.

It stated that it 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". The Platform also stated that accusations of parental alienation by abusive fathers must be considered as a continuation of power and control by state agencies and actors, including those deciding on child custody.

A collective international response led by Canadians, Dr. Linda Neilson, a legal academic, and Dr. Peter Jaffe, a psychologist, was prepared describing the many significant concerns relating to the proposed action. (See the link at p. 20 of our Report). A more recent development has been a renaming of parental alienation by some as "rejection and relationship dysfunction". Doing so does not address the

international concerns raised as it appears to be essentially the same concept with a different name.

Screening/Risk Assessment and Safety Planning (Our Report, pp. 40-41)

As noted earlier, in 2012, "There is often 'no screening'. This should be a requirement." Again, from the LEAF report in that year, 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).

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.

Over Reliance on Reports by Courts (Our Report, p. 41)

In the LEAF report in 2012, 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.

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.

SECTION 211 REPORTS AND FAMILY VIOLENCE: INTEGRATING LEGAL PRINCIPLES, JUDICIAL SKILLS AND SOCIAL CONTEXT. (Our Report, pp. 41-55 - Donna Martinson was the primary author of this section)

Part III of our Report incorporates the contextual information provided into the relevant s. 211 legal framework and provides practical suggestions/guidelines. Section 211(1) of the FLA states:

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.

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". 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.

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

The White Burgess Approach – Experts Generally. (Our Report, p. 43)

White Burgess Langille Inman v. Abbott and Haliburton Co. 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. 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.

The Unique Nature of s. 211 Reports. (Our Report, pp. 43-46)

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.

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 of the *Family Relations Act* 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.

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 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.

This investigative/fact-finding role of the assessor goes far beyond the traditional role of experts. Yet, 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.

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

The Initial Gate-keeper role – Should a s. 211 Report be Ordered? (Our Report, pp. 46-49)

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?

Reports can be used when they are not necessary. The need for and purpose of the report should be identified by lawyers and the court; their use should not be "rubber stamped" by the court. 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. 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: (Our Report, p. 47)

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? and, 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* (Controversies about Experts) also support the view that judges need to play a gate-keeper role when considering whether or not an assessment should be ordered.

<u>What Qualifications are Required by Assessors in Family Violence Cases?</u> (Our Report, pp. 30-32 and 48-49)

There is a legitimate concern that not all family assessors have the kind of detailed knowledge and understanding of the nature, dynamics, cycle, impact and relevance of family violence required. The Association of Family and Conciliation Courts, (AFCC Family Violence Qualification Model Standards for Custody Evaluation) in 2007: S. 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:

> *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.*

Here are questions prepared by Canadian legal academic, Dr. Linda Neilson, which may assist:

- 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.)
- 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?

A Second Gate-keeper Role – Is the S. 211 Report Admissible? (Our Report, pp. 49-50)

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.

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 British Columbia Supreme Court has supported the view that such a hearing is necessary. The *White Burgess* analysis allows the Court to consider all the *White Burgess* factors, including for this purpose, whether the assessor is properly qualified, and has acted impartially.

A Third Gate-keeper Role – the Admissibility of Critique/Review Report. (Our Report, pp. 50-52)

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.

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. We support the application of the principles of admissibility described by Justice Kent in *Dimitrijevic v. Pavlovich.* 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. Justice Kent then observed that for a number of reasons the use of such reports will be rarely necessary or appropriate [see our Report at pp. 51-52].

Each one identified 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 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.

ASSESSING THE ASSESSMENT. (Our Report, pp. 52-55)

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 assessor's 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.

Practical Suggestions – Generally (Our Report, pp. 52-53)

The first author suggested that the following questions may be considered by a court: 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: (1) the specific purpose(s) for which the report was obtained, (2) the psychological testing, if appropriate, (3) the relevant facts, and (4) the relevant legal criteria relating to a child's best interests found in Part 4 of the Family Law Act?; and, 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 and specific Guidelines are provided for each (Our Report pp.53-55): Prioritize the safety and wellbeing of children and parents; Ensure an informed, fair, and accountable process; and, focus on the individual family.

Parenting Capacity Assessments and Indigenous Parents

Though our Report deals with assessments in family law cases, recent reports prepared in the context of parenting capacity assessments for Indigenous parents in the child protection area, and released after our Report was prepared, are relevant. See: (2019). Parenting Capacity Assessments and Indigenous Parents in Canada: Policy Brief. Toronto, Ontario: Policy Bench, Fraser Mustard Institute for Human Development, University of Toronto; and the companion document, Parenting Capacity Assessments and Indigenous Parents in Canada: Literature Review. Toronto, Ontario: Policy Bench, Fraser Mustard Institute for Human Development, University of Toronto. There are some common themes/concerns with respect the impact of these assessments, the qualifications of assessors and the importance of considering the cultural context, using culturally appropriate methods.

CONSIDERING SECTION 211 FROM THE PERSPECTIVE OF THE CHILD

(Our Report, pp. 18-27 and pp. 56-65 - Donna Martinson was the primary author of these sections)

Our report considers a shift in thinking about children's participation in family law proceedings generally, and in those involving s. 211 reports in particular. It is a shift from viewing children as non-actors in judicial processes, other than to have their "views" presented, usually once, and by third parties, to that of viewing children as people with rights, who are entitled to have those rights advanced and respected thoughout court proceedings. Here we highlight: child rights and their implementation through safeguards; the role of independent legal representation generally. and when

there is a s. 211 report; and how to involve an independent children's lawyer in court processes.

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*." Lady Brenda Hale, Chief Justice of the United Kingdom Supreme Court.

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 their dependence, lack of maturity and actual or perceived voicelessness. Access to justice of children is about building a system that recognizes these difficulties, but nonetheless gives children participatory rights. It is not about paternalism. It is about empowerment. Chief Justice of British Columbia, Robert Bauman, 2017 CLEBC Access to Justice for Children Conference.

Children have, without question, the right to be free from and protected from family violence of all kinds. It is common in cases where there are allegations of family violence itself, or in conjunction with allegations of parental alienation, for parents, lawyers and judges to consider obtaining a s. 211 assessment. It goes without saying that the child is the focus of such a report and that the report can have a major impact upon the ultimate decision. Children have a significant stake in ensuring that a report is necessary at all, and if it is, that all the pre-requisites to the creation of a fair and equality-based report are met. As Chief Justices Hale and Bauman state, a child has separate rights, including the right to be free from violence within the family, pre and post separation, AND the child must have a way of enforcing those rights.

What Rights?

Child rights are rights found in domestic laws such as the *Family Law Act* and the *Divorce Act*, the *Charter*, which applies to children, and the *United Nations Convention on the Rights of the Child*, (the Convention) and include, but are not limited to the rights of all children:

- to be safe, secure and well, including the right to be free, within the family and after separation/divorce, from violence of all kinds by family members
- to participate in decisions that affect them, if they make an informed choice to do so, and if they are capable of forming their own views; doing so is particularly important in cases involving allegations of violence
- to have those views taken seriously when a judge makes a decision, assists in mediating a resolution/facilitating a settlement, or expresses a non-binding opinion.
- to the judge's explanation as to how the child's views were considered in the decision, particularly if the result is different from those views, and how the judge applied child rights principles overall, and

- to the assistance of adults, including lawyers and judges, to help implement their rights.

Implementing Rights – Legal Safeguards

The Convention, ratified by Canada in 1991, and the United Nations Committee on the Rights of the Child created by Article 43 of the Convention to implement it by way of General Comments and regular compliance reviews, provide international standards which apply to the family law work that B.C. lawyers and judges do. They identify children's rights and the importance of legal guarantees and describe how to implement children's rights in judicial proceedings. They require applying procedural safeguards, including but not limited to obtaining children's views and requiring all appropriate legal representation when children's best interests are being formally assessed by courts.

The UN Convention and the General Comments of the UN Committee on the Rights of the Child have legal status in B.C., referred to by B.C. and other Canadian courts (see our Report, pp. 26-27). The persuasive General Comments particularly relevant to family law cases are: General Comment 12 on "The right of the child to be heard", 2009; General Comment 13 on "The right of the child to freedom from all forms of violence, 2011; and General Comment 14, on "The right of the child to have his or her best interests taken as a primary consideration (article 3 para. 1), 2013.

The UN Committee states that procedural safeguards must be applied. Those safeguards are discussed at pp. 22 and 23 and 56 to 59 of our Report. These safeguards are relevant to all family law cases, and especially those where a s. 211 report is in issue. That is, they apply not only to the ultimate decision maker (often a judge) overall, but they apply to decisions relating to s. 211 reports. They impose several obligations that must be met before the processes used and the results reached can be said to be fair and equality based. Obtaining the views of children is only one of the safeguards. It requires that the views of the child are accurately presented and properly considered by, initially, the assessor and then by the court. The second is that the decision-maker, which includes the assessor and the court, must have all facts relevant to the child's best interests, not just those parents/guardians choose to present; the evidence of the parents/guardians must be tested for relevance and weight from the perspective of the child, and the evidence should include that which supports the views of the child.

A third is ensuring that the proceedings, (which would include the preparation of the s. 211 report) are conducted and decision/result given, in a timely fashion. A fourth safeguard is the importance of independent legal representation for children. The Committee on the rights of the Child, in General Comment 14, para 96, Legal Representation, states:

> 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.

A fifth, referred to as "legal reasoning" requires the assessor and the court to apply all relevant legal principles, including child rights principles, to all relevant facts, including those supporting the child's views. There is a specific requirement that the decision-maker must explain how the child's views were taken into account, particularly when the result differs from the child's views. Finally, the child has a right to be advised about the legal correctness of the decision, and, if appropriate, the potential of an appeal.

How to implement Children's Rights – Independent Legal Representation

The Supreme Court of Canada has stated that the ability to access a lawyer to advance and protect legal rights without interference is a fundamental aspect of Canada's legal system. Children, like adults, should be able to take advantage of this fundamental right. Though the idea of independent legal representation for a child is not without controversy, there is strong support for it. (See our Report at pp. 59-61 and pp. 63-65.) That support includes not only the UN Committee on the Rights of the Child's legal representation safeguard, but also the UN High Commissioner on Human Rights, and the Human Rights Council. They conclude that while legal representation is not found explicitly in the wording of Article 12, the right to such representation is implicit in children's Article 12 right to be heard in legal proceedings. In addition, International human rights instruments, including the International Covenant on Civil and Political Rights, which Canada has ratified, support the right to legal representation in both criminal and civil law matters. These instruments apply to children. Legal representation includes general information about legal rights, confidential legal advice about how general rights apply in particular cases, and assistance in implementing, advancing, and protecting rights in court proceedings.

Legal Information.

Legal information includes information about children's legal rights generally; their rights to participate and the choices available; the way the court processes work; and the role of the judge. This information can but does not have to be provided by a lawyer.

Legal Advice

With respect to legal advice, where lawyers provide specific advice relevant to the child's specific circumstances, lawyers have professional obligations under governing codes of conduct to, in a confidential setting, investigate facts, identify issues, determine client objectives, consider possible options and develop and advise the client on appropriate courses of action. For children in family law cases this would include, for

example: exploring relevant facts; exploring their views; explaining that they have a right to both provide their views and a right to have the court take them seriously; advising them generally on potential options and their pros and cons, including options about presenting their views; suggesting appropriate options about how views should be heard and who should participate; and, more generally explaining the child's options to advance and develop their rights in court processes, including settlement options.

Legal Representation in Court Proceedings

Returning to Chief Justice Bauman's comments, for children, having legal rights in family law cases will be meaningless if children do not have the ability to implement them in court proceedings. Learning about legal rights and obtaining legal advice from a lawyer will not assist the child in implementing those rights in court proceedings if the lawyer who has advised the child cannot participate in settlement discussion and contested hearings/trials.

A lawyer can be very helpful in facilitating a resolution during settlement discussions of all kinds. At a contested hearing/trial the lawyer, who would have a significant role in implementing the safeguards mentioned, can participate on the child's behalf: (1) in the presentation and testing of evidence; (2) with respect to s. 211 parenting assessments: (a) in the decision about whether one is necessary; (b) if it is, the qualifications of the expert and the method used; (c) its admissibility. (d) the appropriateness of a critique report; (3) in guarding against unreasonable delay; and (4) by advancing and protecting children's rights during final submissions, including submissions on the relevant law, how the child's views are weighed, and the weight to be given to the parenting assessment in the context of all of the evidence. Once the court's decision is provided, they can also: explain the decision to the child; review the ultimate decision for correctness; and appeal the decision if appropriate.

How to Involve an Independent Lawyer for a Child in Court Processes.

B.C. Supreme Court cases support children getting advice from a lawyer outside the Court process but say that Court approval is required for that lawyer to participate in court proceedings (see below). The court itself can appoint a lawyer based on s. 203. The court can, based on s. 201(2)(b), permit a child to make, conduct or defend a proceeding with a lawyer the child has retained/obtained by the child, (such as a lawyer with the Children's Legal Centre,) to act in the proceedings on behalf of the child. The view that s. 201(2)(b) can be used as described has emerged since our Report was released in June 2019. We therefore elaborate on the reasons for it, below.

S. 203 of the FLA

Section 203(1) gives the court authority to appoint a lawyer to represent the interests of a child in the proceeding 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 in the best interests of the child. The right provided by the legislature under this section is limited and has been

narrowly applied by the B.C. Supreme Court, supported by the B.C.C.A. The section makes parental conflict and parents' inability to decide what is in the best interests of the child the determining factors. Doing so is arguably not consistent with treating the child as a person with rights separate from those of the child's parents.

S. 201 of the FLA

In considering this section we discuss: the plain wording of the section, which allows a child under 16 to make, conduct or defend any FLA proceedings; the context of the section within the FLA as a whole; case law; and the ways in which a child rights analysis applies to the exercise of a judge's discretion..

The plain wording of the section

Section 201(1) states that a child has the capacity to make, conduct or defend a proceeding under the Act without a litigation guardian if the child is 16 years or older, a spouse or a parent. Subsection 2 states that there is nothing in the section which prevents a court if the court considers it appropriate, from:

> (b) allowing a child who is not described in subsection 1 [that is, a child under the age of 16] to make, conduct or defend a proceeding under this act without a litigation guardian.

Therefore, subject to the judge's discretion:

(1) a child has the right to be involved in making, conducting or defending ANY family law proceeding, which includes those relating to guardianship, parenting arrangements, contact, child support and parental cross-border child abduction;

(2) the right is not limited to specific issues within a proceeding but applies to all issues; and

(3) as a participant in the proceedings the child is entitled to independent legal representation.

The section does not deal with adding a child as a party. However, Rule 20(5)(b) of the *Provincial Court (Family) Rules*, gives the court authority (may) to "at any time order that a person be added as a party for the purpose of a hearing or proceeding generally".

The Context of Section 201(2)(b) within the FLA as a Whole

i. Relationship to Section 203

Section 201(2)(b) is distinct from s. 203; it deals with the right of the child to make, conduct or defend a proceeding under the Act and to retain a lawyer chosen by the child to do so, subject to the judge's discretion. Section 203, on the other hand is narrower in scope, and is judge driven. That is, it is the judge who determines, in the specific and limited circumstances set out in the section, whether a lawyer should be appointed (and

whether to allocate fees and disbursements either among the parties or to one party alone). Arguably, s. 203 only applies where there is no existing lawyer for the child.

ii. Relationship to other FLA Sections

The right of the child to make, conduct or defend a proceeding under section 201(2)(b) is consistent with sections in the FLA directed at evidentiary means by which the child's views can be presented. These sections include s. 202 (giving the court authority to admit hearsay and to give direction about evidence) and s. 211. Those sections provide means by which the child, through the child's lawyer, can present evidence of the child, including her views. Presenting such evidence is but one of the many functions the lawyer will have during the course of the proceedings.

Exercising Judicial Discretion under s. 201(2)(b) Using Child Rights Principles

Allowing a child to make, conduct or defend a proceeding:

(1) is consistent with Article 12 of the UN Convention, which, in addition to giving children the right under s. 12(1) to express their views, also, in Article 12(2) gives them the right to be heard in any judicial proceeding directly or through a representative;

(2) recognizes that a judge cannot apply s. 37(2) (b) in a vacuum; that is, to meaningfully consider a child's views as required, they must be tested in the context of all the evidence. The child should have a role in providing, testing and making submissions about that evidence.

(3) is consistent with the strong support found in Canada and internationally for legal representation in all cases where their best interests are being formally assessed by courts, which is described above, and

(4) is consistent with the requirement to implement the numerous legal safeguards discussed, hearing the voice of the child being just one of them.

Case Law on s. 201

British Columbia:

In *N.K v. A.H.,* (2016 BCSC 744), the BC Supreme Court was dealing with two applications to appoint independent (separate) counsel, one by an 11-year-old transgender child directly, through a lawyer retained by him and attending on his behalf, based on s. 201(2)(b) of the FLA. The family law application filed by A.H., the father, arose within a dispute between the parents about the proper course of treatment for a child diagnosed with gender dysphoria. A provision of the parent's divorce order allowed such an application in case of disagreement of this sort. The father disagreed with the view of a psychologist and an endocrinologist about appropriate treatment; the mother supported that treatment. A lawyer retained by the child asked that the child be

allowed to defend the proceedings, and to be added as a party.The result was that the judge exercised his discretion and appointed a litigation guardian instead, noting that the guardian must act through a lawyer. He also added the child as a party. **In doing so, he stated that the child undoubtedly had a right to retain any lawyer to advise the child about the child's rights, but it is for the court to determine the manner in which a child will be permitted to participate in the proceedings.** [at para. 43]

In exercising his discretion on the facts before him, the Judge concluded that this case was about the child, and the child's role in determining his own future, and he should be able to participate directly. [paras. 39 and 40] Though not in issue on the facts before him, he commented that the case: "is different from the many family law cases that come before the courts in which the views of the child are sought on issues relating to guardianship and parenting time, and where those views are typically presented through third party reports." [para. 39] In *J.E.S.D v. Y.E.D* (2017 BCSC 495) the hearing judge referred, at para. 26, to paras. 39 and 40 of *N.K v. A.H.,* above, in a case dealing with s. 203, not 202. Though *J.E.S.D.* went to the Court of Appeal, the question of s. 201 did not arise.

When the issue of the exercise of discretion in one of the more typical parenting cases is squarely before the court, we respectfully suggest that the court can consider that:

(1) S. 201(2)(b) applies to all proceedings and all issues within those proceedings, not just unique ones.

(2) In many of them, especially those where there are allegations of domestic violence and/or parental alienation, the impact of the court proceedings themselves can be highly significant. The results of the judge's decision can have a profound effect on the child's future well-being; orders can include preventing a child from seeing one parent at all, and they may be enforced by police intervention, arguably engaging the child's s. 7 *Charter* rights

(3) As explained in the discussions above on the purpose of legal representation for children, learning about legal rights from a lawyer will not assist the child in implementing those rights in court processes if the lawyer cannot participate in settlement discussion and contested hearings/trials.

In *A.B. v. C.D. and E.F* (2019 BCSC 604) a 14-year-old transgender boy brought a family claim, applying for a Protection Order restraining his father from interfering in his treatment. He did so through his own lawyer, and that lawyer, and co-counsel, appeared on his behalf throughout. Aspects of the case have been heard by the B.C. Court of Appeal, with those lawyers appearing for the young person. The decision is, at the time of writing, under reserve.

Ontario:
Judicial comments in two Ontario cases, though decided under the relevant Ontario legislation, may be of assistance in considering the issue of children participating in family law court proceedings without a litigation guardian.

In *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, the Ontario Court of Appeal concluded that the role of the Office of the Children's lawyer was fundamental to the proper function of the legal system. (2018 ONCA 559, leave to appeal to the Supreme Court of Canada refused; see our Report at pp. 56-57 and 64-65). It also considered the issue of whether children can represent themselves and have a lawyer, without a litigation guardian, concluding that, "children can represent themselves without a litigation guardian and do so regularly in family law proceedings." (para 91).

The court concluded that the original Adjudicator was "wrong" in concluding: (1) that the existence of the Children's Lawyer is premised in part on the fact that children cannot represent themselves or retain counsel without a litigation guardian, as they are under the legal disability of childhood; and (2) that even with respect to child protection cases, the role of the Children's Lawyer as legal representative differs from a conventional solicitor-client relationship. (paras. 89-91)

In *C.M.M. v. D.G.C.* (2015 ONSC 2447), the Ontario Divisional Court considered whether a child could make an application for child support without a litigation guardian. In answering "yes", the Court, at para. 24, raised what it described as a consequential access to justice issue that arises if the child is required to have a litigation guardian. The Court noted that normally the logical persons to act as a litigation guardian for a child is that child's parents. However, in child support cases, the parents (or at least one of them) is likely to be on the opposite side to the child in the application. It concluded that there is a legitimate concern that the requirement that a child must always have a litigation guardian in such matters "may effectively disenfranchise many children from the very relief that the Family Law Act (and a number of other statutes) accords to them."

S. 211 REPORTS AND FACT-FINDING: A FOCUS ON CREDIBILITY ASSESSMENT

We have noted that an important aspect of the role of s. 211 assessors is that of fact-finding. In the context of allegations of family violence that will necessarily involve making credibility assessments about whether family violence exists, and its nature and impact. In our Report we consider Chief Justice Wagner's statement that understanding social context "provides judges with the necessary skills to ensure that myths and stereotypes do not influence judicial decision making…" Here we will highlight some of the more common unfounded assumptions that can be used when credibility

assessments about family violence are made by all decision makers, including assessors.

We then consider provisions in the *Guidelines for Assessing Intimate Partner Violence* prepared by the Association of Family and Conciliation Courts (AFCC) which address violence. Next, we look at the general challenges all people, including professionals, can have in assessing deliberate lies and the fact that most people think they are better at assessing credibility that they, in fact are. Finally, we consider the idea of gender symmetry, a view held by some, one which in our opinion is not well founded, that women and men are equally violent in intimate partner relationships.

Unfounded Assumptions: Myths and Stereotypes (Our Report, pp. 14-17)

Here are some of the myths and stereotypes identified in both 2012 and 2018. We note in our Report that the concern is that these assumptions/inferences should not be drawn based *solely* on the specific facts described; a contextual analysis is required:

1. Assuming that because the relationship has ended, or divorce proceedings have begun, that the family violence has ended.
2. Inferring 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. Inferring 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. Inferring that if claims of family violence are made late in the proceedings or were not made in prior proceedings, they are false or exaggerated. Inferring 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.
5. Inferring 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.
6. Infer that leaving a violent household to reside in a shelter or other temporary housing is contrary to the best interests of the child.

7. Inferring that the absence of observable physical injuries or the absence of external expressions of fear means the abuse did not happen.

AFCC Guidelines for Examining Intimate Partner Violence (Our Report, pp. 16-17)

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. Guideline 5 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 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 (Our Report, p. 17)

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. *The Ring of Truth, the Clang of Lies – Assessing Credibility in the Courtroom* 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%.

Do Gender Symmetry Claims Minimize the Significance of Social Context in Family Violence Cases? (Our Report, pp. 65-77 - Margaret Jackson was the primary author of this section)

History of the Gender Symmetry debate (Our Report, pp. 65-67)

The concept of gender symmetry in domestic violence is based upon the argument that men and women commit similar rates of violence against one another. A debate emerged as a "fierce" topic after the results from the application of the Conflict Tactics Scale (CTS) were published by the developer of the scale, Dr. Murray Straus Steinmetz (1977/78). His work really set off the controversy 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'.

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

Our overall point here is that gender symmetry arguments made in family violence cases can represent a form of gender bias, based upon erroneous gender-based stereotypes. Making findings of fact about family violence in individual cases requires an analysis of all contextual factors, without applying what we suggest is an erroneous assumption about the existence of gender symmetry; otherwise, gender bias will influence the decision. Therefore, information about the actual context of the conduct being assessed is essential so that allegations are not inappropriately minimized or overlooked.

This idea is reinforced with respect to assessors in AFCC Guideline 5 referred to above. With respect to the mitigation of bias, it states that a child custody evaluator strives to recognize, among other factors, gender bias, and take active steps to alleviate the influence of such bias on the evaluation process. It also specifically refers the importance of endeavouring to be alert to and avoid the application of gender-based stereotypes and role expectations that can normalize abuse and discrimination.

To further strengthen the non-gender symmetry argument in family violence cases, (then) Justice Donna Martinson (2007), in referencing Jaffe, Crooks, and Bala in 2005, similarly summarizes 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". Such information identifies important gender patterns in severity, impact and lethality of violence.

Method Issues (Our Report, pp. 67-73)

The CTS tool itself has played a central role in the gender symmetry debate. Those challenging the method associated with the CTS application indicate that 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 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.

(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 said to be denied medical, and criminal justice services because of an unwillingness to accept the evidence from homicide statistics and the CTS surveys (p. 74). As we have stated earlier, men certainly can be victims of family violence and thus should be allocated needed legal and other supports and resources in an equitable manner. However, their numbers,

relative to the numbers of women victims, do not constitute anything close to the same or symmetric outcomes.

In that regard, below we present key sets of statistics which support our analysis of the qualitative stories of women's experiences in family violence cases.

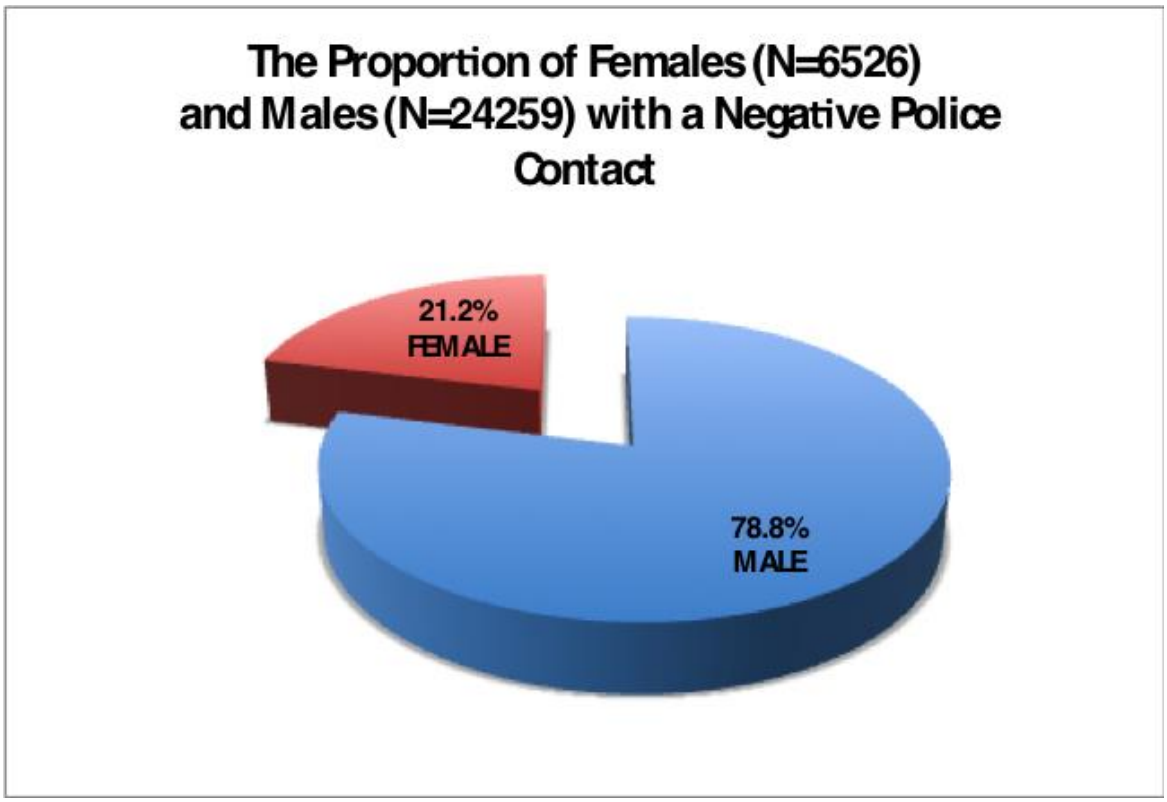
But first, to summarize the above discussion, in this section we dealt with the controversial topic of gender symmetry in intimate partner violence situations. It does seem that much of the debate revolves around the value and validity of victimization survey data and analysis as opposed to data gathered 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, however, that certain researchers do argue that the revised CTS2 properly accounts for the context of violence in some instances, as for example, it is said to be able to separate incidents of play fighting and actual assault.

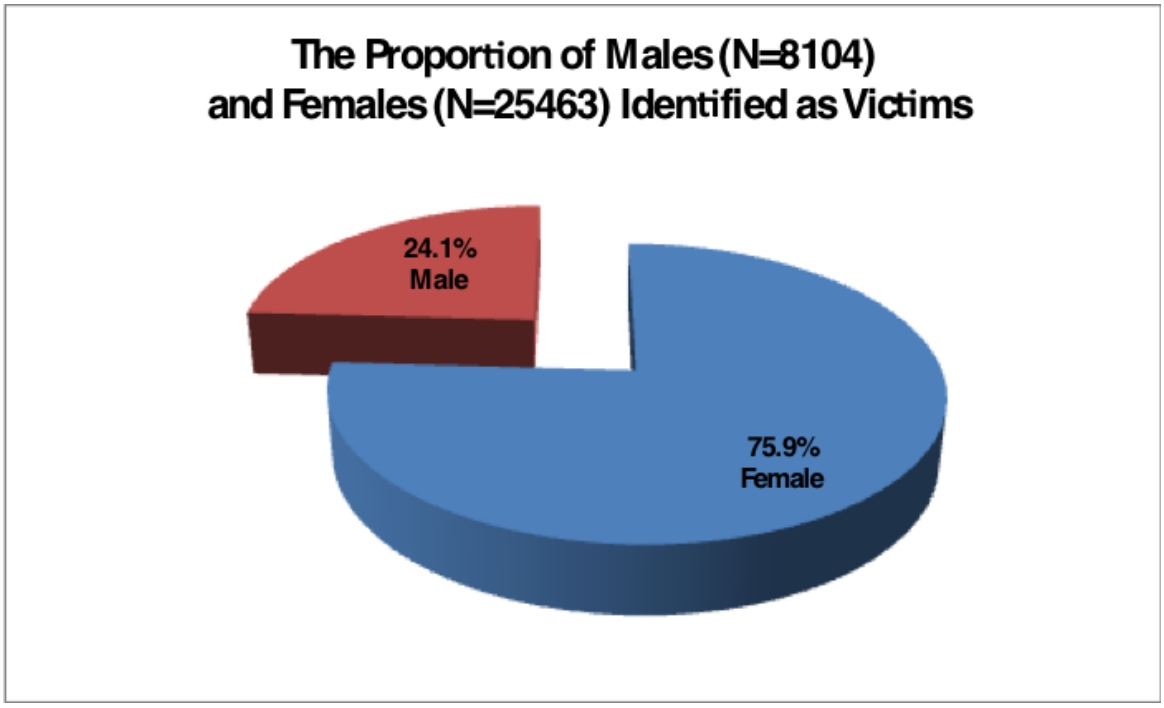
Therefore, as we have seen throughout this report, meaningful social context is essential information for assessors to be both aware of and informed by, to make assessments and decisions for parenting capacity, *child protection* and guardianship issues. In that sense, the answer to the opening question to this section, 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 substantive 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 – it does not capture meaningful social context.

<u>Research Findings – BC. National, US and the UN</u> (Our Report, pp. 73-77)

Our Report includes a Research Addendum. None of the reports included in it 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 (2009-2012):





The research above focused upon victim roles and negative police contact roles (NPC). NPC roles were defined as: arrested, charged, suspect chargeable and suspect roles for people associated with an event.

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:

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.

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).

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. 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.

Myrna Dawson, the Director of the Observatory, stated, "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."

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.

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."

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