Osgoode Hall Law Journal

Volume 49, Number 2 (Fall 2011)

Article 3

# Enforcing a Parent/Child Relationship at All Cost?: Supervised Access Orders in the Canadian Courts

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**Abstract**
Supervised access has become a key component of Canadian custody and access decision making in recent years, in large part due to a shift in attitudes towards post-separation contact between non-custodial parents, typically fathers, and their children. While the sole criterion upon which an access decision can be made is the "best interests of the child," the increased emphasis on ensuring that children have "maximum contact" with each of their parents post-separation, and the particular focus on maintaining paternal contact, has meant that orders for "no access" have almost disappeared. In an effort to unpack the themes underlying supervised access decision making in Canada, this article analyzes two years of family law judgments from British Columbia and Ontario in which supervised access was ordered. It provides an overview of the types of families and factual situations that attract supervised access orders and analyzes the three themes that emerge from the cases.

**Keywords**
Custody of children; Visitation rights (Domestic relations); British Columbia; Ontario; Canada

# Enforcing a Parent/Child Relationship At All Cost? Supervised Access Orders in the Canadian Courts

FIONA KELLY*

Supervised access has become a key component of Canadian custody and access decision making in recent years, in large part due to a shift in attitudes towards post-separation contact between non-custodial parents, typically fathers, and their children. While the sole criterion upon which an access decision can be made is the "best interests of the child," the increased emphasis on ensuring that children have "maximum contact" with each of their parents post-separation, and the particular focus on maintaining paternal contact, has meant that orders for "no access" have almost disappeared. In an effort to unpack the themes underlying supervised access decision making in Canada, this article analyzes two years of family law judgments from British Columbia and Ontario in which supervised access was ordered. It provides an overview of the types of families and factual situations that attract supervised access orders and analyzes the three themes that emerge from the cases.

Le droit de visite sous supervision est devenu depuis quelques années au Canada un élément clé du processus de prise de décision en matière de garde d'enfants et de droits de visite, en grande partie en raison d'un changement d'attitude envers le contact post-séparation entre le parent n'ayant pas obtenu la garde, généralement le père, et leurs enfants. Bien que « l'intérêt véritable de l'enfant » soit le seul critère pouvant motiver l'attribution de droits de visite, l'importance accrue que revêt la nécessité que les enfants aient après la séparation « le maximum de communication » avec chacun de leurs parents, et l'accent particulier mis sur le maintien du contact paternel, a pratiquement sonné le glas des ordonnances interdisant les droits de visite. Afin d'élucider les thèmes sous-jacents au processus de prise de décision en matière de droit de visite sous supervision au Canada, cet article analyse deux années de jugements du droit de la famille de la Colombie-Britannique et de l'Ontario dans lesquels une ordonnance de droit de visite sous supervision a été rendue. Il fournit un aperçu du genre de familles et des situations de fait qui motivent une ordonnance de droit de visite sous supervision et analyse les trois thèmes qui ressortent de ces cas.

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**FOLLOWING WHAT HAS BECOME** an international common law trend identified in Australia, the United Kingdom, and the United States, Canadian custody and access decision making has become increasingly focused on maintaining parent/child access.[1] Although both provincial and federal legislation state that access decisions must be in the "best interests of the child," the simultaneous statutory and judicial emphasis on "maximum contact" has, in practice, resulted in a situation in which access between a child and his or her non-custodial parent (typically the father) is awarded in almost all instances of divorce or separation. This is often true even in situations where the child has no relationship with the access parent, or where the access parent has a history of violence towards the custodial parent or the child. In fact, family law scholars in both Canada and elsewhere have suggested that maintaining post-separation access, particularly paternal access, is viewed by judges as tantamount to a child's "best interests."[2]

1. Kirsti Kurki-Suonio, "Joint Custody as an Interpretation of the Best Interests of the Child in Critical and Comparative Perspective" (2000) 14 Int'l JL Pol'y & Fam 183.

2. Susan B Boyd, "Contradictions and Challenges in Canadian Family Law" (2007) 7 Thirdspace: J of Fem Theory & Cult 51; Dawn Bourque, "'Reconstructing' the Patriarchal Nuclear Family: Recent Developments in Child Custody and Access in Canada" (1995) 10 CJLS 1. For similar arguments, see *e.g.* Susan Boyd, "Is There an Ideology of Motherhood in (Post)Modern Child Custody Law?" (1996) 5 Soc & Leg Stud 495; Helen Rhoades, "The 'No-Contact Mother' Reconstructions of Motherhood in the Era of the 'New Father'" (2002) 16 Int'l JL Pol'y & Fam 71. This position is also supported by case law emanating particularly from the Ontario Superior Court level, where most supervised access decisions are determined in that province. In this supporting case law, a number of judges have cited with approval the assertion that "[t]here is a presumption that regular access by a non-custodial parent is in the best interests of children" (*VSJ v LJG* (2004), 5 RFL (6th) 319 at para 128 (Ont Sup Ct J) [*VSJ*]). This statement has been further cited with approval in *Elwan v Al-Taher* (2009), 69 RFL (6th) 199 at para 76 (Ont Sup Ct J) [*Elwan*]; *MI v MW*, [2011] OJ No 1685 (QL) at para 102 (Sup Ct J) [*MI*]; *Norman v Penney* (2010), 305 Nfld & PEIR 241 at para 22 (SC Trial Div) [*Norman*]; *Matos v Driesman* (2009), 86 WCB (2d) 27 at para 39 (Ont Sup Ct J) [*Matos*].

As Susan Boyd notes, "Even without legislative reform, the trend of enhancing paternal contact—and paternal authority—is already occurring in Canadian courts, sometimes in circumstances that endanger mothers and children."[3]

Given that it is now very difficult to get a "no access" order in Canada,[4] courts have had to determine how access can be exercised safely in circumstances where it might have been denied altogether in the past. Supervised access, typically defined as access that takes place under the supervision of a third party,[5] has emerged as a possible solution.[6] Whether supervised by a family member or in the formal environment of a supervised access centre, supervision is designed to offset concerns about an access parent's ability to parent the child adequately or to refrain from perpetrating violence against the child or custodial parent during access visits or handovers. As I will demonstrate, it is not uncommon for judges to make orders of supervised access in situations where the access parent has no previous relationship with the child; has displayed poor parenting skills in the past; has a history of child abuse, substance abuse, mental health issues, or

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3. Susan B Boyd, "Demonizing Mothers: Fathers' Rights Discourses in Child Custody Law Reform Processes" (2004) 6 J Assn Research on Mothering 52 at 52. As far back as 1995, Dawn Bourque concluded from her review of Canadian custody and access decision-making that "[a] child's supposed 'need' for or 'right' to father [access], irrespective of the quality or quantity of his parenting, has superseded virtually all other considerations." *Supra* note 2 at 6.

4. In a number of the cases reviewed for this study, judges noted that the circumstances in which no access should be ordered are "quite narrow." See *e.g. Biraben v Pelland* (2006), 150 ACWS (3d) 410 at para 19 (Ont Sup Ct J) [*Biraben*]. In *VSJ*, a frequently cited Ontario Superior Court supervised access decision, the judge stated that no access is both an "extreme remedy" and "exceptional." Justice Blishen stated that "as the termination of access is the most extreme remedy to be ordered in only the most exceptional circumstances, the court must carefully consider the option of supervision prior to termination." *VSJ*, *supra* note 2 at para 137. The statement has been cited with approval in a number of Ontario trial court decisions, including *Chartrand v De Laat* (2008), 63 RFL (6th) 196 at para 113 (Ont Sup Ct J); *Jaanenah v Saider*, [2011] WDFL 54 at para 12 (Ont Ct J) [*Jaanenah*]; *Israel v Wright* (2010), 95 RFL (6th) 239 at para 15 (Ont Ct J).

5. This definition is drawn from the Ontario Ministry of the Attorney General's website on supervised access. Supervised access may also include supervised transfers. Ontario Ministry of the Attorney General, "Family Justice: Supervised Access" (9 December 2010), online: <http://www.attorneygeneral.jus.gov.on.ca/english/family/supaccess.asp#what>.

6. As Elizabeth Barker Brandt states, "[S]upervised access has developed in most jurisdictions as a pragmatic tool for the management of intractable or difficult custody cases." Barker Brandt goes on to express a concern that supervised access is a "stopgap that relieves judges of the responsibility of eliminating parental contact with children where such contact is not in the child(ren)'s best interests." Elizabeth Barker Brandt, "Concerns at the Margins of Supervised Access to Children" (2007) 9 JL & Fam Stud 201 at 217.

violence towards the custodial parent; or where the child is resistant to having contact with the access parent.

While a number of assumptions appear to underlie the use of supervised access orders in situations that might have resulted in a "no access" order in the past,[7] a review of two recent years of supervised access cases from Ontario and British Columbia indicates that the most commonly cited reason for making such an order is that it is in a child's best interests to have ongoing contact with both parents following parental separation. The perceived importance of ongoing contact has meant that even when the quality of the existing relationships—both between the parent and child and between the custodial and access parents—is poor, access will still be deemed appropriate. However, in order to make access "safe" for those involved, supervision is required. Supervision is believed by many judges to be a win-win situation: It allows children to maintain post-divorce contact with both of their parents, even those with serious parenting deficiencies, while ostensibly preserving the safety and well-being of all parties involved.[8]

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7. Situations in which courts have terminated access in the past (or have stated that the circumstances described might result in terminating access) are listed below, though it is important to note that none of the cases cited dealt with only one of the listed factors.

   1. Long-term harassment and harmful behaviours towards the custodial parent causing that parent and the child stress and or fear. See *Stewart v Bachan* (2003), 120 ACWS (3d) 466 (Ont Ct J); *Studley v O'Laughlin* (2000), 188 NSR (2d) 133 (SC Fam Div) [*Studley*]; *Dixon v Hinsley* (2001), 22 RFL (5th) 55 (Ont Ct J) [*Dixon*].

   2. History of violence; unpredictable, uncontrollable behaviour; alcohol or drug abuse that has been witnessed by the child and/or presents a risk to the child's safety and well-being. See *Jafari v Dadar*, [1996] NBR (2d) (Supp) No 33 (QB (Fam Div)); *Maxwell v Maxwell* (1986), 75 NBR (2d) 254 (QB (Fam Div)) [*Maxwell*]; *Abdo v Abdo* (1993), 126 NSR (2d) 1 (CA) [*Abdo*]; *Studley, ibid.*

   3. Extreme parental alienation that has resulted in changes of custody. See *Tremblay v Tremblay* (1987), 10 RFL (3d) 166 (Alta QB); *Reeves v Reeves* (2001), 102 ACWS (3d) 1116 (Ont Sup Ct J).

   4. Ongoing severe denigration of the other parent. See *Frost v Allen* (1995), 101 Man R (2d) 70 (QB (Fam Div)) [*Frost*].

   5. Lack of relationship or attachment between noncustodial parent and child. See *Studley, ibid*; *Montgomery v Montgomery* (1992), 42 RFL (3d) 349 (Ont CA) [*Montgomery*].

   6. Neglect or abuse to a child on the access visits. See *Maxwell, ibid.*

   7. Older children's wishes and preferences to terminate access. See *Frost, ibid*; *Dixon, ibid*; *Pavao v Pavao* (2000), 95 ACWS (3d) 891 (Ont Ct J).

8. See *e.g. KKH v SSH*, [2008] WDFL 1499 (BC Prov Ct) [*KKH*]. The court held that 'supervision transforms a dangerous parent/child relationship into a safe one.

Though supervised access orders have been on the rise for a number of decades,[9] the topic has attracted limited domestic academic attention.[10] Canadian research has focused primarily on providing an overview of the kinds of factual circumstances giving rise to supervised access orders. A critique of the practice, particularly in situations where the relationships are characterized by violence, has begun to emerge.[11] Absent from the existing Canadian debate, however, is an analysis of the patterns of judicial reasoning that characterize supervised access decision making or any discussion of whether the key assumption underlying the practice—that parents with significant (and often ongoing) behavioural concerns should be given access to their children—is an appropriate one. Even some women's anti-violence groups, who have historically opposed access in situations of spousal and child abuse, have accepted the phenomenon grudgingly, in the belief that supervision is better than nothing.[12]

Despite the (sometimes tentative) endorsement of supervised access by a broad range of stakeholders, an assessment of the appropriateness of the practice is needed. Empirical research in other jurisdictions reveals that supervised access produces mixed results for participants, especially children, even when it is facilitated through a regulated access centre. While parents typically report fewer instances of conflict and violence in supervised access situations, children's experiences are much more ambivalent.[13] Studies from the United States and Australia reveal that

9. While there is no statistical information as to the prevalence of supervised access orders in Canada, it has been argued that a proliferation in supervised access centres and other associated services (for example, Ontario went from having nine funded centres in 1994 to fifty-two by 2003) suggests that orders are increasing in frequency. Rachel Birnbaum & Stephanie Chipeur, "Supervised Visitation in Custody and Access Disputes: Finding Legal Solutions for Complex Family Problems" (2010) 29 Can Fam LQ 79 at 83.
10. Marie L Gordon, "Supervised Access: Why, When, How Long?" (2004) 22 Can Fam LQ 185; Rachel Birnbaum & Ramona Alaggia, "Supervised Visitation: A Call for a Second Generation of Research" (2006) 44 Fam Ct Rev 119; Martha Bailey, "Supervised Access: A Long Term Solution?" (1999) 37 Fam Ct Rev 478.
11. See *e.g.* Birnbaum & Chipeur, *supra* note 9.
12. See *e.g.* "Step 6: Provide fair access to justice for women," online: Step It Up! Ontario <http://www.stepitupontario.ca/10-steps/step-6.html>. This organization advocates for "universally available" supervised access services so that "women [will] not fear sending their children on access visits" or "be put in danger doing so." While the present article discusses the risks to custodial mothers of supervised access orders, its primary focus is on the health, safety, and well-being of child participants.
13. See *e.g.* Legal Aid and Family Services, *Contact Services in Australia: Research and Evaluation Project* by Tricia Szirom et al (Greenway: Attorney-General's Department, 1998) at 70-92. This large-scale study of child contact services in Australia found that all of the forty-nine children participants interviewed for the study "displayed or discussed feelings of insecurity and apprehension with respect to some aspect of the visit" (*ibid* at 76). One quarter of

children engaged in supervised access are typically much more vulnerable than other children,[14] rarely understand why access is being supervised,[15] and routinely express apprehension, fear, and insecurity about the process.[16]

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the children did not feel safe during visits, yet in none of those cases were staff aware of the child's concerns (*ibid* at 78). Critical research has also emerged from the United States. See Jessica Pearson & Nancy Thoennes, "Supervised Visitation: The Families and their Experiences" (2000) 38 Fam Ct Rev 123; Jessica Pearson, Lanae Davis & Nancy Thoennes, "A New Look at an Old Issue: An Evaluation of the State Access and Visitation Grant Program" (2005) 43 Fam Ct Rev 372. The American research has indicated a number of concerns, particularly for families experiencing domestic violence. Most notable was that supervisors often had little insight into the dynamics of domestic violence and treated all families generically, whether domestic violence was a concern or not. A second concern was that supervisors experienced tension in their roles. They struggled with goals that they viewed as conflicting: remaining neutral, offering children quality time with their non-custodial parent, improving relationships between children and their parents, undoing the harm of abuse to children, not colluding with batterers' manipulation of children, and protecting women from further abuse. See Office on Violence Against Women, *Safe Havens Supervised Visitation and Exchange Program, Michigan Demonstration Site Safety and Accountability Audit Planning Assessment* by Praxis International (Michigan Demonstration Site Advisory Committees, 2004), online: <http://www.michigan.gov/documents/SH_Audit_Rpt_9-04_104341_7.pdf>.

14. Children participating in supervised access are eight to fourteen times more likely to have emotional and behavioural problems than other children. Ministry of the Attorney General, *Evaluation of the Supervised Pilot Access Program: Final Report* by Rona Abramovitch, Jenny Jenkins & Michele Peterson-Badali (Toronto: Ministry of the Attorney General, 1994) at 112-13. Over the course of the last decade the Child Behaviour Checklist, developed by Thomas Achenbach, has become one of the most widely-used instruments for assessing child and adolescent emotional and behavioural problems in a variety of settings. Many of the children experience externalizing behaviours (*i.e.*, fighting and verbal abuse) and internalizing behaviours (*e.g.*, stomach aches and headaches) that are clinically significant when measured by the Child Behaviour Checklist. Szirom et al, *supra* note 13.
15. Research from Australia and Ontario indicates that few children understand why they are attending a supervised access centre, while a small number wonder if it is they who are being watched. For the Australian research, see Szirom et al, *supra* note 13. For the Ontario research, see Abramovitch, Jenkins & Peterson-Badali, *supra* note 14 at 108. Less than one quarter of the children interviewed for this study demonstrated a detailed and accurate understanding of why they attended the access centre. Johnston and Straus have suggested that unless abused children clearly understand what is going on, they may think that the access order or the supervisor condones the violence or that the access is being ordered because the child cannot be trusted. Both are likely to cause the child anxiety. Janet R Johnston & Robert B Straus, "Traumatized Children in Supervised Visitation: What Do They Need?" (1999) 37 Fam & Conc Cts Rev 135 at 148.
16. For example, every single one of the forty-nine children interviewed for the Szirom study of supervised contact services in Australia "displayed or discussed feelings of insecurity and apprehension with respect to some aspect of the visit." Szirom et al, *supra* note 13 at 76. The range of fears included:

In an effort to unpack the themes underlying supervised access decision making in Canada, I review two recent years of custody and access cases from British Columbia and Ontario in which supervised access was ordered. Supervised access is sometimes ordered in child protection cases, but I discuss supervised access decision making in the custody and access context only. I begin by discussing what supervised access looks like in Canada, comparing it to what might be considered a best practice model. I then introduce the case law data, analyzing the types of families and factual situations that attract supervised access orders and the three key themes that emerge from the decisions. Framing this discussion is a consideration of the appropriateness of ordering any kind of access in situations where violence or abuse characterize the parent/child or parent/parent relationships. I conclude by offering some recommendations for reform, focusing particularly on the need for a second generation of research into the relationship between supervised access and the health and well-being of participant children.

## I. SUPERVISED ACCESS IN CANADA: WHAT DOES IT LOOK LIKE?

At its most basic, supervised access involves a third party overseeing access visits between a child and his or her parent.[17] In practice, supervised access arrangements

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"Dad might get here before Mum and she'd have to run away."

"They might say mean things to each other and shout and stuff."

"He always looks like he's going to run away with me."

"The worker might go into the other room."

"How will I tell him I don't want to come any more?"

"He's scary.... I don't want to see him."

"He might ask me where I live and I'm not supposed to say."

"Mummy doesn't want us to come here." (*Ibid.*)

An excellent literature review from Scotland that provides an overview of studies on children and domestic violence notes that an analysis of qualitative research with children indicates that when children discuss their attitude toward their abusive fathers, the most overwhelming feeling expressed is fear. Cathy Humphreys, Claire Houghton & Jane Ellis, *Literature Review: Better Outcomes for Children and Young People Experiencing Domestic Abuse – Directions for Good Practice* (4 August 2008), online: The Scottish Government <http://www.scotland.gov.uk/Publications/2008/08/04112614/0>.

17. Supervised access, understood broadly, may also include "supervised exchange" or "supervised transfer." Supervised exchanges, which may take place in public places, such as a McDonald's restaurant, a police station, or a supervised access centre, are arrangements in which a third party supervises the movement of the child between the parents.

vary enormously. At the informal end of the spectrum, a grandparent, aunt, uncle, or other family member is present in the house while the parent exercises access. The supervisor in such a case may be tasked with ensuring that the parent is behaving appropriately towards the child or is not under the influence of drugs or alcohol. The order may require that the supervisor be present in the room during the visit or simply be in the house at the time the visit is taking place. In such situations, supervised access is typically expected to be of limited duration, with the goal of graduating to unsupervised access once the parenting concerns are resolved.

Supervision by family members is sometimes criticized for putting children and custodial parents at further risk, particularly in cases involving allegations of violence and abuse.[18] Family members who are asked to supervise may lack insight into the dynamics of violence, be intimidated by the access parent, or refuse to accept that violence is occurring, often due to the erroneous public image domestic violence perpetrators often present to family members.[19] In some instances, supervising family members may not even be made aware of the allegations of violence. The private nature of the arrangement may also make it more likely that an abusive parent will use access visits to continue the abuse. For example, the parent may use the child as a source of information, something that is typically monitored in a supervised access centre.[20]

At the more formal end of the spectrum, supervised access takes place at a supervised access centre. In the best-case scenario, trained supervisors facilitate access or supervise the exchange of the child from one parent to the other. Access centres are often used in high-risk situations, such as where there is a history of violence or abuse within the family. However, they may also be used in situations of low or unknown risk, such as where a parent is being reintroduced to a child after a lengthy absence. Supervised access centres that may be considered best practice models employ a number of practices to ensure the safety and

18. See *e.g.* Martha Schaffer & Nicholas Bala, "Wife Abuse, Child Custody and Access in Canada" in Robert Geffner, Robyn Igelman & Jennifer Zellner, eds, *The Effects of Intimate Partner Violence on Children* (New York: Haworth Press, 2003) 253; Melanie Shepard, "Child-visiting and Domestic Abuse" (1992) 71 Child Welfare 357.

19. For a discussion of the often charismatic and likeable presentation of domestic violence perpetrators, see Peter G Jaffe et al, "Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans" (2008) 46 Fam Ct Rev 500 at 506; L Bancroft & J Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (Thousand Oaks: Sage, 2002).

20. There are a number of cases from the United States where children have been harmed or even murdered while a family member supervised access. See Barker Brandt, *supra* note 6 at 228.

well-being of the families they serve.[21] The best centres are staffed by professional psychologists or social workers with work experience related to domestic violence, child protection, or childcare. Where necessary, supervisors provide one-on-one supervision of the parent and child at all times. Quality centres also have a physical space capable of meeting the needs of all parties. This includes multiple entrances, barriers within the building to prevent parents from crossing into a protected area, age-appropriate toys, and outdoor space. The best centres also provide links or pathways to other social services, sometimes even available on site. Finally, some specific measures relevant to situations of domestic violence are also indicated as best practices. These include a caution to staff about the dangers of focusing on parental rights or neutrality; carefully thought out security measures; universal standards of practice and certification criteria; and adequate training for staff members in the dynamics of domestic violence, the impact of domestic violence upon child witnesses, behaviours common to batterers (and how these behaviors are manifested in supervised visitation settings), and available legal remedies such as orders for protection.[22] In most jurisdictions where high-quality centres are

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21. A body of literature on what might be considered a best practice model of supervised access has begun to emerge from the United States via the non-profit organization Supervised Visitation Network. See *e.g.* Robert B Straus, Nadine Blaschak-Brown & Anne Reiniger, "Standards and Guidelines for Supervised Visitation Network Practice: Introductory Discussion" (1998) 36 Fam & Conc Cts Rev 96; Supervised Visitation Network, *Standards and Guidelines for Supervised Visitation Practice* (July 2006), online: Association of Family and Conciliation Courts <http://www.afccnet.org/pdfs/Supervised_Visitation_Nework-Standards%20Final%207-14-06.pdf>. Additional commentary, including some from Canada, is also available. See Linda Cantelon, "Manitoba's Access Assistance Project: New Directions for 'Old' Problems of Access" (1992) 30 Fam & Conc Cts Rev 102; Peg Hess et al, "The Family Connection Center: An Innovative Visiting Program" (1992) 71 Child Welfare 77; Susan M Stocker, "A Model for a Supervised Visitation Program" (1992) 30 Fam & Conc Cts Rev 352. A number of the practices discussed in these articles are specifically required by agencies wishing to apply for an Ontario government contract to administer a supervised access centre. Ministry of the Attorney General, *Request for Proposals for Supervised Access Service Provider for the Court District of Lambton County* (Queen's Printer for Ontario, 2008) [*Request for Proposals*]. Documents on file with author.

22. For research specifically addressing best practice models for supervised access centres in situations where parties are engaged in domestic violence, see Daniel Saunders & Karen Oehme, "Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Risk Factors and Safety Concerns" (2007), online: Violence Against Women Online <http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=371>; Sharon Maxwell & Karen Oehme, "Strategies to Improve Supervised Visitation Services in Domestic Violence Cases" (2001), online: Violence Against Women Online <http://www.mincava.umn.edu/documents/commissioned/strategies/strategies.html>.

found, they are partially or fully government funded, regulated or monitored by an accreditation body, and widely available.

Unfortunately, few supervised access centres in Canada meet the best practice model described above.[23] In fact, most provinces do not regulate supervised access centres at all or regulate only those that receive government funding.[24] In most provinces there are few, if any, rules governing who can open a centre, what qualifications or experience the supervisors must have (many are staffed primarily by volunteers), or what practices they should follow in facilitating access visits.[25] Access services range from ad hoc programs run by churches, community groups, or for-profit companies—the administrators of which do not necessarily have any particular insight into the complexity of the issues raised by the families they serve—to highly specialized facilities staffed by trained professionals. Unfortunately, some centres have particular political agendas that are arguably in conflict with the provision of supervision services. For example, the Men's Educational Support Association (MESA) in Calgary offers supervised access services where supervision is conducted by volunteers who have experienced separation and divorce. While this need not be problematic, MESA's website states that a "prevailing experience among Fathers today is that fair and balanced outcomes involving the law are difficult to attain."[26] Read in light of statements on the website accusing both the courts and lawyers of being biased against fathers, this assertion suggests that MESA may not be fully committed to the very orders its volunteers are being asked to uphold.

A second concern in the Canadian context is that supervised access services are not widely available. In some provinces and rural areas, they may not be

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23. Only Quebec has provincial standards for supervised access centres, while Ontario has a number of specified criteria that must be adhered to in order to receive funding. By contrast, most provinces administer and regulate supervised access facilities for families involved in child protection matters. Leslie Tutty provides a fairly recent overview of the state of supervised access in each Canadian province and territory. See Alberta Ministry of Children's Services, *Supervised Visitation and Exchange Centres for Domestic Violence: An Environmental Scan* by Leslie Tutty et al (Edmonton: Alberta Ministry of Children's Services, 2006) at viii-xiii.
24. The most notable exception to this trend is Ontario, which administers and partially funds a province-wide supervised access program, though with only limited regulation. The Ontario supervised access program will be discussed in greater detail in Part II, below. At present, Ontario, Manitoba, Saskatchewan, Quebec, and Nova Scotia fund some centres.
25. Unlike numerous state governments in the United States, provincial legislatures have not introduced statutory rules around supervised access. For a discussion of some of the American statutes, see Barker Brandt, *supra* note 6 at 225-30.
26. See Men's Educational Support Association, online: <http://www.mesacanada.com>.

available at all.[27] Additionally, only a small number of centres are subsidized by government, putting them out of the economic reach of many families. The lack of regulation of most of Canada's supervised access centres means that the quality of the services provided varies enormously, adding to the concerns of those who already believe that supervised access may not be appropriate where children and custodial parents are at physical risk. Furthermore, because employees and volunteers at supervised access centres keep observation reports about each visit and may appear as witnesses in court, they have the potential to wield considerable power in the family law setting.[28] The lack of regulation with regard to the qualifications of supervisors, as well as the use of observation reports as evidence in court in lieu of actual testimony,[29] may have serious implications for family law disputants.

Finally, a review of supervised access services across the country indicates that, for the most part, centres appear to be operating with neutrality as a foundational principle.[30] The majority of programs see themselves as neutral third parties whose role is to promote safe access between the child and non-custodial parent, without getting involved with relationship issues between the parents. While neutrality may be a laudable goal, in practice, supervisors in Canada and elsewhere have indicated that there is often a tension between neutrality and the equally important goal of safety for families where domestic violence and abuse is a concern.[31] For example, supervisors in the United States have reported that perpetrators of violence use supervised access to continue to harass a spouse via the child, but because of centres' commitment to neutrality they have been

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27. There are no formalized supervised access programs in Prince Edward Island, New Brunswick, Northwest Territories, Nunavut, and the Yukon. Tutty, *supra* note 23 at viii-xiii.
28. A 1999 study from the United States shows that nearly 80 per cent of visitation programs serving divorced families make factual reports to the court, and nearly 60 per cent offer recommendations about parent contact to the court. Thirty-three per cent offer advice to the court regarding the validity of allegations such as parental neglect or sexual abuse. See Nancy Thoennes & Jessica Pearson, "Supervised Visitation: A Profile of Providers" (1999) 37 Fam & Conc Cts Rev 460 at 466.
29. Nat Stern and Karen Oehme warn that using narrative reports completed during supervised access visits in lieu of testimony may save court time, but is completely inappropriate. As they state, "When a court allows a program's observation report into evidence in lieu of having the staff member testify, it often effectively substitutes an irrelevant narrative for a formal evaluation." See "The Troubling Admission of Supervised Records in Custody Proceedings" (2002) at 10, online: Minnesota Center Against Violence and Abuse <http://www.mincava.umn.edu/documents/supvisitation/supvisitation.pdf>.
30. Tutty, *supra* note 23 at xvii.
31. *Ibid* at xiv-xv.

prevented from intervening to any significant degree or explicitly taking sides, even where one party is clearly at risk.[32] The same supervisors often believed that abusive parents were calculated in their use of supervised access, 'doing their time' in the program with the intention of returning to abusive behaviours once they were released from supervised access. In such situations, supervisors were concerned that voicing their suspicions could be perceived as taking a position in favour of one parent over the other, contrary to the mandate of neutrality. Recognizing the potential pitfalls of adopting neutrality as a foundational principle, a small number of centres in Canada now explicitly consider the safety of the child and adult victim as their core organizational value.[33] At the same time, a number of the judges in the cases reviewed appear to view the neutrality of supervised access centres as a positive attribute.[34]

## II. SUPERVISED ACCESS IN BRITISH COLUMBIA AND ONTARIO: THE PROJECT

In an effort to identify the patterns of judicial reasoning underlying the use of supervised access orders in Canada, I reviewed all cases in which supervised access was ordered over a two year period (2006-2007) in Ontario and British Columbia. Cases were identified by searching the Quicklaw legal database service.[35] The searches produced fifty cases in total from the two provinces. Cases were then analyzed to determine (i) the characteristics of the families using supervised access services; (ii) the specific reason(s) given for ordering supervised access; (iii) the length (or proposed length) of the supervision period; and (iv) the identity of the supervisor. In addition, cases were coded to determine whether any particular themes emerged from the judicial analysis. Ultimately, three distinct themes were identified.

The provinces of Ontario and British Columbia were chosen for two reasons. First, given their sizeable populations, they were likely to yield an appropriate sample size. Second, the two provinces have taken vastly different approaches to

32. *Ibid.*
33. *Ibid* at xvii.
34. One judge refers to the access centre as "a neutral safe access intermediary," a deeply problematic position given that the father had been convicted several times for assaulting the mother and that one of the children feared being in his presence. *Kozachok v Mangaw* (2007), 36 RFL (6th) 183 at para 20 (Ont Ct J) [*Kozachok*]. With all due respect to the judge, neutrality in such a situation seems completely inappropriate.
35. Search terms used were: access, supervised access, supervised visitation, supervised contact, supervision.

the provision of supervised access services and were therefore good candidates for comparative analysis.[36]

Through partnerships with non-profit organizations, the government of Ontario provides a province-wide, funded network of fifty-two supervised access centres staffed by trained professionals and volunteers.[37] Partner organizations must sign a service agreement with the Ministry of the Attorney General requiring them to meet specific criteria set out by the Ministry.[38] These include requirements as to the physical space, the practices of the facility, the training of staff and volunteers, and the safety measures in place. Fees for the service are paid on a sliding scale and must be waived if a client is unable to pay. In most instances, families pay a minimum of twenty-five dollars per visit and can use the service for as long as is needed.[39]

While Ontario provides the most regulated supervised access program in Canada, it has a number of deficiencies. For example, though staff must be trained professionals, there are no criteria with regard to qualifications. Indeed, the variety of different agencies providing the services suggests an array of different qualifications, some of which may not be particularly relevant to the role of supervisor. In addition, because the services are provided through partnerships with existing non-profit organizations such as the YMCA, children's mental health centres, neighbourhood support centres, and local children's aid societies, the nature and culture of services may differ according to the individual culture and physical facilities of each organization.

In contrast to Ontario, British Columbia offers little by way of regulation or funding for supervised access. This was not always the case. Between 1996 and 2002, the BC Ministry of Attorney General established three supervised access

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36. No differences in decision making between the provinces were ultimately found, though a greater number of Ontario orders resulted in families attending actual supervised access centres than in BC, where courts rarely specified the nature of the supervision in their order.
37. The program began in 1992, was evaluated in 1994, and was extended across the province in 1999 and 2000. In 2003-2004, Ontario programs served 20,523 families, providing 23,949 supervised visits and 22,602 monitored exchanges. It is estimated that Ontario programs deal with 5 per cent of the 15 per cent of high-conflict families posing the greatest challenges. Tutty, *supra* note 23 at x.
38. *Request for Proposals*, *supra* note 21 at 24. Service agreement on file with author.
39. Most participating families in Ontario are involved with supervised access programs for between eight months and one-and-a-half years. However, some families use the program for years. Children are allowed supervised access visits until the age of majority. See Tutty, *supra* note 23 at xi.

programs housed within existing Family Justice Centres.[40] The Supervised Access and Exchange Program was designed to provide six to twelve supervised visits per family upon a referral from a Family Justice Counsellor.[41] However, after it became operational, a decision was made to stretch the same budget designated for three locations to nine locations to support services at the twenty-eight existing Family Justice Centres. In so doing, the Ministry reduced the time available to each family to approximately eight visits for all nine locations. Thus, in contrast to the approach in Ontario, where families can use supervised access services for as long as they are needed, the assumption in BC was that supervised access was a short-term solution to parenting problems and that parents would quickly graduate from the program and be able to exercise access without supervision. As the case law discussion in Part III indicates, this assumption demonstrates a misunderstanding of the kinds of behaviours that characterize families who require supervised access orders.

The BC program was underutilized. In March 2006, all program funding was withdrawn and all contracts terminated. At the start of the 2006–2007 fiscal year, BC moved to a largely unregulated, private, fee-for-service model. As a result, there is no regulation of supervised access in British Columbia. Centres can be run by anyone with the initiative to set one up. Practices and fees are determined by the operators.

Given the wide array of concerns raised by the practice of supervised access in Canada, it is important to consider how the courts perceive the appropriateness of its use in a variety of factual circumstances. The remainder of this article considers the characteristics of families using supervised access and the judicial themes underlying the use of supervised access orders by the courts of Ontario and British Columbia.

## III. THE FINDINGS: A SUPERVISED ACCESS "FAMILY PROFILE"

The first stage of the research was to determine the characteristics of families who are ordered to use supervised access services. As noted in Part II, Quicklaw produced

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40. Family Justice Centres are provincially funded information centres located in British Columbia and staffed by family justice counsellors, who can assist with issues related to separation or divorce. They provide services free of charge to parents and other family members. For more information, see BC Ministry of Attorney General, Family Justice Centres, online: <http://www.ag.gov.bc.ca/family-justice/resources/brochures_booklets/gen_brochure/FamJustCen.pdf>.

41. The description of the BC system is drawn from Tutty, *supra* note 23 at viii.

fifty cases[42] across the two jurisdictions during 2006–2007.[43] The vast majority were trial decisions providing final orders. The Quicklaw search produced very few appeal cases, suggesting that for the vast majority of families involved in supervised access disputes, their experience of the judicial system is limited to the trial court.[44] The cases were then analyzed to determine if a typical supervised access "family profile" emerged. Mirroring findings in other jurisdictions,[45] the

42. Given that supervised access services are well-used in both provinces, the cases discussed in this article do not represent all families using the services. It is likely that a number of negotiated settlements or mediated cases also include an agreement that access be supervised.

43. *CMW v CB*, [2006] BCJ No 792 (QL) (Prov Ct (Fam Div)); *DTB v TJM* (2006), 152 ACWS (3d) 658 (BCSC); *KC v SH*, [2006] WDFL 2691 (BCSC); *Boeckh v Boeckh* (2006), 147 ACWS (3d) 1017 (BCSC); *JAZ v JRG*, [2006] BCJ No 1158 (QL) (Prov Ct); *Heisler v Heisler* (2006), 151 ACWS (3d) 872 (BCSC); *CAL v LSH*, [2006] BCJ No 3094 (QL) (Prov Ct); *Boquiren v Thomas* (2006), 153 ACWS (3d) 636 (BCSC); *Grant v Grant* (2006), 155 ACWS (3d) 114 (BCSC); *ACJ v RC* (2006), 151 ACWS (3d) 871 (BCSC); *SC v SM* (2007), 161 ACWS (3d) 588 (BCSC); *KKH*, *supra* note 8; *Sandhu v Sandhu* (2007), 157 ACWS (3d) 381 (BCSC); *KAM v DLJW*, [2007] BCJ No 744 (QL) (Prov Ct); *J v J* (2007), 156 ACWS (3d) 1101 (BCSC); *Gallant v Gallant* (2007), 155 ACWS (3d) 117 (BCSC); *CF v SW* (2007), 162 ACWS (3d) 778 (BCSC); *DJD v SMD*, [2007] BCJ No 2364 (QL) (Prov Ct); *LJJC v VSC* (2006), 145 ACWS (3d) 856 (Ont Sup Ct J); *YQL v TTH* (2006), 147 ACWS (3d) 784 (Ont Ct J); *Rabong v Taylor* (2006), 148 ACWS (3d) 419 (Ont Ct J); *Biraben*, *supra* note 4; *AF v IV* (2006), 145 ACWS (3d) 101 (Ont Sup Ct J); *RA v JR*, [2006] OJ No 810 (QL) (Sup Ct J); *Young v Halverson* (2006), 150 ACWS (3d) 849 (Ont Sup Ct J) [*Young v Halverson*]; *TL v JLS* (2006), 148 ACWS (3d) 751 (Ont Ct J); *Johnson v Abbott* (2006), 152 ACWS (3d) 91 (Ont Sup Ct J); *Abrego v Moniz* (2006), 35 RFL (6th) 460 (Ont Ct J); *Mindzak v Turner* (2006), 147 ACWS (3d) 85 (Ont Sup Ct J); *Hall v Burke* (2006), 145 ACWS (3d) 644 (Ont Sup Ct J (Fam Ct)); *Atkinson v Spiridakis* (2006), 148 ACWS (3d) 420 (Ont Ct J); *Gemmill v Lackey* (2006), 149 ACWS (3d) 614 (Ont Sup Ct J); *CS v BA* (2006), 150 ACWS (3d) 413 (Ont Sup Ct J); *Xourafas v Xourafas* (2006), 154 ACWS (3d) 624 (Ont Sup Ct J); *SD-A v KO* (2007), 170 ACWS (3d) 559 (Ont Ct J); *Sportack v Sportack* (2007), 154 ACWS (3d) 1123 (Ont Sup Ct J); *KDC v MCC* (2007), 172 ACWS (3d) 963 (Ont Ct J); *Roche v Trafford* (2007), 169 ACWS (3d) 1069 (Ont Ct J); *Kozachok*, *supra* note 34; *Prosser-Blake v Blake* (2007), 156 ACWS (3d) 853 (Ont Sup Ct J); *Lee v Wright* (2007), 170 ACWS (3d) 555 (Ont Ct J); *Perkins v Perkins* (2007), 162 ACWS (3d) 983 (Ont Sup Ct J); *Pettenuzzo-Deschene v Deschene* (2007), 40 RFL (6th) 381 (Ont Sup Ct J); *Faragova v Farag*, [2007] OJ No 714 (QL) (Ct J); *Wilson v Keyes* (2007), 157 ACWS (3d) 353 (Ont Ct J); *Pretchuk v Pretchuk* (2007), 157 ACWS (3d) 563 (Ont Sup Ct J); *Rawn v Laviolette* (2007), 158 ACWS (3d) 252 (Ont Sup Ct J); *Campbell v Campbell*, [2007] OJ No 430 (QL) (Ct J); *Walsh v Moore*, [2007] OJ No 3966 (QL) (Ct J) [*Walsh*]; *HH v HC* (2002), 326 AR 222 (QB) [*HH*].

44. It is important to note that the trial decisions may not reflect appellate court trends, but given that few of the decisions I reviewed were ever appealed, the trial decisions are an essential part of the jurisprudence on supervised access.

45. Grania Sheehan & Rachel Carson, *Children's Contact Services: Expectation and Experience*

cases reveal that the profile of supervised access families is a complex one. Few cases relied upon a single reason for ordering supervised access. Rather, most families presented two or more personal or relationship issues.

Supervised access was most commonly ordered because one or more of the following issues was identified: (i) domestic violence; (ii) child abuse; (iii) poor parenting skills; (iv) mental illness; (v) risk of abduction; (vi) reintroduction of a parent; (vii) drug or alcohol abuse; and (viii) entrenched conflict between the parents. Only five of the fifty cases had only one of these factors in play. In most instances, somewhere between two and five factors were at issue. These findings suggest that the dynamics of the families using supervised access are complex, with most involving multiple concerns around safety and appropriate parenting. The vast majority of family relations were characterized by violence or child abuse. In almost all instances, the families were described as high-conflict,[46] and the risk to children of unsupervised access was typically considered high.[47] Given the complexity of the problems, they will likely take years to resolve for most of the families involved (if they are ever resolved). This suggests that supervision might be a long-term or even permanent feature of the access relationship.[48]

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– *Final Report* (Melbourne: AIFS, Griffith University, University of Melbourne, Attorney-General's Department, 2005); Rosemary Aris, Christine Harrison & Cathy Humphreys, *Safety and Child Contact: An Analysis of the Role of Child Contact Centres in the Context of Domestic Violence and Child Welfare Concerns* (London: Lord Chancellor's Department, 2002); Jessica Pearson & Nancy Thoennes, "Resolving Issues of Access: Noncustodial Parents and Visitation Rights" (1997) 55 Public Welfare 5.

46. While there is no single definition of a high-conflict divorce or separation, and some academics are loathe to create one, such divorces may be characterized by high levels of anger, disagreement, poor communication, multiple court appearances, denigrating comments about the other parent in front of the children, extended family involvement, multiple counsel, and parental alienation. High-conflict divorces should be distinguished by those characterized by domestic violence, though judges do not always do so. For a discussion of the range of possible definitions, as well as some caution as to whether a definition is actually appropriate, see Department of Justice Canada, *The Early Identification and Streaming of Cases of High Conflict Separation and Divorce: A Review* by Ron Stewart (Ottawa: Minister of Justice and Attorney General of Canada, 2001), online: <http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2001/2001_7/pdf/2001_7.pdf>.
47. It is important to note that judges often report facts selectively and that the judgment ultimately produced for the public is just one telling of the factual narrative. For a discussion of the selectiveness of judicial narrative, particularly in the context of male violence against women, see Elizabeth Sheehy, "Causation, Common Sense, and the Common Law: Replacing Unexamined Assumptions with What We Know about Male Violence against Women or from Jane Doe to Bonnie Mooney" (2005) 17 CJWL 87.
48. Historically, courts have been reluctant to order long-term supervision. The preference for

In thirty-two of the fifty cases identified, the access parent was the father. In fourteen cases, the access parent was the mother. In one case, the access of the grandmother was to be supervised. The breakdown of orders between mothers and fathers likely reflects the fact that the majority of access parents are fathers.[49] Of the thirty-two cases in which the access parent was the father, the vast majority involved a combination of domestic violence, sustainable allegations of child abuse, poor parenting skills, and drug and alcohol use. In twenty-two of these cases, there were sustainable allegations of domestic violence. Twelve of these cases involved at least one criminal conviction for spousal assault, while other evidence such as medical reports supported the remaining allegations. In one instance, the successful application for access was made from jail, where the father was serving a sentence for spousal assault. In twenty-one of the cases involving fathers, sustainable allegations of child abuse were made. In about half of these cases, the child either witnessed the father hitting the mother or sustained an injury during an altercation. Many children were fearful of their fathers as a result. In one additional case, the father was given supervised access despite his possession of child pornography. Thus, in over one third of all cases

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short-term orders was established by an often-cited Court of Appeal for Ontario decision. See *Montgomery*, *supra* note 7. In that case, the court stated that "[t]he purpose of supervised access, far from being a permanent feature of a child's life, is to provide 'a temporary and time-limited measure designed to resolve a parental impasse over access. It should not be used ... as a long-term remedy'" (*ibid* at 361, quoting Norris Weisman, "On Access after Parental Separation" (1992), 36 RFL (3d) 35 at 74). However, in more recent years, courts have been open to long-term access and have questioned the reasoning in *Montgomery*. The trend appears to have begun at the Court of Appeal for Ontario with *CAM v DM*, [2003] 67 OR (3d) 181 at para 24 (CA). It continued in 2004 at the Superior Court level in *VSJ*, *supra* note 2 at para 140, where the court stated that "supervised access, whether short, medium or long term, should always be considered as an alternative to a complete termination of the parent/child relationship." *VSJ* has been cited recently with approval in *Potyrala v Potyrala* (2008), 170 ACWS (3d) 794 at para 46 (Ont Sup Ct); *Shore-Kalo v Kalo* (2007), 218 Man R (2d) 136 at para 95 (QB (Fam Div)); *Roach v Roach* (2008), 63 RFL (6th) 114 at para 17 (NSSC (Fam Div)); *Jaanenah*, *supra* note 4 at para 12. However, as recently as 2010, *Montgomery* has been cited as supporting limiting supervised access to the short term: *Kagan v Kagan*, [2010] OJ No 4757 (QL) at para 89 (Sup Ct J) ("Supervised access is a temporary measure, not a long-term remedy"); *MW v SEM* (2010), 354 NBR (2d) 78 at para 159 (QB (Fam Div)) ("Supervised access is always a short term solution"). For an academic discussion of whether supervision is an appropriate long-term solution to issues of risk, see Bailey, *supra* note 10.

49. Nine out of ten children live with their mothers after divorce, even in cases of joint custody. The vast majority of access parents are thus fathers. See Department of Justice, *Child Access in Canada: Legal Approaches and Program Supports* by Pauline O'Connor (Ottawa: Minister of Justice and Attorney General of Canada, 2002), online: <http://www.justice.gc.ca/eng/pi/fcy-fea/lib-bib/rep-rap/2002/2002_6/2002_6.html>.

involving supervision of a father's access, allegations of both domestic violence and child abuse were made.

Of the fourteen cases in which the access parent was the mother, the reasons given for supervision were a combination of poor parenting skills, mental illness, and drug and alcohol abuse. On one occasion, the issue was emotional abuse of the child; on another, it was a risk of abduction. In none of the cases was the mother accused of domestic violence or physical abuse of the child. In no instance was she considered to be a physical threat to the custodial parent.

The significant differences between the factual situations in which mothers and fathers are required to submit to supervision have also been found in other studies on supervised access. For example, large scale empirical research conducted by Nancy Thoennes and Jessica Pearson in the United States found that mothers whose access is supervised usually have histories of substance abuse, poor parenting skills, and neglect of their children.[50] By contrast, fathers are typically supervised because of a history of controlling, threatening, and physically violent behaviour directed at their former spouses and at their children.[51] In some cases, the father had threatened to kill his partner or the children—or both—if she left him.

Given the factual differences, one might expect that the themes emerging from the cases would vary somewhat depending on the sex of the parent being supervised. This was indeed the case. The cases involving access fathers were dominated by statements, ostensibly supported by (uncited) research, about the importance of paternal access for the child's psychological and educational well-being. That children did best with their fathers involved in their lives was treated as "trite science,"[52] resulting in decisions where children were ordered to have access to their fathers even where the child opposed it and the judge acknowledged that the child would experience (what one hopes would be) short-term anxiety.[53] In these cases, paternal access was presented as both the child's right and as virtually required by the "maximum contact" rule. By contrast, the cases involving mothers were largely devoid of rights rhetoric or any reference to maximum contact. A child's right to maintain a relationship with his or her mother was not mentioned in any of the cases. Nor did any of the decisions note any research pertaining to psychological, sexual, and educational outcomes for children who grow up without mothers. Perhaps the courts took

50. "Supervised Visitation: The Families and Their Experiences" (2000) 38 Fam Ct Rev 123 at 128-29.
51. *Ibid.*
52. *Walsh*, *supra* note 43 at paras 6-7.
53. *KKH*, *supra* note 8; *Kozachok*, *supra* note 34.

for granted that it is in a child's best interests to have a relationship with his or her mother and thus did not consider this worthy of comment. Or perhaps the contrast in judicial reasoning employed in cases involving mothers versus fathers reflects the fact that children are far less likely, statistically, to lose contact with their mothers.[54]

What is most striking when comparing cases involving mothers and fathers is what might be described as the sense of urgency that characterized the judgments involving access fathers. Judges appeared intent on maintaining father/child relationships even in the most desperate of circumstances, often against the wishes of both mother and child. The rationale provided was typically that children do best if they remain in contact with their fathers. While some research tentatively supports this conclusion in relation to low-conflict families,[55] there is little to support the assertion in situations of high conflict or where the father has actually abused the child or mother.[56]

In the next Part, the themes that emerged from the case law analysis will be addressed in greater detail. The majority of the analysis will focus on cases involving supervised fathers for three reasons. First, far more fathers than mothers were subject to supervision orders. As a result, the cases involving fathers produced the greatest thematic coherence. Second, the cases in which fathers were supervised tended to involve the greatest danger to both children and custodial parents and thus raised some of the most challenging factual circumstances. Finally, the cases involving fathers produced unique themes. Many of them drew on fathers' rights rhetoric, though often couched in the language of the child's best interests, to support the assertion that children must remain connected to their fathers, even

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54. While all access parents exercise less access over time, overall more access mothers than access fathers see their children, and they also see them more often. They are also less likely than access fathers to lose complete contact with their children. Department of Justice Canada, *Custody, Access and Child Support: Findings from the Longitudinal Survey of Children and Youth* by Nicole Marcil-Gratton & Céline Le Bourdais (Ottawa: Department of Justice Canada, 1999).

55. Martha Shaffer, "Joint Custody, Parental Conflict and Children's Adjustment to Divorce: What the Social Science Literature Does and Does Not Tell Us" (2007) 26 Can Fam LQ 285 at 297-98; Michael E Lamb, "Noncustodial Fathers and Their Impact on the Children of Divorce" in Ross A Thompson & Paul R Amato, eds, *The Post-Divorce Family: Children, Parenting, and Society* (Thousand Oaks: Sage, 1999); Joan B Kelly & Robert E Emery, "Children's Adjustment Following Divorce: Risk and Resilience Perspectives" (2003) 52 Family Relations 352.

56. See Claire Sturge & Danya Glaser, "Contact and Domestic Violence: The Experts' Court Report" (2000) 30 Fam L 615; David A Wolfe et al, "Child Witnesses to Violence Between Parents: Critical Issues in Behavioral and Social Adjustment" (1986) 14 J of Ab Child Psy 95.

when those fathers are violent or abusive.

## IV. THEMES UNDERLYING SUPERVISED ACCESS ORDERS

Each of the fifty cases was analyzed and coded to determine whether any particular themes emerged. Three themes supporting the use of supervised access were identified: (i) that access (including supervised access) between the child and non-custodial parent is supported, or even required, by the legislative regime; (ii) that access is in a child's best interests, even in high-conflict situations; and (iii) that children have a right of access (to their fathers). Many of the cases drew on more than one of these themes to support supervised access, and the reasoning underlying them sometimes overlapped.

### A. THEME 1: THE LEGISLATIVE REGIME REQUIRES ACCESS

The first theme to emerge in favour of supervised access (and access in general) is that it is supported, or perhaps even required, by the legislative regime itself. The federal *Divorce Act*, which applies to married couples, states that the paramount consideration when making custody and access orders is the best interests of the child "as determined by reference to the condition, means, needs and other circumstances of the child."[57] The only additional legislative guidance courts receive in determining what is in a child's best interests is section 16(10), often referred to as the "maximum contact" rule. The section states that when making an access order, the court shall

> give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.[58]

In the absence of any other guiding criteria in the *Divorce Act*, the maximum contact rule has come to play a highly influential role in custody and access decision making. Though the rule is tempered by what is in the child's best interests—that is, maximum contact is the goal, but only when consistent with a child's best interests—in practice, the child's best interests have become so intertwined with maintaining a relationship with both parents that the section is often interpreted as indicating that maximum contact is always in a child's best

57. RSC 1985, c 3 (2d Supp), s 16(8).
58. *Ibid*, s 16(10).

interests.[59] Indeed, at the trial level in Ontario, where most supervised access decisions in that province are made, a number of judges have stated that there is a "presumption" that "regular access" is in a child's best interests.[60] Mothers who oppose access, often because their own safety is at stake, are sometimes reminded by judges that maximum contact is "the only specific factor which Parliament has seen fit to single out as being something which the judge must consider."[61] The legislative framework is thus presumed by courts to support access in all but the most extreme circumstances. However, in order for access to be exercised safely in cases in which violence is an issue, supervision is typically required. Supervised access has thus become the vehicle for enabling what is arguably a de facto legislative presumption.

The provincial family law statutes in both British Columbia[62] and Ontario[63] differ from the federal statute in that neither expressly refers to maximum contact. However, the maximum contact principle is applied in decisions made under provincial legislation even in the absence of explicit legislative reference. Judges typically cite the Supreme Court of Canada decision in *Young v Young* to support the application of the principle.[64] Such an approach is facilitated in British Columbia by the *Family Relations Act*, which provides judges with very little guidance as to how the best interests of the child should be determined.[65] Ontario, however, has a more detailed best interests test that judges must consider in every case. Section 24(4) of the *Children's Law Reform Act* specifically requires that judges

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59. Birnbaum & Chipeur, *supra* note 9 at 93.
60. See *e.g. VSJ*, *supra* note 2 at para 128; *Elwan*, *supra* note 2 at para 76; *MI*, *supra* note 2 at para 102; *Norman*, *supra* note 2 at para 14; *Matos*, *supra* note 2 at para 39.
61. The statement derives from a Supreme Court of Canada decision. See *Young v Young*, [1993] 4 SCR 3 at para 204 [*Young*]. However, it has also been cited in cases of severe abuse. See *e.g. Fullarton v Fullarton* (1994), 152 NBR (2d) 321 at para 17 (QB (Fam Div)) [*Fullarton*]. In *Fullarton*, the custodial mother was the victim of extensive abuse for over eight years, half of which occurred after the parties had separated. The abuse included kicking, hitting, having a knife held to her throat, hair pulling, and verbal attacks. The children, aged eleven, ten, and eight at the time of trial, had witnessed numerous violent altercations during access handovers, and as a result, the mother severed contact. The children themselves used violence to resolve their disputes. The eleven-year-old stated that when she grew up and her husband hit her she would call the police. Given the ongoing violence and the effects on the children four years after separation, the mother sought an order terminating access. Relying on the statement in *Young* that maximum contact was the guiding principle underlying the best interests test, the judge reduced but maintained the father's access.
62. *Family Relations Act*, RSBC 1996, c 128 [*FRA*].
63. *Children's Law Reform Act*, RSO 1990, c C. 12 [*CLRA*].
64. *Young*, *supra* note 61; Birnbaum & Chipeur, *supra* note 9 at 93.
65. *FRA*, *supra* note 62, s 24.

consider past violence against the child, the former spouse, a parent of the child, or a member of the parent's household when considering the ability of the parent seeking access to act as a parent.[66] Section 24(4) was introduced in 2006 and was thus not in force for half of the study period. It is possible that a review of more recent decisions would produce different results, though it should be noted that the provision received little attention in the 2007 cases studied.

The sample cases strongly reflect the trend towards ordering maximum contact in almost all circumstances. References were frequent to section 16(10) of the *Divorce Act* or to the maximum contact principle in disputes determined under provincial legislation. Reflecting the interpretive trend, section 16(10) was also typically interpreted as if it required access between fathers and their children. For example, in situations where a mother opposed access altogether, typically because she had grave concerns about her own physical safety and that of her children, maximum contact was frequently cited as a reason to dismiss her claim. In very few instances did judges even entertain the idea that access might not be granted. Rather, the discussion tended to focus on whether or not supervision of access was required. It appears that supervision has become the means by which courts attempt to ensure safety in an interpretive environment in which no access orders have virtually disappeared.

## B. THEME 2: (SUPERVISED) ACCESS IS IN A CHILD'S BEST INTERESTS

Given the interpretive trends surrounding maximum contact, it is not surprising that the vast majority of the decisions reviewed for this study framed access with both parents as in a child's best interests.[67] Judges accepted that access would occur even in situations where the parent posed some risk to the child or custodial parent. Supervision was presumed to allay concerns about safety in such cases. In instances where supervision was not able to address every aspect of risk—particularly anxiety on the part of the child—the danger was thought to be outweighed by the long-term benefits of access for the child.

In the cases where the risk to the child was a result of a parent's drug or alcohol use or mental health issues, supervision was typically able to address the custodial parent's concerns. Supervisors were required to verify that access parents were sober and to keep an eye on those whose emotional state was volatile. Due to supervision, neither the custodial parent nor the child was at risk in these

66. *CLRA*, *supra* note 63, s 24.

67. Note that the trend at the appellate level is more tempered. While maximum contact is a mandatory consideration, it carries weight only to the extent that that it is in a child's best interests.

instances. However, in those cases where the judge accepted that the child feared his or her access parent as a result of serious violence within the home, supervision was more problematic. Yet a review of the sample cases suggests that some judges made no distinction between the different types of scenarios that might give rise to supervision. Rather, because judges assumed that access was almost always in a child's best interests, a child's well-founded fear of a parent was minimized. In such cases, the anticipated benefit of the relationship between parent and child was presumed to balance any risk of physical or psychological harm.

The case of *Biraben v Pelland* provides a good example of the reasoning described above.[68] The three-year-old child in *Biraben* witnessed his father abuse his mother on one occasion, though the court found that the father physically and verbally abused the mother on multiple occasions throughout their relationship. One of these incidents gave rise to a criminal conviction. The father was minimally involved in the child's care during the marriage. Justice Smith, however, declared that the circumstances in which no access should be ordered "remain quite narrow."[69] Weighing up the risk of harm to the child with the benefit of a relationship and applying the maximum contact principle, he concluded that access supervised by the paternal grandparents was in the child's best interests. Justice Smith stated:

> [T]he Applicant father has shown on many instances that he has engaged in physical and verbal abusive behaviour towards his former wife. However there is no evidence before the Court that [he] has behaved in a manner that is inappropriate or poses any risk of harm to the child... . I find that when weighing the risk of harm versus the benefits of a free and open relationship, which permits the child to know the access parent and the principle of maximizing contact with each parent, I find that an order permitting access would be in the best interests of the child, on the condition that supervision be provided.[70]

In the cases studied, many judges distinguished between violence directed towards the mother and violence directed towards the child. There appeared to be general consensus amongst judges that a violent husband does not make a bad father, and that it therefore remains in a child's best interests to maintain contact with the father even in circumstances where the father poses a significant risk to the mother. Supervision is offered as the solution. This position was taken to the extreme in *HH v HC.*[71] The decision in *HH* demonstrates an extreme situation

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68. *Biraben*, *supra* note 4.
69. *Ibid* at para 19.
70. *Ibid* at paras 24-25.
71. *HH*, *supra* note 43. While this case was decided in Alberta, it was located in the BC search because it originated in BC and has involved subsequent BC-based hearings.

in which courts will award supervised access. It also demonstrates the dissonance between attitudes towards spousal violence in the family law context and attitudes within other risk-reduction organizations such as child welfare agencies and the police. While the father in *HH* was awarded supervised access by the court, the police identified the case as a "homicide prevention" file. The child protection authorities considered the risk so high that they arranged for the mother and children to relocate to another province. The unevenness of response across organizations in this case warrants a detailed examination.

*HH* involved an application for unsupervised access by the father. The mother opposed all access on the basis that the father had repeatedly beaten her, sometimes in the presence of the children. Several of the beatings were the subject of criminal charges and convictions. The most serious attack took place the day after the father completed a court-ordered anger management program, just prior to the couple's separation. The court described the attack as vicious and unprovoked. It involved the father hitting the mother and her elderly parents with a hammer. He then pushed the mother down a flight of stairs, kicking her and hitting her with a hammer on her head and arms while she fell. The mother was convinced that she was about to be killed. However, her father was able to wrestle the hammer from her husband and seek help from a neighbour, who called the police. The mother suffered lacerations to her forehead and right forearm requiring stitches, an abrasion and swelling of her left middle finger, a large bruise on her left thigh, and a fractured shoulder. Her parents also suffered serious injuries requiring stitches and continue to suffer long-term disabilities from the attack. The two children were one and three-and-a-half years old when the attack took place. The mother alleged that they witnessed the attack. The father denied this but ultimately argued that it did not matter, because they were so young when it happened.

While the mother was still in the hospital, a child welfare worker met with her and advised her to take her children and leave their home in Kamloops immediately. Social Services funded her transportation out of Kamloops because they feared for her safety and that of her children. When the mother arrived in her new home in Edmonton, she met with the Spousal Violence Intervention Team of the Edmonton police, who designated her case as a homicide prevention file. The mother was also awarded an *ex parte* sole custody order by the Alberta provincial court, and the father was denied access. As a result of the attack, the father was convicted of aggravated assault. He received a conditional sentence of fourteen months, which included two convictions for lesser violent offences perpetrated against victims other than the mother. As part of the sentence, the father was prohibited from seeing his wife and children. He

was also required to attend counselling, perform one hundred hours of community service, abide by a curfew, and refrain from owning, possessing, or carrying a weapon.

Approximately two months after the assault, the father applied for access to his two children. Unlike most judges in the cases examined, Justice Lee in *HH* did at least entertain the possibility of denying access. He quoted from other access disputes in which courts have confirmed that research supports the assertion that children who have been exposed to inter-parental violence suffer both short- and long-term effects and that supervised access in such circumstances may have a detrimental effect on the children's psychological development.[72] Justice Lee also cited with approval previous decisions in which courts noted that while the custodial parent's interests must be set aside in favour of the child's best interests, if access is going to negatively affect the welfare of the mother to the extent that it limits her ability to parent, it is relevant to the best interests determination.[73] Finally, Justice Lee cited social science research indicating that supervised access is "not a panacea"[74] in cases involving domestic violence, that batterers frequently exhibit abusive behaviours while utilizing supervised access services, and that a number of supervised access centres have experienced on-site murders.[75] Justice Lee also quoted from an expert report provided by the Manager of Family Violence Prevention Training with the Alberta Office of Family Violence, which expressed concern about the father.[76] The author was particularly worried that while the father acknowledged the violence he perpetrated, he blamed others for his behaviour. For example, while he admitted to hitting his wife and father-in-law with a hammer, he indicated that he did not hit "very hard."[77] The father also stated that the incident would not have taken place if his parents-in-law were not living with them.

Despite all of this information, Justice Lee awarded the father access. Noting that "[the father] obviously misses seeing his young sons who he has never directly

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72. *Ibid* at para 40.
73. *Ibid* at paras 41, 46, citing *Abdo, supra* note 7. The best interests analysis in *Abdo* has also been cited with approval in *EH v TG* (1995), 146 NSR (2d) 254 (CA); *Innes v Ayadi* (1999), 178 NSR (2d) 125 (SC (Fam Div)).
74. *Ibid* at para 55.
75. *Ibid* at paras 55-58.
76. Many of the assertions in this report are seconded and echoed by a letter from a social worker who works in the Spousal Violence Intervention Team of the Edmonton Police. Justice Lee refers to this letter in his judgment. *Ibid* at para 64.
77. *Ibid* at para 32.

harmed"[78] and that he has "already been punished ... for his criminal acts, and he should not be punished again in these family law proceedings,"[79] Justice Lee held that "conflict between parents, is not sufficient basis for assuming that the child's interests are not being served."[80] Minimizing the viciousness of the attack by referring to it as "domestic conflict," Justice Lee concluded that "the denial of access to a parent, who is *other than for the domestic conflict* an exemplary person, where that parent is clearly desirous of exercising such access, is always something that the Court should do as a last resort."[81] Ultimately, monthly supervised access was ordered, the terms of which were to be agreed by the parties or determined by a judge in the event that they could not agree. The father's application indicated that any supervision should be short-term, something Justice Lee did not address in his judgment. In ordering supervised access, Justice Lee dismissed the research about the potential problems or even dangers associated with the practice, noting that "the Alberta experience ... has thankfully been different."[82] It is not clear upon what evidence he based this conclusion. While there are no recorded murders at Alberta supervised access centres, there is no Canadian research investigating whether the other issues raised in the studies cited by the experts in *HH* are pertinent in the Canadian context or not.

The complete separation of the "domestic conflict"[83] and the best interests of the children in *HH* is troubling on many levels. First, while Justice Lee acknowledged the relevance of the custodial parent's safety in the best interests analysis, he ultimately treated the children's interests as separate from the mother's. By forcing the mother to participate in supervised access, an arrangement that the judge noted is not always able to protect women from ongoing violence, Justice Lee put the mother at risk both physically and emotionally. There is no mention of how this risk might affect the children. Second, the decision sends a rather contradictory message to the children about the appropriateness of violent behaviour. While the two young boys in this case had not, as yet, been the victims of their father's violence, they appeared to have witnessed his behaviour. Their

78. *Ibid* at para 65.
79. *Ibid* at para 76.
80. *Ibid* at para 93.
81. *Ibid* at para 104 [emphasis added].
82. *Ibid* at para 99.
83. To refer to the violence in this case as merely "domestic conflict," and to characterize it as "between the parents" as opposed to perpetrated by the father on the mother, highlights the extent to which extreme violence of this kind is minimized, de-gendered, and deflected when courts discuss access.

father will inevitably serve as a role model in their lives. What are they likely to learn from him about conflict resolution, the treatment of women, or parenting? Research suggests that the influence can be profound. As Kerr and Jaffe note:

> Children who witness violence are at risk for a number of significant emotional and behavioural problems such as aggression, bullying, anxiety, destruction of property, insecurity, depression, and secretiveness. Almost 60 per cent of children who are exposed to violence show symptoms consistent with a DSM-IV diagnosis of post-traumatic stress disorder. Children who witness violence are also at risk in developing inappropriate attitudes about the use of violence to resolve interpersonal conflicts—especially in "loving" relationships. In the long-term, boys who are exposed to violence are more likely to end up being an abuser in an intimate relationship. For example, in the Statistics Canada study women were three times more likely to be assaulted as well as suffer repeat, severe and injurious abuse if their father-in-law was violent towards their mother-in-law.[84]

Finally, the court's evaluation of the children's best interests was very much at odds with the views of other organizations involved in their lives, including the police. If it is in the children's best interests to have a relationship with their father, why did both the children's services agency and the police feel they needed to be relocated to another province? How can it be in the children's best interests to require their mother, a woman the police viewed as a likely candidate for being murdered, to participate in court-ordered access? The dissonance between the court's position and that of both the police and child welfare authorities suggests that perceptions of what is in a child's best interests are far from uniform across the organizations that have a mandate to protect children. This discrepancy is perhaps due to a belief by judges that the supervision of access between children and violent parents can offset any risk involved. This is an arguably erroneous assumption, particularly in provinces where the regulation of supervised access is minimal. While *HH* represents the extreme end of the spectrum of supervised access cases, it highlights many of the assumptions underlying the use of such orders. It also demonstrates the degree to which a custodial parent's well-founded fear of harm is minimized by judges intent on protecting father/child access.

A final worrying feature of the interpretation of a child's best interests in the sample cases was that, in several instances, courts seemed to substitute consideration of the interests of the actual child in question with often unsubstantiated, abstract, and generic assumptions about what is in every child's best interests. This trend was particularly concerning when the child had experienced things

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84. S Grace Kerr & Peter G Jaffe, "Legal and Clinical Issues in Child Custody Disputes Involving Domestic Violence" (1999) 17 Can Fam LQ 1 at 3 [footnotes omitted].

that most children do not. For example, *Young v Halverson*[85] was a case involving a father who had no relationship with the child whatsoever, an extensive drug history, a lengthy criminal record, and a permanent restraining order against him due to a long history of alleged assaults on the mother.[86] The court ordered access because to do otherwise would mean that the child lacked a "father figure" in his life. In ordering access the court did not evaluate the father's behaviour or consider the individual child's best interests. Rather, it stated that while the child had "no emotional ties to [his father] or to any member of [his father's] family, access ... would mean that there is a father figure in [his] life."[87] In the court's view, the abstract benefit of a father figure outweighed any concerns about the father's actual behaviour or the lack of a relationship between them.

Another case, *Walsh v Moore*,[88] involved the reintroduction of a father to a two-year-old boy after a year without contact. The court stated that even though the child would experience anxiety as his father was reintroduced to his life, children "mature best" knowing both a mother and father.[89] The court noted:

> It has become trite science to note that children mature best knowing both a mom and a dad. ... [A]lthough Spencer is anxious when he is out of sight of his mother, this anxiety cannot be a block to access outside the presence of the applicant and her family. Like a vaccination, a short-term pain for Spencer will lead to a long-term benefit to him when he recognizes the respondent as an equally secure person in his life.[90]

While an application of the best interests test might have produced the same result, the concern is that "trite science" replaced such an analysis. In cases such as *Walsh*, where judges relied on "science" or "research" to support an assertion that children who have access with their fathers have better outcomes, the research itself was rarely, if ever, cited. Similarly, when discussing "research findings," judges rarely distinguished between high- and low-conflict families, an omission that could ultimately prove quite dangerous. Had judges actually read the research they purported to rely on, they would have found that in high-conflict families, particularly those in which children witness violence between their parents or experience violence directly themselves, the benefits of ongoing

85. *Supra* note 43.
86. The father had also been convicted of a number of other violent crimes committed against people other than the child's mother.
87. *Young v Halverson*, *supra* note 43 at para 155.
88. *Supra* note 43.
89. The court may have come to the same conclusion had it applied a best interests analysis. The concern is that it failed to do so in favour of generalized, and ultimately unsubstantiated, assertions.
90. *Walsh*, *supra* note 43 at paras 6-7.

access with the violent parent are at best unclear. In some instances, the research suggests that frequent access may actually be harmful.[91]

## C. THEME 3: ACCESS IS A CHILD'S RIGHT

The final justification provided by courts to support supervised access is that access is the child's right. This right is enforced even in circumstances where the child opposes access. The focus on children's rights and a child-centred approach to custody and access decision making emerged in the 1990s and has come to dominate family law reform in the twenty-first century. Though a children's rights framework has a long history, the notion of children as rights-bearing individuals gained momentum with the introduction in 1990 of the United Nations *Convention on the Rights of the Child*.[92] Article 7 of the *CRC*, which asserts that a child has "the right to know and be cared for by his or her parents," is often used to support a child's right to access.[93] A number of family law statutes reflect the spirit of Article 7, primarily by including versions of the maximum contact principles.[94] Although the exact terminology is rarely used in statutes, the legislative, and ultimately judicial, direction is at the very least consistent with the provision.

While a child's right to access may appear uncontroversial, in practice the access parent enforces it. The child's right to access becomes, in effect, the ac-

91. In her article on joint custody, parental conflict and children's adjustment to divorce, Martha Shaffer provides a comprehensive overview of the social science literature pertaining to post-divorce contact in high-conflict families. See *supra* note 55. Shaffer found that in several areas the empirical evidence contradicts the assumptions being made by the courts. For example, Shaffer cites Janet Johnston's review of numerous studies on high-conflict families and notes that there is "strong empirical evidence" that, for children from high-conflict families, arrangements involving frequent contact with both parents are more likely to be harmful than helpful (*ibid* at 306). High-conflict families are also unlikely to become low-conflict families over time. Thus, children from high-conflict families are likely to experience conflict around access for several years. Shaffer also cites a number of research reviews that conclude that the "the quality of parental functioning is one of the best predictors of children's behaviour and well-being" (*ibid* at 291). A custodial parent who experiences tension or fear around access, even supervised access, is likely to experience a decrease in parental functioning.

92. 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) [*CRC*].

93. *Ibid*, art 7.

94. For example, most provincial statutes state that both parents are presumed to be the guardians of a child and have an equal right of custody, reflecting the statement in Article 7 that a child has a right "as far as possible ... to know and be cared for by his or her parents." Ontario's *Children's Law Reform Act* states that "[e]xcept as otherwise provided in this Part, the father and the mother of a child are equally entitled to custody of the child" (RSO 1990, c C.12, s 20(1)). Similarly, British Columbia's new *Family Law Act* states that "[w]hile a child's parents are living together and after the child's parents separate, each parent of the child is the child's guardian" (SBC 2011, c 25, s 39(1)).

cess parent's right. It is thus very easy for the access parent to use the language of a child's right to support the parent's own interests. A second concern, at least with regard to how the Canadian courts interpret the right, is that the right to access is often employed contrary to the child's wishes. This creates bizarre situations where a child who objects to access is forced to participate because it is his or her 'right' to do so.[95] This latter scenario played out with some frequency in the supervised access cases studied, none of which involved accusations that the child's opposition to access was the result of parental alienation on the part of the custodial parent.[96]

For example, in *KKH v SSH*,[97] supervised access was ordered despite the fact that the eight-year-old girl indicated that she feared her violent father and had no desire to see him. The judge describes the girl's fear as follows:

> Her perception of the violence which occurred in the home is an indelible one... . To require this eight year old child to have unsupervised visits with her father *would be a very frightening experience for her*, given her perception of her father ... It would place her in a position where she might feel abandoned of the protection that this court has thus far afforded her. It may be that in time she is able to develop a relationship with her father in which she feels safe and not vulnerable. She is a long way from being in that position at this time.[98]

Despite the child's clearly articulated fears, and the judge's recognition that she was a long way from developing a relationship with her father that was not characterized by fear and vulnerability, the judge ordered access on the grounds that the child had a right to a meaningful relationship with her father. The judge presented supervision as the mechanism through which this right could be exercised safely:

> Access to a non-custodial parent *is a child's right* and, as a general rule, children have the right to a meaningful relationship with their access parent. However ... that objective may be restricted [through supervision] where the welfare of the child requires it.[99]

The assumption behind both of these statements is that the risk associated with the child exercising her right to access, as well as her fear, can be allayed

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95. There are several cases beyond those included in the sample where judges have ordered access despite a child's well-founded fear of his or her parent. See *e.g. Al-Maghazachi v Dueck* (1995), 17 RFL (4th) 132 (Man CA); *Fullarton*, *supra* note 61; *EF v JSS* (1995), 17 RFL (4th) 283 (Alta CA); *RMC v JRC* (1995), 12 RFL (4th) 440 (BCSC).
96. While none of the cases in the sample involved parental alienation syndrome, the access of parents who have allegedly alienated their children is typically supervised.
97. *KKH*, *supra* note 8.
98. *Ibid* at para 17 [emphasis added].
99. *Ibid* at para 15 [emphasis added].

through supervision and that over time the child's emotional well-being will improve. However, the evaluators of Ontario's supervised access pilot project found that a significant number of the children interviewed did not feel that the supervision arrangement insulated them from the access parent's hostility.[100] In such cases, the evaluators concluded that supervised access may actually harm children's interests by prolonging their exposure to high-risk events. This finding was echoed by Australian research over a decade later.[101]

In a similar case, *Kozachok v Mangaw*,[102] two young children, one of whom did not wish to see her father, were ordered to participate in access visits. This order was made despite their father's two convictions and jail terms for assaulting their mother. Seemingly oblivious to the irony of using the language of children's rights to order access contrary to the actual wishes of the children, the court stated that while they did not want access, "[t]he children have the right to know and to love both their parents... ."[103]

In *KKH* and *Kozachok*, the children involved were not expressing a preference derived from childish whim or a process of parental alienation. They did not wish to see their fathers because they were scared of them. Their fear was well-founded. In both instances, the children watched their fathers repeatedly and viciously attack their mothers. Yet the children's expressions of fear were minimized, and the children themselves undermined, by judges who were intent on enforcing the child's right to access.

## V. CONCLUSION

The sample cases analyzed for this study provide a two-year snapshot of supervised access in two Canadian provinces. While the study is by no means exhaustive, the results suggest a troubling picture, particularly in a country where supervised access is largely unregulated. There is no doubt that supervised access has its place. For example, it can do an excellent job of offsetting risks associated with poor parenting skills and parental drug and alcohol use. However, as the analysis of the case law indicates, few of the families involved in supervised access arrangements present with only one issue. Most involve a complex array of parenting

100. Abramovitch et al, *supra* note 14 at 110-11. A more detailed discussion of the report's findings with regard to children can be found in Michele Peterson-Badali, June Maresca & Jenny Jenkins, "An Evaluation of Supervised Access III: Perspectives of Parents and Children" (1997) 35 Fam & Conc Cts Rev 51 at 61, 63.

101. See Szirom et al, *supra* note 13 at 76.

102. *Kozachok*, *supra* note 34.

103. *Ibid* at para 19.

and relationship concerns, with violence or child abuse a factor in the majority of disputes. Yet courts give very little attention to the complexity or gravity of the conflict, presuming that access is almost always in a child's best interest and that supervision addresses all risks equally. Consequently, access is ordered in circumstances that appear to pose an ongoing risk to mothers and children. It is also ordered in circumstances where children themselves do not wish to participate, in some instances because they fear the parent they have been ordered to visit.

The themes identified in these cases, and the inappropriate assumptions underlying them, are highlighted perfectly by the statement of Justice Jones in *Kozachok*, a case in which the father had been criminally convicted of assaulting the mother on several occasions and where the children opposed access because they feared their father:

> Case law is clear that the access centre option need not, nor should it be, a permanent access solution. These parents need to find a way to step back from their anger and to focus on the well-being of their children. If the mother truly wishes her children to grow up to be healthy adults and if the father sincerely wishes to play a meaningful role in his children's lives, each parent must reassess his or her position on the value of the other parent in the lives of the children.[104]

This statement assumes that unsupervised access is in the long-term best interests of the children and that contact with their father is necessary for their healthy development. It also minimizes the father's violence, suggests that the mother's opposition to access is only a function of anger, and demands that she reassess her position, all the while failing to recognize that the mother's position is grounded in having been beaten.

When ordering supervised access in high-conflict cases, judges clearly believe they are doing the right thing for children. In many instances, judges state that research demonstrates that it is in a child's best interests following separation to maintain contact with both parents. As the discussion in the Introduction indicates, the research findings are far less clear than the judges suggest. In high-conflict families and families where domestic violence is present, ongoing access between children and violent parents may actually increase the risk of harm to children. It is clear that more research needs to be done. As Rachael Birnbaum and Romona Alaggia suggest, it is time for a second wave of research on supervised access that focuses specifically on the relationship between supervised visits with a violent parent and the short- and long-term health and

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104. *Ibid* at 21. Note that in recent years judges have been more willing to consider supervised access as a long-term solution. See O'Connor, *supra* note 49.

well-being of children.[105] In particular, it would be helpful to know the answers to the following questions: To what extent does supervision protect children and custodial parents from ongoing physical harm? How attentive is supervision to the psychological well-being of children? For example, does supervision actually redress the anxiety and fear that many of the children in the cases studied expressed? How quickly (if at all) does the child's fear dissipate and how long a period of anxiety (if any) should we accept for the ostensible long-term gain of a parent/child relationship? To what extent does the quality of the supervised access centre and the supervisors themselves influence outcomes? All of these questions need to be answered if courts are going to continue to award supervised access to violent and abusive parents.

105. *Supra* note 10.