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9-1-2020

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Jennifer Koshan

Janet Mosher

Wanda Wiegers

### Source Publication:

Farrow, Trevor C. W., and Lesley A. Jacobs. The Justice Crisis : the Cost and Value of Accessing Law. UBC Press, 2020.

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## **The Costs of Justice in Domestic Violence Cases** Mapping Canadian Law and Policy

*Jennifer Koshan, Janet Mosher, and Wanda Wieggers*

DOMESTIC VIOLENCE CASES IN Canada present unique access to justice challenges due to complex power dynamics, structural inequality, and the fact that victims, offenders, and children must often navigate multiple legal systems to resolve the many issues in this context.<sup>1</sup> The complexity of these cases has both personal and systemic impacts. Different legal systems – for example, criminal, family, child protection, social welfare, and immigration – have differing objectives and personnel with varying levels of expertise in domestic violence. Conflicting decisions by different courts and tribunals with overlapping jurisdiction may impair the safety of victims and children, and may require multiple court appearances to resolve. Victims may face contradictory messages about how seriously adjudicators will treat domestic violence, and offenders can use the existence of different systems to perpetuate abuse. These issues are gendered, as women are the primary victims of domestic violence, and the concerns may be heightened among marginalized women. The issues may also differ across Canadian provinces and territories and on First Nations reserves, given the application of different laws, policies, and dispute resolution models.

This chapter explores how the access to justice crisis in Canada manifests itself in domestic violence cases.<sup>2</sup> It reviews the literature on access to justice and domestic violence, adopting a broad definition of access to justice to inform the analysis. It then documents and compares the legal and policy provisions and systems affecting litigants in domestic violence cases across Canadian jurisdictions, highlighting legal reforms as well as the systemic barriers in seeking justice that victims, offenders, and children confront. A hypothetical case study is then used to explore how the complex interaction of multiple laws, policies, and dispute resolution processes may impact victims of domestic violence. This comparative mapping analysis is a first step towards identifying the systemic reforms necessary to enhance access to justice in domestic violence cases.

## **Defining Access to Justice in Domestic Violence Cases**

Access to justice provides an important conceptual framework for examining the justice system's response to domestic violence, given its place as a fundamental principle and goal of the Canadian legal system.<sup>3</sup> Realizing access to justice requires the creation of a truly equal justice system, which in turn requires conceptualizing access to justice from the perspective of those most affected, especially those marginalized by social institutions such as law.<sup>4</sup>

Access to justice may incorporate notions of substantively fair or just outcomes and of the social and economic costs of justice.<sup>5</sup> In our specific context, a federal report estimated the total economic costs of domestic violence for a one-year period to be over \$7 billion, \$545.2 million of which was borne by the justice system.<sup>6</sup> Access to justice may also intersect with principles of democracy, equality, judicial independence, the rule of law, and social justice, and have distributive and symbolic components.<sup>7</sup> Feminist literature on access to justice emphasizes women's particular needs: access to legal advocates in light of power and financial disparities; information about rights; spiritual, cultural, and financial supports; and access to safe, independent, and accountable processes.<sup>8</sup>

Access to justice also has procedural dimensions. For example, a growing body of literature documents the lack of effective and equitable access to justice in the civil justice system, including the family law realm.<sup>9</sup> Specific issues identified in this context include lack of legal representation, services, and access to information; costs, complexity, and delays; the prevalence and impact of unmet legal needs; challenges presented by litigants' social locations; pressures to settle family disputes; lack of judicial oversight; and enforcement problems.<sup>10</sup> While this literature typically emphasizes barriers to the resolution of disputes using courts and lawyers, access to justice concerns may also arise from settlement initiatives such as alternative dispute resolution (ADR) processes and multi-disciplinary approaches.<sup>11</sup>

The literature also identifies a number of barriers unique to domestic violence, which often arise because of power imbalances and safety issues. These barriers vary according to legal context but may include a reluctance to engage with the legal system because of fear of violent retaliation or child protection consequences; routine screening out of domestic violence issues by legal actors, often due to a limited understanding of the dynamics of abusive relationships; and the fact that self-representation in court, tribunal, and ADR processes is particularly onerous for domestic violence victims.<sup>12</sup> Because of a lack of information and institutional support, victims may withdraw from proceedings or agree to outcomes adverse to themselves and their children.<sup>13</sup> Settlement-oriented dispute resolution methods may also create access to justice concerns

for victims of domestic violence.<sup>14</sup> These processes are pervasive and are being increasingly employed in cases characterized by domestic violence, without consensus as to their appropriateness or methodology.<sup>15</sup>

Although not always recognized by law and policy makers, these barriers to accessing justice have a gendered dimension because women are the primary victims of domestic violence.<sup>16</sup> Moreover, the barriers within and tensions between different systems may be heightened for women from marginalized groups, including Indigenous women, lesbian women, immigrant women, women refugee claimants, women with disabilities, and women living in poverty, given high rates of domestic violence and/or justice system involvement.<sup>17</sup> Barriers may also arise for persons accused of domestic violence, including women seeking to defend themselves,<sup>18</sup> and may have a detrimental impact on children.<sup>19</sup>

## Mapping Domestic Violence Laws and Policies

A comparison of the legislative treatment of domestic violence across areas of law and between jurisdictions will bring into focus the impact of discrete statutory frameworks, as well as how access to justice issues arise and are dealt with at points of intersection, a question that is only beginning to be explored in the domestic violence context in Canada.<sup>20</sup>

Across Canadian jurisdictions, multiple and intersecting justice system components may have diverse effects on access to justice in domestic violence cases. Some legal issues fall within federal jurisdiction, others within provincial/territorial jurisdiction, and the legal issues faced by Indigenous peoples are even more complicated jurisdictionally. As a result, diverse laws and dispute resolution models exist in different provinces and territories, and may apply in different ways to different groups.<sup>21</sup>

## Federal Laws and Policies

Canada's criminal law does not contain any specific prohibitions related to domestic violence, but the *Criminal Code* includes several offences that may be generally applicable.<sup>22</sup> Other countries have prohibited domestic violence specifically, including the offence of coercive control.<sup>23</sup> The *Criminal Code* does identify intimate partner violence as an aggravating factor for interim release and sentencing purposes, and provides restitution for household expenses for some victims of domestic violence.<sup>24</sup> Orders may also provide that offenders have no contact with their intimate partners (and sometimes their children), and that they refrain from being at particular places as a condition of interim release, probation, conditional sentences, and peace bonds.<sup>25</sup> Where offenders are convicted of or discharged for an indictable offence in which violence was

used, threatened, or attempted against their intimate partner, the court must prohibit the person from possessing any weapon during a specified period.<sup>26</sup> Section 127 of the *Criminal Code* provides a general offence of breaching a court order and may be used for breaches of provincial/territorial civil protection and restraining orders where the legislation does not include specific breach provisions.<sup>27</sup> At the enforcement level, the federal government has since 1983 maintained a pro-charging and pro-prosecution policy for offences in the domestic violence context that applies to the RCMP and federal prosecutors.<sup>28</sup>

The federal government also has jurisdiction over divorce and related matters, including child and spousal support and parenting issues corollary to divorce.<sup>29</sup> There is no presumption in favour of any particular parenting outcome, and until recent amendments come into force, the *Divorce Act* does not explicitly require the consideration of domestic violence.<sup>30</sup> These amendments will require that primary consideration be given to achieving physical, emotional, and psychological safety and security for children, and will add family violence as a relevant factor in making orders that allocate parenting time and decision-making responsibility.<sup>31</sup> However, judges will also be required to consider providing as much parenting time with each spouse as is consistent with a child's best interests (widely interpreted as a maximum parenting time principle under the current act) and to consider a parent's "willingness to support the development and maintenance of the child's relationship with the other spouse" (a "friendly parent" provision).<sup>32</sup> Disclosures of domestic violence may thus come with the risk that, if they cannot be substantiated, victims will be viewed as unfriendly parents and their own claims to custody may be placed in jeopardy.

The revised *Divorce Act* will also require parties to try to resolve their dispute through negotiation, mediation, or collaborative law processes "to the extent that it is appropriate to do so," and will require legal advisers to encourage their clients to do so "unless the circumstances of the case are of such a nature that it would clearly not be appropriate."<sup>33</sup> There is no express recognition that ADR may not be advisable in light of family violence and no requirement that professionals be trained in and undertake screening for family violence. Persons who wish to change their residence or relocate will also be expected to give notice of the move or apply to court to waive or amend notice requirements.<sup>34</sup> Failure to give notice or apply for an exemption will be considered in determining whether to authorize the relocation.<sup>35</sup> Although court applications can be made without notice to the other party, these requirements may be difficult to meet where survivors need to change residence or relocate immediately to ensure their and their children's safety and where they lack access to timely and affordable legal assistance.

Other federal family-related laws illustrate the complexity of overlapping laws for Indigenous Peoples in Canada. *An Act respecting First Nations, Inuit and Métis Children, Youth and Families* affirms the inherent jurisdiction of Indigenous Peoples to legislate in relation to child and family services and sets minimum standards for an assessment of the best interests of Indigenous children in all such matters across Canada.<sup>36</sup> Mandatory considerations include the direct or indirect impact of family violence on the child and “the physical, emotional and psychological harm or risk of harm to the child,” as well as any civil or criminal proceedings, orders, or measures relevant to the safety and well-being of the child.<sup>37</sup> Such factors are to be interpreted in accordance with Indigenous laws, “to the extent that it is possible to do so.”<sup>38</sup> The *Family Homes on Reserves and Matrimonial Interests or Rights Act (FHRMIRA)* also authorizes First Nations to develop their own laws for the possession of family homes and the division of property interests, and establishes provisional rules that govern until such laws are enacted.<sup>39</sup> These rules allow a spouse or partner who is a victim of family violence to apply *ex parte* to a “designated judge” either in person or by telecommunication to obtain an order for exclusive possession of the family home or other relief for up to ninety days if needed for their immediate protection or that of their property.<sup>40</sup> Few First Nations have enacted their own matrimonial property laws under the *FHRMIRA*, and only three provinces have designated judges, leaving many Indigenous victims of violence on reserves without access to emergency orders for exclusive possession of their homes.<sup>41</sup>

Also important federally in the domestic violence context is the *Immigration and Refugee Protection Act (IRPA)*.<sup>42</sup> Among the methods of entry to Canada is the family class, in which a Canadian citizen or permanent resident may apply to sponsor a spouse or common-law partner. Although presumptively this occurs, and permanent resident status is granted, before the sponsored spouse or partner arrives in Canada, in some circumstances the sponsorship application may be initiated from within Canada. In these circumstances, the sponsorship application can be withdrawn at any time prior to the granting of permanent resident status.<sup>43</sup> An extensive literature documents threats by abusive men to revoke the sponsorship application and to have their intimate partners deported, making it very difficult for women to leave such relationships.<sup>44</sup> If the sponsorship is withdrawn, in limited circumstances a refugee claim may be available, but usually the only route to permanent resident status is through a humanitarian and compassionate (H & C) application.<sup>45</sup> This is a highly discretionary form of relief that is not routinely granted, and many of the factors to be considered in exercising this discretion – a history of stable employment, a pattern of sound financial management, integration into the community – work against success on such applications for abused women precisely because of the nature

of the abuse they have experienced. While immigration officers are instructed to be “sensitive to situations in which the spouse ... leaves an abusive situation and, as a result, does not have an approved family class sponsorship,” the further instruction to consider court documents, police or incident reports, conviction certificates, letters from shelters, and medical reports fails to appreciate that many abused women do not have access to these forms of verification.<sup>46</sup> In July 2019, the federal government introduced a fee-exempt temporary resident permit for verified victims of family violence (broadly defined) whose status in Canada is dependent upon their abusive spouse/partner. While a welcome development, such permits are temporary in nature, usually for a minimum of six months and to a maximum of three years.<sup>47</sup>

Other provisions of the *IRPA* also raise issues of concern. A foreign national (a person who is neither a citizen nor a permanent resident) who is convicted of an indictable offence – with all hybrid offences deemed indictable – is inadmissible to Canada and subject to removal proceedings with no right of appeal.<sup>48</sup> Even a permanent resident may be subject to removal if convicted of an offence in Canada for which the maximum term is at least ten years or where the actual term of imprisonment imposed is more than six months.<sup>49</sup> The potential for removal in these situations is particularly concerning where abused women without citizenship status are inappropriately charged criminally. While the Canadian literature is sparse on this issue, some evidence indicates that abusive men will manipulate the police and criminal justice system response, resulting in charges against the victim with the attendant possibility of removal from Canada.<sup>50</sup> A further provision bars a Canadian citizen or permanent resident from being a sponsor if convicted of an offence that caused bodily harm to a conjugal partner or family member.<sup>51</sup> For abused women who are dependent upon their spouse’s sponsorship, the potential loss of the sponsorship may result in reluctance to seek help.

### **Provincial/Territorial Laws and Policies**

Given the presence of thirteen provinces and territories in Canada, with broad jurisdiction over matters including the administration of criminal justice, civil protection orders, family law, property and housing, social assistance, and employment laws, the legislative and policy picture is complex. Here, we take a look at the provincial and territorial legislation, policies, and justice system components relevant to domestic violence and compare differences across jurisdictions to gain a sense of the complex intersections facing victims and offenders in this context (see Table 7.1).<sup>52</sup>

In the administration of criminal justice, all provinces have pro-charging and pro-prosecution policies for domestic violence offences that apply to provincially

regulated police forces and prosecutors.<sup>53</sup> Most jurisdictions have specialized domestic violence courts that hear criminal matters in some locations, although the scope of these courts differs greatly within and between jurisdictions. Toronto has an integrated domestic violence court (IDVC) that allows some family law cases and criminal charges to be heard by a single judge. The IDVC operates at the provincial court level, excludes divorce, family property, and child protection matters, and hears only summary conviction criminal matters.<sup>54</sup>

Some jurisdictions have victims of crime legislation providing for various rights, including rights to be informed of proceedings, to be granted absence from work for justice system appearances, and to be kept apart from the offender to ensure safety.<sup>55</sup> Most have legislation providing compensation or restitution for victims of domestic violence crimes either explicitly or implicitly.<sup>56</sup> Some of these jurisdictions limit the extent to which compensation is available where victims contributed to their injuries, engaged in conduct detrimental to their health or safety, or failed to report the matter or to cooperate with law enforcement authorities.

Civil domestic violence protection order legislation exists in most provinces and territories across Canada, except Ontario and Quebec.<sup>57</sup> This legislation is generally intended to make protection orders more accessible and extensive than restraining orders. Victims are able to obtain emergency and longer-term protection orders where “domestic,” “family,” or “interpersonal” violence or abuse, as defined by the legislation, has occurred or the victim has a reasonable fear that it will occur. A key difference across jurisdictions is whether emotional, psychological, and financial abuse are included. Most statutes limit the availability of orders to victims who have resided together in a family, spousal, or intimate relationship and to parents of children regardless of whether they have cohabited. Emergency orders may be issued *ex parte* by courts, and in some jurisdictions by justices of the peace via telecommunication, if an immediate order is needed for protection of the victim. Protection orders may give the applicant exclusive possession of a family home, order the removal of the respondent, and require no contact or attendance at or near specified places. Breaches may be dealt with specifically through powers of arrest and offence provisions, or, if the legislation is silent on breaches, s 127 of the *Criminal Code* will apply.

Some provinces have recently passed domestic violence disclosure laws.<sup>58</sup> These laws are intended to provide information that a person might use in deciding to avoid or leave a relationship with someone who could be violent, although the details have been left to regulations that have not yet been developed or not as yet proclaimed in force.



In the area of family law, many jurisdictions stipulate that domestic violence is to be considered in assessing the best interests of children and determining parenting, custody, access, and/or contact orders, but how domestic violence is defined varies widely across these jurisdictions.<sup>59</sup> At the same time, many jurisdictions presume the equal division of parental authority where the parents have cohabited, subject to a court order, agreement, or, in some jurisdictions, consent or acquiescence of one parent to the child's residence with the other. Many also include a maximum contact or friendly parent principle similar to that in the *Divorce Act*. Only British Columbia explicitly excludes a presumption of equal parenting responsibility and equal time in making court orders. That province also provides that a denial of parenting time or contact with a child is not considered wrongful where the guardian reasonably believed that the child might suffer violence if contact was exercised.<sup>60</sup> Although the inclusion of domestic violence as a mandated factor is positive, disclosures by victims could still jeopardize their own claims to custody if the violence cannot be proven.

For cross-border disputes, all provinces and territories incorporate the *Hague Convention on the Civil Aspects of International Child Abduction*, which secures the return of children wrongfully removed to states that are party to the *Convention*. The *Convention's* "grave risk" exception – which has been found to exist in some cases of domestic violence – can be invoked where the court finds the child would be exposed to a grave risk of physical or psychological harm or otherwise be placed in an intolerable situation if returned to the child's habitual residence.<sup>61</sup>

Under child welfare legislation, most provinces and territories explicitly define children to be in need of protection or intervention where they may be physically or emotionally harmed by family or domestic violence.<sup>62</sup> All jurisdictions create a duty to report on persons who have reasonable and probable grounds to believe that a child may be in need of protection or intervention. For mothers, a disclosure of domestic violence to virtually anyone will increase the risk of reports being made to child welfare authorities and the risk of child apprehension.<sup>63</sup>

Statutes dealing with property division upon the breakdown of a spousal relationship do not identify domestic violence as a relevant factor, but courts are authorized to grant exclusive possession of the family home in various circumstances, including domestic violence.<sup>64</sup> Exclusive possession or orders for use of the family home can also be tied to parenting, child, or spousal support, and made in other circumstances. In addition, most jurisdictions have amended their residential tenancy legislation to allow tenants to terminate leases early without the usual consequences where they must vacate the premises because

of domestic violence.<sup>65</sup> In jurisdictions without these amendments, civil protection legislation may provide other tenancy-related remedies. Regardless of these protections, however, residential tenancy legislation typically prohibits tenants from changing locks, requires them to pay rent until the end of the tenancy, and allows landlords to terminate tenancies where a tenant has caused damage to the property or adversely affected the security of another occupant, making it difficult for domestic violence victims to remain in rented premises.<sup>66</sup>

Procedurally, several provinces and territories encourage or mandate mediation or other forms of ADR for family disputes, but only a few require dispute resolution professionals to take domestic violence training and screen for family violence or exempt victims of domestic violence from ADR requirements.<sup>67</sup> Most jurisdictions provide legal aid for protection orders and family law disputes involving domestic violence, but this typically involves financial eligibility requirements and is done in policy documents, allowing coverage to be easily changed over time.<sup>68</sup>

In the context of social benefits laws and policies, several jurisdictions explicitly or implicitly include domestic violence in providing financial supports for moving, transportation, and other costs and/or in assessing income, assets, needs, and eligibility. Some jurisdictions also consider domestic violence in the allocation of subsidized housing and may exempt victims of abuse from the usual obligations related to social assistance eligibility, such as work search requirements and the obligation to pursue support from an ex-spouse or under an immigration sponsorship.<sup>69</sup>

With regard to employment law, the occupational health and safety legislation of some provinces explicitly includes domestic violence as a workplace hazard and requires employers to take all reasonable precautions for the protection of workers who may be exposed to physical injury in the workplace. Additionally, several jurisdictions permit employees to take domestic violence leave from employment to obtain medical attention, counselling, or victim services; to seek legal or law enforcement assistance; and/or to relocate.<sup>70</sup>

Most provinces and territories have also removed or extended limitation periods for civil claims relating to sexual assault and/or assault and battery where the claimant was living in an intimate relationship with the person who committed the assault or battery.<sup>71</sup>

This comparison of jurisdictions is relatively high level but still illustrates the complexity of laws, policies, and processes confronted by domestic violence victims across Canadian jurisdictions. Different terms – domestic, family, and interpersonal violence – are used and defined differently in different jurisdictions, and sometimes within jurisdictions.<sup>72</sup> Making matters more complicated, access to information and privacy legislation may restrict information sharing

Table 7.1 Comparison of provincial/territorial laws including domestic violence

Territorial laws	Province												
	BC	AB	SK	MB	ON	QC	NB	NS	PE	NL	YK	NT	NU
Civil domestic violence protection orders	x	x	x	x			x	x	x	x	x	x	x
Family: parenting orders	x	x	[x]	x	x			x		x		x	x
Family: child welfare	x	x	x			x	x	x	x	x	x	x	x
Alternative dispute resolution (ADR) <sup>1</sup>	x		x	[x]	x	x				x			
Residential tenancies	x	x	x	x	x	x	[x]	x		x		x	
Social benefits and/or social housing	x	x	x	x	x	x	x	x	x	x			
Employment	x	x	x	x	x	x	x	x	x	x		x	
Limitations	x	x	x	x	x	x	x	x		x	x	x	x

Note: This table includes statutes or regulations that explicitly reference domestic or family violence or related terms but does not include such references in policy documents or where those terms are read in by interpretation. Square brackets indicate that the relevant provisions were not fully in force as of March 2020.

<sup>1</sup> Domestic violence is identified as a factor in deciding whether ADR is required and/or in requiring training on domestic violence issues for at least some ADR professionals.

across systems unless disclosure is necessary to protect a person's mental or physical health or safety, or for law enforcement purposes.<sup>73</sup> This leads to a siloed approach to the legal issues raised in domestic violence cases that can compromise safety in the absence of information-sharing protocols.<sup>74</sup>

### **Domestic Violence and Access to Justice across Intersecting Legal Systems**

Victims, offenders, and children must frequently engage with multiple legal forums and processes in domestic violence cases, including those related to the legislation discussed earlier.<sup>75</sup> Though definitive information on the extent of sequential or overlapping processes is lacking, there is evidence that at least one-third of domestic violence cases with family law issues also include criminal charges, and the number of cases engaging multiple legal processes is likely much higher when other legal issues are factored in, especially those resolved before trial.<sup>76</sup> These legal matters are scattered across inferior, superior, unified, specialized, and integrated court systems, as well as mandatory mediation and other informal settlement processes. Domestic violence issues may also intersect with immigration, housing, and social assistance systems and tribunals.<sup>77</sup> Many of these issues require ongoing contact between the parties due to changing circumstances and enforcement problems, leading to continuing conflict and legal disputes.<sup>78</sup>

Navigating these multiple systems may impede access to justice and impair safety. Parties may have to appear before multiple courts on multiple days in multiple locations, with different lawyers, different judges, and differential access to services, legal representation, and remedies. Besides the resulting confusion, victims and children may have to tell their stories repeatedly, resulting in possible revictimization as well as child care and absenteeism issues. Delays in resolving issues and added expenses for the parties may also result from multiple and ongoing proceedings within and across systems.<sup>79</sup> Systemically, different legal systems have varying objectives, which may create inter-system tensions. For example, family courts are generally mandated to encourage the resolution of conflicts, avoid attributions of fault, and facilitate contact between parents and children. In contrast, courts hearing criminal matters are mandated to focus on victim safety and offender accountability, which may favour limited contact.<sup>80</sup> Different systems have varying legal rules on evidence, document disclosure, and privacy and confidentiality, leading to inconsistent access to information on matters such as the risk of future violence. The relevant personnel – including judges, lawyers, mediators, custody evaluators, social workers, and immigration and welfare officers – may also have varying levels of expertise and varied conceptual frameworks for understanding domestic violence.<sup>81</sup>

These differing objectives, priorities, rules, and levels of expertise, combined with a lack of coordination among different service providers and decision makers, may lead to contradictory norms and cultures and piecemeal and disparate outcomes for individuals, compromising access to justice. Inconsistent information, settlements, decisions, and enforcement practices within and across systems, along with system silos, may also result in conflicts and gaps that impair safety and require further court appearances to resolve.<sup>82</sup> More generally, victims may face contradictory pressures and messages about how their actions in response to domestic violence will be treated by decision makers.<sup>83</sup>

Perpetrators of domestic violence may leverage these different legal systems as a means of furthering their power and control. They may initiate multiple applications to vary parenting orders, instigate investigations of women based on false reports of child abuse or welfare fraud, or report women to immigration authorities.<sup>84</sup> While the sharing of information between systems can sometimes enhance safety, in other circumstances it can be used to amplify the power of abusers.<sup>85</sup> These contradictory effects of information sharing may dissuade some women from disclosing domestic violence and seeking help.

### **The Costs of Seeking Justice for a Domestic Violence Victim**

The following case scenario illustrates the complex interplay of various legal systems. While it builds upon a single jurisdiction, it also illuminates why and how the details of specific legislative and regulatory regimes matter for access to justice.

Nazifa came to Canada in 2014 on a visitor's permit to see her fiancé, a Canadian citizen. With his promise to initiate a spousal sponsorship, Nazifa remained in Canada after the expiry of her permit. They married in 2015 and their son was born in 2016. They resided in an apartment in Toronto, and both had signed the lease. Nazifa's husband regularly complained about her cooking, her care of their son, and her appearance. He controlled her access to the telephone and computer, and installed cameras to ensure that she did not leave home without his permission. His physical violence began shortly after their marriage and continued to escalate. When her injuries required medical attention, Nazifa's husband always accompanied her and he did the talking. He repeatedly threatened to withdraw his sponsorship application and told her that he would ensure she was deported. Nazifa did her best to hide the abuse and violence from her son. She disclosed the abuse to no one, fearful that if the police became involved, the violence would escalate, child welfare authorities might take their son, and she would be deported.

One evening in August 2019, two male police officers arrived at their apartment, saying that a neighbour had called to report a domestic disturbance.

Nazifa's husband told police that she had assaulted him. Fortunately, the officers took Nazifa to a police station, provided an interpreter, and ensured that a female police officer conducted the interview. Nazifa's husband was arrested and charged. As required, the police officers notified the Children's Aid Society. At the time of his arrest, Nazifa's husband told the police that Nazifa was "illegal." The police learned shortly thereafter that Nazifa's husband had initiated a sponsorship application in 2018 but withdrew it immediately after he was charged. Although he was released on no-contact conditions, he regularly contacted Nazifa, promising to restart the sponsorship application if she dropped the assault charge. He also told her that if he was convicted, he would be precluded from sponsoring her. As a result, she begged the Crown prosecutor to drop the charge, but the prosecutor refused to do so. At the trial, Nazifa testified that she could not recall anything about the incident, and her husband was acquitted. Nazifa also denied the abuse when interviewed by the Children's Aid Society, and the society closed its file, noting that the abuse had not been verified.

The police response has important implications for access to justice: whether an interpreter is provided, whether charges are laid, and whether the moment of contact with the criminal justice system is seized as an opportunity to provide information, supports, and resources. Assuming this opportunity was seized and Nazifa was provided with relevant, up-to-date information and resources, she would have learned that if she chose to leave the relationship, she could get out of the lease with twenty-eight days' notice. She would also have learned that the procedure is very straightforward; she needs to complete two forms: a notice to vacate early and a "statement about sexual or domestic violence and abuse" (the statement is included on the form; all that was required was her signature). Significantly, her access to early termination was not dependent upon verification of the abuse by others.<sup>86</sup> While this would have enabled her to get out of the existing lease, obviously she would have needed access to other housing.

Nazifa would also have learned that in Ontario domestic violence victims have access to a priority wait-list for social housing. However, once the sponsorship was withdrawn, Nazifa was without immigration status and ineligible to apply for social housing.<sup>87</sup> Moreover, without status, she was also ineligible for social assistance benefits.<sup>88</sup> She would have been advised that, if she were able to verify that she was a victim of family violence, she would be eligible for a fee-exempt temporary resident permit (TRP) for a period between six months and three years and a work permit. The TRP is by nature temporary, and it remains the case that unless Nazifa were to stay in the relationship with her abusive husband and he were to restart the spousal sponsorship (which he would not have been able to do if convicted), her only route to permanent resident status would be through the highly discretionary H & C application process,

the outcome of which is anything but assured. However, with the initiation of the H & C application, Nazifa would have been eligible to apply for both social assistance and social housing.

Yet Nazifa would have encountered additional hurdles to access priority social housing; she would have needed to provide a record verifying the abuse prepared by a listed professional (among them a doctor, lawyer, nurse, law enforcement officer, or social services provider). The only professionals from whom Nazifa could have requested a verification report were the law enforcement officers who intervened in August 2019. Whether she was able to reach them, and whether they were prepared to provide the report, would have impacted Nazifa's access to the priority wait-list for social housing.<sup>89</sup> While the verification sources to access a TRP are more expansive, they too focus on police records and reports from various professionals, as well as criminal and family court documents.

In the meantime, imagine that in this scenario, Nazifa's husband started a family law proceeding seeking sole custody of their child. Nazifa is very concerned for her son's well-being, given her husband's behaviour. Although judges are required to consider any violence or abuse against a spouse in assessing the ability to act as a parent, apart from the police intervention and charge (which did not result in a conviction), Nazifa has no corroborating evidence. Moreover, her testimony in the criminal trial may be used against her in the family law proceeding. Raising the abuse poses the risk that if her account is not accepted, she may be characterized as an "unfriendly" parent at best or, worse, as manipulative or alienating. But the complexity does not end there. Even assuming that Nazifa initiated an H & C claim, this would not bar removal proceedings against her. If an immigration order was issued for her removal, she could be removed without her son – in the immigration context, the best interests of a child is but one consideration among many, unlike the family law context, where it is determinative. The jurisprudence is clear that the family courts will not issue custody orders as a means of circumventing an immigration order. Rather, the court will determine the best interests of a child, taking into account the existence of a removal order against a parent. Courts will consider, among other factors, the relative educational and social advantages a child may have in Canada compared with the country to which the parent is being removed; the stability of remaining in Canada; the child's citizenship; and the child's social ties and networks. All of these factors are likely to work against a custody order in Nazifa's favour, and there is a very real possibility that she will be deported and her son will remain in Canada.<sup>90</sup> If Nazifa applies for and receives a TRP, this narrows the possibility of removal, but again, this is a temporary measure.

Nazifa's refusal to testify against her husband or disclose the abuse to child protection authorities may mean that she does not have the verification needed to access social housing, social assistance, or the TRP. It may also mean that her account of abuse will not be seen as credible in the family law proceeding. Yet even if she had all of the critical information about the harms of not disclosing, her decision may have been no different given the limited options open to her to secure permanent resident status. Without access to expert legal information, advice, and representation, it is difficult to imagine how Nazifa could navigate these multiple systems in a way that best ensures safety for her and her child.

## **Conclusion**

As Nazifa's story makes clear, access to justice for survivors of domestic violence requires addressing the common obstacles faced by litigants – costs, delay, lack of information, and culturally and linguistically inaccessible services. But her story also reveals additional impediments.

For domestic violence victims, access to justice is rendered more complex not only by the need to engage multiple legal systems – criminal, family, child welfare, immigration, housing, and social assistance, for example – but by how these systems interact (or fail to do so). As noted earlier, and as illustrated by Nazifa's story, these various legal systems are shaped by different, and sometimes inconsistent, statutory mandates. In some instances, the result is that women are subject to contradictory court orders that render compliance virtually impossible. In other instances, steps taken and decisions made in one legal forum will, unknown to victims, have significant implications for decisions in another legal forum. An acquittal (or conviction) in the criminal arena, for example, will reverberate in the family, child welfare, and immigration contexts. Nazifa's story also reveals that the sharing of information across systems – by police with child welfare or immigration authorities, for example – can itself operate as a barrier to accessing justice, and that this potential is exploited by abusive men. In other instances, the sharing of information will yield a more complete picture of risk that creates the potential for more responsive safety planning.

Access to justice is also compromised by the failure to prioritize safety. Statutes that define domestic violence solely as physical violence, that fail to identify domestic violence as a relevant consideration (for example, in relation to parenting orders or access to housing), or that mandate participation in ADR processes without adequate attention to power imbalances are one such manifestation. Another is the verification of domestic violence required by statute or policy, or simply insisted upon by a decision maker before a woman's account of violence is believed and her access to benefits, such as subsidized housing,



social assistance, or the early termination of a lease, is enabled. The failure to centre the safety of women and children can also be traced to the lack of knowledge among legal actors of the dynamics of abusive relationships and to the ready equation of harm with serious physical injuries, with coercive, controlling behaviour dismissed as inconsequential.

Troublingly, women's access to justice is all too often dependent upon the jurisdiction in which they reside, the treatment of domestic violence within the statute(s) governing their legal issue(s), and whether the legal professionals they encounter – lawyers, judges, mediators, and so on – have a deep understanding of domestic violence and its harms and are alive to the complex interactions between multiple legal systems. In domestic violence cases, accessing legal systems occurs in the context of ongoing inequalities of power. All too often, the result of access to legal systems, which is how access to justice has traditionally been framed, is not justice but rather the exacerbation of inequalities between victims and their abusers. Abusive men may access legal systems to further their power and control, and in these instances women are reluctantly drawn into legal systems.<sup>91</sup> Women's initiation of engagement with various legal systems can also be fraught with risk: of retaliatory violence, of the loss of child custody or social assistance, or of adverse immigration consequences.

Domestic violence imposes a tremendous financial burden on women, and on society more generally. The costs take the form of both expenditures – for example, to improve health, access housing, or participate in the justice system – and lost opportunities for women, in some instances undermining their capacities as workers. These lost opportunities are but one manifestation of a more profound and troubling form of cost – that is, the cost to women and children's sense of safety, of self, and of belonging.<sup>92</sup> Access to justice must be reframed in a way that ensures that women's interactions with various legal systems reduce rather than exacerbate these costs. Reframing of this sort points towards access to justice initiatives such as a systematic review of legislation to assess its implications for women and children's safety,<sup>93</sup> new approaches to judicial and legal education, and further research to better ensure that legal systems work together seamlessly in support of safe, equitable, and fair outcomes.

## Notes

Our research is supported by grants from the Social Sciences and Humanities Research Council of Canada and the Law Foundation of Ontario's Access to Justice Fund, for which we are grateful. We also thank our research assistants Ellen Bolger, Elysa Darling, Kristin McDonald, Irene Oh, and Andrea Vitopoulos, and Trevor Farrow for his helpful comments on an earlier draft.

- 1 We use the term "domestic violence" to capture abuse in adult intimate relationships. We are especially interested in coercive controlling violence, a conceptualization that builds

- upon earlier feminist work documenting tactics of power and control. Coercive control encompasses the range of tactics used to isolate, control, demean, and dehumanize women, as distinct from a decontextualized approach focused narrowly on discrete acts of physical violence. For an overview, see Jane Wangmann, “Different Types of Intimate Partner Violence – an Exploration of the Literature” (Australian Domestic and Family Violence Clearinghouse, 2011), online: OPUS <<https://opus.lib.uts.edu.au/handle/10453/19466>>. We use the terms “victim” and “offender” for ease of reference, recognizing that not all domestic violence cases are resolved in the justice system or with findings of culpability.
- 2 Our SSHRC project, *Domestic Violence and Access to Justice Within and Across Multiple Legal Systems*, consists of several phases, including legislative/policy mapping, case law research, and qualitative interviews with service providers and justice personnel. Wendy Chan and Michaela Keet are co-investigators.
  - 3 Action Committee on Access to Justice in Civil and Family Matters, *Meaningful Change for Family Justice: Beyond Wise Words. Final Report of the Family Justice Working Group* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013) [*Meaningful Change*]; Canadian Bar Association, *Reaching Equal Justice: An Invitation to Envision and Act* (Ottawa: Canadian Bar Association, 2013), online: Canadian Bar Association <<http://www.cba.org/CBA-Equal-Justice/Equal-Justice-Initiative/Reports>> [*Reaching Equal Justice*].
  - 4 Action Committee on Access to Justice in Civil and Family Matters, *Meaningful Change*, *supra* note 3; Canadian Bar Association, *Reaching Equal Justice*, *supra* note 3; Trevor Farrow, “What Is Access to Justice?” (2014) 10 Osgoode Hall LJ 12.
  - 5 Trevor Farrow, Lesley Jacobs, & Diana Lowe, *The Cost of Justice: Weighing the Costs of Fair and Effective Resolution to Legal Problems* (Toronto: Canadian Forum on Civil Justice, 2012), online: Canadian Forum on Civil Justice <[http://www.cfcj-fcjc.org/sites/default/files/docs/2012/CURA\\_background\\_doc.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2012/CURA_background_doc.pdf)>; Patricia Hughes and Janet E. Mosher, “Foreword” (2008) 46 Osgoode Hall LJ xxi; Michael Trebilcock, Anthony Duggan, & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012).
  - 6 Ting Zhang et al, *An Estimation of the Economic Impact of Spousal Violence in Canada, 2009* (Ottawa: Department of Justice Canada, 2012) at x (including \$320.1 million to the criminal justice system and \$225.1 million to the civil justice system).
  - 7 Canadian Bar Association, *Access to Justice Metrics: A Discussion Paper* (Ottawa: Canadian Bar Association, 2013); Mary Eberts, “Future of Law Conference: ‘Lawyers Feed the Hungry’: Access to Justice, the Rule of Law, and the Private Practice of Law” (2013) 76 Sask L Rev 115; Genevieve Painter, “Thinking Past Rights: Towards Feminist Theories of Reparations” (2012) 30 Windsor YB Access Just 1.
  - 8 Joseph Roy Gillis et al, “Systemic Obstacles of Battered Women’s Participation in the Judicial System: When Will the Status Quo Change?” (2006) 12 Violence against Women 1150; Rosemary Hunter, “Feminist Explorations of Access to Justice” (2002) 11 Griffith LR 263; Debra Parkes et al, “Listening to Their Voices: Women Prisoners and Access to Justice in Manitoba” (2008) 26 Windsor YB Access Just 85.
  - 9 Canadian Bar Association, *Reaching Equal Justice*, *supra* note 3; Farrow, Jacobs, & Lowe, *supra* note 5.
  - 10 Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (Ottawa: Action Committee on Access to Justice in Civil and Family Matters, 2013), online: Canadian Forum on Civil Justice <[http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)> [*Roadmap*]; Action Committee on Access to Justice in Civil and Family Matters, *Meaningful Change*, *supra* note 3; Rachel Birnbaum, Nicholas Bala, & Lorne Bertrand, “The Rise of

- Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants" (2013) 91 Can Bar Rev 67; Farrow, *supra* note 4; Law Commission of Ontario, *Increasing Access to Family Justice through Comprehensive Entry Points and Inclusivity* (Toronto: Law Commission of Ontario, 2013); Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants, Final Report" (May 2013), online: <[https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/s/self-represented\\_project.pdf](https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/s/self-represented_project.pdf)>; Michael Saini, Rachel Birnbaum, & Nicholas Bala, "Access to Justice in Ontario's Family Courts: The Parents' Perspective" (2016) 37 Windsor Rev Legal Soc Issues 1; Noel Semple & Carol Rogerson, "Middle Income Access to Justice: Policy Options with Respect to Family Law" in Trebilcock, Duggan, & Sossin, *supra* note 5 at 413.
- 11 Linda C. Neilson, "At Cliff's Edge: Judicial Dispute Resolution in Domestic Violence Cases" (2014) 52 Fam Ct Rev 529; Federal-Provincial-Territorial Ad Hoc Working Group on Family Violence, *Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems* (Ottawa: Department of Justice Canada, November 2013), c 8 [*Making the Links*].
  - 12 Pamela Cross, *Through the Looking Glass: The Experiences of Unrepresented Abused Women in Family Court* (Oshawa, ON: Luke's Place, 2008) [*Through the Looking Glass*]; Pamela Cross, *It Shouldn't Be This Hard: A Gender-Based Analysis of Family Law, Family Court and Violence against Women* (Oshawa, ON: Luke's Place, 2012); Jennifer Koshan & Wanda Wiegers, "Theorizing Civil Domestic Violence Legislation in the Context of Restructuring: A Tale of Two Provinces" (2007) 19 CJWL 145; Donna Martinson & Margaret Jackson, "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases" (2017) 30 Can J Fam L 11; Linda C. Neilson, *Enhancing Safety: When Domestic Violence Cases Are in Multiple Legal Systems (Criminal, Family, Child Protection)* (Ottawa: Department of Justice Canada, 2013) [*Enhancing Safety*].
  - 13 Nicholas Bala, "Reforming Family Dispute Resolution in Ontario: Systemic Changes and Cultural Shifts" in Trebilcock, Duggan, & Sossin, *supra* note 5 at 271; Semple & Rogerson, *supra* note 10.
  - 14 Bala, *supra* note 13; Lene Madsen, "A Fine Balance: Domestic Violence, Screening, and Family Mediation" (2012) 30 Can Fam LQ 343; Wanda Wiegers & Michaela Keet, "Collaborative Family Law and Gender Inequalities: Balancing Risks and Opportunities" (2009) 46 Osgoode Hall LJ 733.
  - 15 Neilson, *Enhancing Safety*, *supra* note 12; Legal Aid Ontario, *Consultation Paper: Development of a Domestic Violence Strategy* (Toronto: Legal Aid Ontario, 2015).
  - 16 Canadian Centre for Justice Statistics, *Family Violence in Canada: A Statistical Profile, 2018* (Ottawa: Minister of Industry, 2019), s 2 (females represented 79 percent of police-reported intimate partner violence victims in 2017 and are at higher risk of intimate partner homicide).
  - 17 In 2014, 10 percent of Aboriginal women self-reported victimization by spousal violence compared with 3 percent of non-Aboriginal women: Canadian Centre for Justice Statistics, *Family Violence in Canada: A Statistical Profile, 2014* (Ottawa: Minister of Industry, 2016) at 15. Eleven percent of lesbian and bisexual women reported spousal violence, compared with 3 percent of heterosexual women (*ibid* at 14). For discussions of spousal violence against marginalized women, see Rupaleem Bhuyan et al, *Unprotected, Unrecognized: Canadian Immigration Policy and Violence against Women, 2008–2013* (Toronto: Migrant Mothers Project, University of Toronto, 2014); Sheryl Burns, *Single Mothers without Legal Status in Canada: Caught in the Intersection between Immigration Law and Family Law* (Vancouver: YWCA, 2010); Jane Ursel, "Over Policed and Under Protected:

- A Question of Justice for Aboriginal Women” in Mary Ruclous Hampton & Nikki Gerrard, eds, *Intimate Partner Violence: Reflections on Experience, Theory and Policy* (Toronto: Cormorant Books, 2006) at 80.
- 18 Cheryl Fraehlich & Jane Ursel, “Arresting Women: Pro-Arrest Policies Debates and Developments” (2014) 29 J Family Violence 507; Jennifer Koshan, “Investigating Integrated Domestic Violence Courts: Lessons from New York” (2014) 51 Osgoode Hall LJ 989; Shoshana Pollack et al, *Women Charged with Domestic Violence in Toronto: The Unintended Consequences of Mandatory Charge Policies* (Toronto: Woman Abuse Council of Toronto, 2005); J. Poon et al, “Factors Increasing the Likelihood of Dual and Sole Charging of Women for Intimate Partner Violence” (2012) 20 Violence against Women 1447.
  - 19 See, e.g., Nicholas Bala, Rachel Birnbaum, & Donna Martinson, “One Judge for One Family: Differentiated Case Management for Families in Continuing Conflict” (2010) 26 Can J Fam L 395.
  - 20 For a longer version of this paper with reference to all relevant legislation, see online: SSRN <<https://ssrn.com/abstract=3598277>> [“Koshan, Mosher and Wiegers”]. See also, e.g., Nicholas Bala & Kate Kehoe, “Concurrent Legal Proceedings in Cases of Family Violence: The Child Protection Perspective” (Ottawa: Department of Justice Canada, n.d.), online: Department of Justice Canada <[http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/fv-vf/child\\_protection.pdf](http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/fv-vf/child_protection.pdf)>; Rachel Birnbaum, Michael Saini, & Nicholas Bala, “Canada’s First Integrated Domestic Violence Court: Examining Family and Criminal Court Outcomes at the Toronto IDVC” (2017) 32 J Family Violence 621; Hon. Bonnie Croll, “The Intersection between Criminal Law, Family Law and Child Protection in Domestic Violence Cases” (8 May 2015), online: FREDA Centre <<http://www.fredacentre.com/wp-content/uploads/2010/09/Croll-J.-The-Intersection-Between-Criminal-Law-Family-Law-and-Child-Protection-in-Domestic-Violence-Cases-May-8-2015.pdf>>; Federal-Provincial-Territorial Ad Hoc Working Group on Family Violence, *Making the Links*, *supra* note 11; Margaret Jackson & Donna Martinson, *Risk of Future Harm: Family Violence and Information Sharing between Family and Criminal Courts* (Fredericton: Canadian Observatory on Intimate Partner Violence, 2016); Donna Martinson, *Judicial Coordination of Concurrent Proceedings in Domestic Violence Cases* (Vancouver: FREDA Centre, 2012); Janet E. Mosher, “Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by Their Intimate Partners” (2015) 32 Windsor YB Access Just 149 [“Grounding Access”]; Neilson, *Enhancing Safety*, *supra* note 12; Mary Ellen Turpel-Lafond, *Honouring Kaitlynn, Max and Cordon: Make Their Voices Heard Now* (Victoria: BC Representative for Children and Youth, 2012); Woman Abuse Council of Toronto, *Policies Matter: Addressing Violence against Women through Reflection, Knowledge and Action* (Toronto: Woman ACT, 2013).
  - 21 Ongoing research includes a case law review and qualitative interviews in selected jurisdictions with justice system personnel and service providers.
  - 22 *Criminal Code*, RSC 1985, c C-46, was amended by Canada, Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018, to include several provisions related to intimate partner violence referenced here.
  - 23 See, e.g., *Serious Crime Act 2015* (UK) c 9, s 76.
  - 24 *Criminal Code*, *supra* note 22, ss 515(3)(a), 515(6)(b.1), 718.2(a)(ii), 718.201, 718.3(8), 738(1)(c).
  - 25 *Ibid*, ss 501(3)(d), 501(3)(e), 515(3)(a), 516(2), 732.1(3)(a.1), 742.3(2)(a.3), 810(3.2).
  - 26 *Ibid*, s 109(1)(a.1); see also s 110(2.1).
  - 27 *Ibid*, s 127.
  - 28 *Final Report of the Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation* (Ottawa: Department of Justice Canada, 2003) at 100–1,

online: Department of Justice Canada <[https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/pol/spo\\_e-con\\_a.pdf](https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/pol/spo_e-con_a.pdf)>. Pro-charging policies require the police to lay charges where they have “reasonable” or “reasonable and probable” grounds to do so. Pro-prosecution policies require prosecutions to proceed where there is a reasonable likelihood of conviction and it is in the public interest to do so.

29 *Divorce Act*, RSC 1985, c 3 (2d Supp).

30 Parental conduct has generally been relevant only to the extent that it affects a person’s ability to parent: *ibid*, s 16(9), now s 16(5).

31 *Ibid*, ss 16(2), 16(3)(j), 16(4), as revised by Canada, Bill C-78, *An Act to amend the Divorce Act*, 1st Sess, 42nd Parl, 2018. Family violence is defined broadly to include psychological and financial abuse and coercive control as well as direct and indirect exposure of children to violence (s 2(1)). Any relevant civil or criminal proceedings or orders must also be considered (ss 16(3)(k), 7.8(2)).

32 *Ibid*, ss 16(3)(c), 16(6), formerly s 16(10).

33 *Ibid*, ss 7.3, 7.7(2)(a).

34 *Ibid*, ss 16.8(3), 16.9(3), 16.96(3).

35 *Ibid*, s 16.92(1)(d).

36 *An Act respecting First Nations, Inuit and Metis Children, Youth and Families*, SC 2019, c 24.

37 *Ibid*, s 10(3)(g) and (h).

38 *Ibid*, s 9(4).

39 *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20.

40 *Ibid*, ss 7, 16(1).

41 “List of First Nations with Matrimonial Real Property Laws and the List of Jurisdictions with Designated Judges” (28 June 2019), online: Indigenous Services Canada <<https://www.sac-isc.gc.ca/eng/1408981855429/1581783888815>>.

42 *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. See generally Bhuyan et al, *supra* note 17. IRPA provisions relevant to domestic violence and refugee claims are beyond the scope of this chapter.

43 *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 126 [IRPR].

44 See, e.g., Janet Mosher, “The Complicity of the State in the Intimate Abuse of Immigrant Women” in Vijay Agnew, ed, *Racialized Migrant Women in Canada: Essays on Health, Violence and Equity* (Toronto: University of Toronto Press, 2009) 41 [“Complicity”].

45 Pursuant to s 25(1) of the IRPA, the Minister may exempt a foreign national from any of the requirements of the act (including that a person apply from outside of Canada) and may grant permanent resident status if of the opinion that “it is justified on humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.”

46 See Immigration, Refugees and Citizenship Canada, “The Humanitarian and Compassionate Assessment: Dealing with Family Relationships,” online: Government of Canada <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing/assessment-dealing-family-relationships.html>>; and “Abuse: Assessing Evidence,” online: Government of Canada <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/service-delivery/abuse/evidence.html>>.

47 See Immigration, Refugees and Citizenship Canada, “Temporary Resident Permit (TRP) for Victims of Family Violence,” online: Government of Canada <<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/permits/family-violence.html>>.

- 48 *IRPA*, *supra* note 42, ss 36(2)(a), 36(3)(a). A hybrid offence is one in which the Crown can elect to proceed either by way of summary conviction (maximum penalty of less than two years) or indictment.
- 49 *Ibid*, s 36(1)(a).
- 50 Pollack et al, *supra* note 18.
- 51 *IRPA*, *supra* note 42, s133(1)(e)(ii).
- 52 See Koshan, Mosher, & Wieggers, *supra* note 20, for more detail on the relevant laws and policies. This section is current to March 31, 2020.
- 53 See *Final Report of the Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation*, *supra* note 28 at 1–2.
- 54 See Birnbaum, Saini, & Bala, *supra* note 20.
- 55 See Koshan, Mosher, & Wieggers, *supra* note 20.
- 56 *Ibid*.
- 57 See Table 7.1. For analysis of this legislation across Canada, see Linda Neilson, *Enhancing Civil Protection in Domestic Violence Cases: Cross Canada Checkup* (Fredericton: Muriel McQueen Fergusson Centre for Family Violence Research, 2015). Quebec’s *Code of Civil Procedure*, CQLR c C-25.01, s 509, provides for protection orders generally in circumstances of violence.
- 58 See Koshan, Mosher, & Wieggers, *supra* note 20.
- 59 See Table 7.1.
- 60 For a discussion of the BC provisions, see Susan B. Boyd & Ruben Lindy, “Violence against Women and the BC Family Law Act: Early Jurisprudence” (2016) 35 Can Fam LQ 101.
- 61 *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Hague XXVIII, art 13(b) (entered into force 1 December 1983).
- 62 See Table 7.1. *The Child and Family Services Act*, CCSM, c C80 in Manitoba and Ontario’s *Child, Youth and Family Services Act, 2017*, SO 2017, c 14 do not explicitly include domestic violence, but provisions relating to harm or injury due to the domestic environment (Manitoba) or emotional harm (Ontario) have been interpreted as including exposure to domestic violence (Manitoba, s 17; Ontario, s 74(2)).
- 63 See, e.g., Judith Mosoff et al, “Intersecting Challenges: Mothers and Child Protection Law in BC” (2017) 50:2 UBC L Rev 435.
- 64 A married spouse must typically apply for relief before a divorce is granted, and an unmarried cohabiting spouse must apply within a specified time period after cohabitation ends.
- 65 See Table 7.1. See also Jonnette Watson Hamilton, “Reforming Residential Tenancy Law for Victims of Domestic Violence” (2019) 8 Annual Review of Interdisciplinary Justice Research 248.
- 66 Watson Hamilton, *supra* note 65.
- 67 See Table 7.1.
- 68 Koshan, Mosher, & Wieggers, *supra* note 20.
- 69 See Table 7.1.
- 70 *Ibid*.
- 71 *Ibid*.
- 72 See, e.g., Alberta, where dating relationships and psychological/emotional abuse are included as “domestic violence” for residential tenancy and employment legislation, but not as “family violence” under civil protection legislation.
- 73 This legislation also typically restricts access to personal information where safety issues would arise from disclosure. Some jurisdictions also have legislation creating torts for the non-consensual distribution of intimate images. See Koshan, Mosher, & Wieggers, *supra* note 20.

- 74 For a discussion of promising coordination practices among systems, see Federal-Provincial-Territorial Ad Hoc Working Group on Family Violence, *Making the Links*, *supra* note 11.
- 75 See, e.g., *ibid*; Jackson & Martinson, *supra* note 20; Linda Neilson, *Responding to Domestic Violence in Family Law, Civil Protection and Child Protection Cases*, 2017 Can LII Docs 2.
- 76 Federal-Provincial-Territorial Ad Hoc Working Group on Family Violence, *Making the Links*, *supra* note 11 at 26–27.
- 77 See, e.g., Bhuyan et al, *supra* note 17; Burns, *supra* note 17; Mosher, “Complicity,” *supra* note 44; Pollack et al, *supra* note 18.
- 78 Bala, Birnbaum, & Martinson, *supra* note 19.
- 79 See, e.g., Martinson, *supra* note 20.
- 80 *Ibid*; Noel Semple, “Whose Best Interests? Custody and Access Law and Procedure” (2010) 48 Osgoode Hall LJ 287.
- 81 Jackson & Martinson, *supra* note 20; Neilson, *Enhancing Safety*, *supra* note 12.
- 82 Bala, Birnbaum, & Martinson, *supra* note 19; Jackson & Martinson, *supra* note 20; Neilson, *Enhancing Safety*, *supra* note 12.
- 83 Marianne Hester, “The Contradictory Legal Worlds Faced by Domestic Violence Victims” in Evan Stark and Eve S. Buzawa, eds, *Violence against Women in Families and Relationships*, vol 2, *The Family Context* (Denver: Praeger, 2009) 127.
- 84 Cross, *Through the Looking Glass*, *supra* note 12; Heather Douglas, “Legal Systems Abuse and Coercive Control” (2018) 18 *Criminology & Criminal Justice* 84; Martinson, *supra* note 20; Janet Mosher, Patricia Evans, & Margaret Little, “Walking on Eggshells: Abused Women’s Experience of Ontario’s Welfare System” (5 April 2004), Commissioned Reports, Studies and Public Policy Documents, Paper 160, online: Osgoode Digital Commons <<https://digitalcommons.osgoode.yorku.ca/reports/160/>>; Neilson, *Enhancing Safety*, *supra* note 12; Andrea Vollens, *Court-Related Abuse and Harassment* (Vancouver: YWCA, 2010); David Ward, “In Her Words: Recognizing and Preventing Abusive Litigation against Domestic Violence Survivors” (2016) 14 *Journal for Social Justice* 429.
- 85 Jackson & Martinson, *supra* note 20; Neilson, *Enhancing Safety*, *supra* note 12; Mosher, “Grounding Access,” *supra* note 20.
- 86 *Residential Tenancies Act, 2006*, SO 2006, c 17, ss 47.1–47.3, and see Form N15. Most other jurisdictions require verification of abuse by a professional unless a no-contact order is in place. See Watson Hamilton, *supra* note 65.
- 87 O Reg 367/11, s 24(1)(a) (made under the *Housing Services Act, 2011*, SO 2011, c 6).
- 88 O Reg 134/98, s 6 (made under the *Ontario Works Act, 1997*, SO 1997, c 25, Sched A).
- 89 O Reg 367/11, *supra* note 87, s 58(1).
- 90 See *Patterson v Osazuma*, 2015 ONCJ 454; and *JH v FA*, 2009 ONCA 17.
- 91 See the references at *supra* note 84.
- 92 For a quantification of other costs associated with access to justice, including increased reliance on social assistance, public housing, and health services, see Trevor C.W. Farrow et al, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report* (Toronto: Canadian Forum on Civil Justice, 2016), online: Canadian Forum on Civil Justice <<http://www.cfcj-fcj.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf>>.
- 93 See, e.g., Australian Law Reform Commission, *Family Violence and Commonwealth Laws: Improving Legal Frameworks*, Report 117 (November 2011), online: <<https://www.alrc.gov.au/publication/family-violence-and-commonwealth-laws-improving-legal-frameworks-alrc-report-117/>>.