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The Influence of Landmark Judgments and Statutory Changes on the Family Litigation Explosion: A Citation Network Analysis

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THE INFLUENCE OF LANDMARK JUDGMENTS AND STATUTORY CHANGES ON THE FAMILY LITIGATION EXPLOSION: A CITATION NETWORK ANALYSIS

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Family law in many countries has changed radically since the 1960s. However, despite family law's central importance, few detailed quantitative analyses of the relationship between legal developments (landmark judgments and statutory changes) and the amount and subject of family litigation have been made. We examine this relationship using a unique dataset of citations among Canadian family law judgments from all levels of the court hierarchy. The network analysis draws attention to significant changes in law and legal practice over time. Not only did litigation increase overall, but the number of judgments involving multiple legal issues grew dramatically in the mid-1990s, signaling the increasing complexity of litigation surrounding family breakdowns. We probe this emergent co-occurrence of legal issues using citation network analysis and find clear links to the jurisprudential changes introduced through the landmark 1992 judgment Moge v Moge *and the* 1997 Federal Child Support Guidelines.

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INTRODUCTION

In Canada, as in other western countries, family relations and family structures have changed dramatically since the 1960s. Litigation volumes have generally increased relative to population, families' legal needs have increasingly gone unmet, and family litigation has become a major site of stress in the legal system.[1] The underlying drivers of these developments are presumably mainly social and economic, as individuals—especially women, for themselves or their children—turned to the legal system to address the consequences of family breakdown. However, the role of legal change such as key judgments and statutes also deserves attention. Have changes in law aimed at supporting the interests of women and children contributed to an increase in litigation or a change in the type of issues being litigated?

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1 Federal Judicial Center, "Federal Judicial Caseloads, 1789-2016: Trial Court Caseloads since 1870" (no date), online: Federal Judicial Center <www.fjc.gov/history/exhibits/graphs-and-maps/trial-court-caseloads-1870>; Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans*, 2d ed (Washington, DC: Legal Services Corporation, 2007); Beverley McLachlin, "The Legal Profession in the 21st Century" (August 14, 2015), online: Supreme Court of Canada, <www.scc-csc.ca/judges-juges/spe-dis/bm-2015-08-14-eng.aspx>; Russell Engler, "Connecting Self-Representation to Civil Gideon: What Existing Data Reveal about When Counsel Is Most Needed," (2010) 37:1 Fordham Urb LJ 37; Lua Kamal Yuille, "No One's Perfect (Not Even Close): Reevaluating Access to Justice in the United States and Western Europe" (2004) 42:3 Colum J Transnat'l L 863; Asher Flynn & Jacqueline Hodgson, eds, *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Oxford, UK: Hart Publishing, 2017).

Has the justice system responded adequately to these jurisprudential changes?

Only a handful of studies have quantitatively examined family litigation patterns before and after legal change. Scholars have examined the effect of changes in child custody laws on the number of family law cases and the issues involved in Oregon,[2] Colorado[3] and Italy[4]; and the effect of changes to child protection agency intervention thresholds on the volume of child welfare cases in Ontario.[5] The scarcity of such studies and their

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2 Douglas W Allen & Margaret Brinig, "Do Joint Parenting Laws Make Any Difference?" (2011) 8:2 J Empirical Leg Stud 304.

3 Jessica Pearson, Paul Munson & Nancy Thoennes, "Legal Change and Child Custody Awards" (1982) 3:1 J Fam Issues 5.

4 Guido de Blasio & Daniela Vuri, "Effects of the Joint Custody Law in Italy" (2019) 16:3 J Empirical Leg Stud 479.

5 Nico Trocmé et al, "What is Driving Increasing Child Welfare Caseloads in Ontario? Analysis of the 1993 and 1998 Ontario Incidence Studies" (2005) 84:3 Child Welfare 341. A substantial body of literature explores the relationship between legal changes in family law and social and economic outcomes. On the effect of fault vs no-fault divorce laws on divorce rates, see Stéphane Mechoulan, "Divorce Laws and the Structure of the American Family" (2006) 35:1 J Leg Stud 143. On the effect of criminal sanctions, including incarceration for failure to pay child support, on payment collection rates, see Richard Lempert, "Empirical Research for Public Policy: With Examples from Family Law" (2008) 5:4 J Empirical Leg Stud 907. On the effect of changes in divorce laws on the labour force participation of women, see Betsey Stevenson, "Divorce Law and Women's Labor Supply" (2008) 5:4 J Empirical Leg Stud 853. Such studies do not generally analyze the relationship between legal changes and litigation patterns.

limited scope highlight the urgent need for further quantitative studies about the relationship between legal change and litigation patterns. One way to fill this fundamental knowledge gap is to use data sources that give a broad, system-wide view of family litigation patterns, while also possessing the detail necessary for probing beyond surface-level correlations between legal changes and litigation frequencies. We adopt such an approach here, using a unique citation dataset consisting of judgments in all types of family law cases from all Canadian common-law jurisdictions and levels of court over several decades. We provide a high-level view of the litigation patterns of different types of family law cases and then drill down to examine, in more detail, how changes in litigation patterns in particular areas of family law are interconnected with one another and related to key legal developments. We apply quantitative analysis to a large dataset to first show major changes in the amount and complexity of Canadian family litigation that have not yet been studied holistically, and then use our quantitative analysis tools to search for likely reasons for these changes.

Our data is a citation network, a set of nodes and links. The nodes represent documents—judgments—and the links represent judges' citations to previous cases. Studies of legal citation networks have proliferated in recent years, but most of these have focused only on the highest level in the court hierarchy, such as the US

Supreme Court,[6] the European Court of Justice,[7] the Supreme Court of India,[8] or the International Criminal Court.[9] Some recent studies using citation data have considered multiple levels of court hierarchies.[10] Studies by

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6 James H Fowler & Sangick Jeon, "The Authority of Supreme Court Precedent" (2008) 30:1 Social Networks 16; Michael J Bommarito II et al "Distance Measures for Dynamic Citation Networks" (2010) 389:19 Physica A: Statistical Mechanics and its Applications 4201; EA Leicht et al, "Large-Scale Structure of Time Evolving Citation Networks" (2007) 59:1 European Physical J B—Condensed Matter and Complex Systems 75; Tom S Clark & Benjamin Lauderdale "Locating Supreme Court Opinions in Doctrine Space" (2010) 54:4 American J Political Science 871; Ryan Whalen, "Modeling Annual Supreme Court Influence: The Role of Citation Practices and Judicial Tenure in Determining Precedent Network Growth" in Ronaldo Menezes, Alexandre Evsukoff & Marta C González, eds, *Complex Networks. Studies in Computational Intelligence*, vol. 424 (Berlin: Springer, 2013) 169.

7 Atieh Mirshahvalad et al, "Significant Communities in Large Sparse Networks" (2012) 7:3 PLoS One e33721, DOI: <doi.org/10.1371/journal.pone.0033721>; Jens Frankenreiter, "The Politics of Citations at the ECJ—Policy Preferences of E.U. Member State Governments and the Citation Behavior of Judges at the European Court of Justice" (2017) 14:4 J Empirical Leg Stud 813.

8 Andrew Green & Albert H Yoon, "Triaging the Law: Developing the Common Law on the Supreme Court of India" (2017) 14:4 J Empirical Leg Stud 683.

9 Fabien Tarissan & Raphaëlle Nollez-Goldbach, "Temporal Properties of Legal Decision Networks: A Case Study from the International Criminal Court," in Antonino Rotolo, ed, *Legal Knowledge and Information Systems: JURIX 2015: The Twenty-Eighth Annual Conference* (Amsterdam: IOS Press, 2015) 111.

10 Matthew P Hitt, "Measuring Precedent in a Judicial Hierarchy" (2016) 50:1 Law & Soc'y Rev 57; Michael J Nelson & Rachael K Hinkle "Crafting the Law: How Opinion Content Influences Legal

Matthew P Hitt and by Michael J Nelson & Rachael K Hinkle use simple citation counts in regression analyses to assess the influence of particular cases from the US Supreme Court and appellate (federal and state) courts, but neither study makes use of the network structure of the data.[11] Krzysztof J Pelc presents a measure of the importance of cases within the network of panel and appellate body rulings in World Trade Organization disputes and investigates its correlation with the commercial value of the disputes, to test the hypothesis that nations litigate in low commercial value cases in order to secure useful precedents for future high value cases.[12] John S Liu et al., studying a citation network of legal decisions in trademark dilution cases from the US Supreme Court and the Circuit Courts of Appeal, find a network method to be capable of identifying judgments of higher than average importance (as assessed by legal experts) when the treatment of the citations is included in the analysis.[13]

A "vertical analysis" of citation networks, which considers judgments at all levels of court in a specific area of law, promises different insights about the structure

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Development" (2018) 39:2 Justice System J 97; Krzysztof J Pelc, "The Politics of Precedent in International Law: A Social Network Application" (2014) 108:3 Am Political Sci Rev 547; John S Liu et al, "Citations with Different Levels of Relevancy: Tracing the Main Paths of Legal Opinions" (2014) 65:12 JASIST: J. Assoc. Information Science & Technology 2479.

11 Hitt, *supra* note 10 and Nelson & Hinkle, *supra* note 10.

12 Pelc, *supra* note 10.

13 Liu et al., *supra* note 10.

and evolution of the law, such as by demonstrating not just which cases are most authoritative but how particular judgments structure the cases lawyers bring subsequently. Our citation network consists of Canadian family law judgments from all levels of the court hierarchy (provincial trial-level including dedicated "family law" courts, provincial appellate-level, and Supreme Court of Canada (SCC)) and the citations among these judgments. Our analysis reveals well-known changes in Canadian law and suggests a role for legal doctrine in shaping the dramatic increase in family litigation since the 1968 federal *Divorce Act* was enacted.[14] Five main time periods emerge, shaped by landmark cases and key legislation. In the 1990s, the volume of family litigation increased sharply, as did judgments featuring multiple legal topics, such as spousal support and property division. Our analysis suggests that the SCC's judgment in *Moge v Moge*[15] in 1992 and the enactment of the *Federal Child Support Guidelines* (FCSG) in 1997[16] have led to a significant increase in judgments involving multiple legal topics—that is, in more complex cases. In particular, we find evidence that *Moge* may have led to the use of unequal division of family property as a means of providing financial compensation to former spouses in provinces

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14 RSC 1970, c D-8.

15 *Moge v Moge*, [1992] 3 SCR 813, 99 DLR (4th) 456 [*Moge*].

16 SOR/97-175 [FCSG]. These guidelines were, and are, mandatory for divorces, which are brought under the federal *Divorce Act*, but all the provinces and territories except Quebec have generally incorporated them into legislation that governs family breakdowns that do not involve applications for divorce.

where the property division legislation was sufficiently flexible. Notably as well, following the implementation of the FCSG, cases primarily concerned with custody and access but that also raised financial issues such as child support, spousal support, or division of family property became just as common as cases in which the financial matter was primary and custody secondary.

Interpreting new divorce legislation passed in 1986,[17] *Moge* revised and expanded the factors to be considered in awarding and revising spousal support. In doing so, *Moge* set out the new governing principle that the *Divorce Act* was intended to promote the equitable sharing of the economic consequences of marital breakdown, superseding an approach that promoted a "clean break" between divorcing spouses. The FCSG introduced a new framework for determining child support amounts, with mandatory quanta (varying by province), if payers' incomes did not exceed $150,000; however, several important factors—including the amount of time a child spent with a parent—could justify varying these standard amounts.[18] In section III, we examine the relationship

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17 *Divorce Act*, 1985, SC 1986, c 4.

18 On the FCSG, see Kristen Douglas, *Divorce Law in Canada* (Ottawa: Library of Parliament, Parliamentary Information and Research Service, 2008); Carol Rogerson, "Child Support under the Guidelines in Cases of Split and Shared Custody" (1998) 15:2 Can J Fam L 11; Nicholas Bala, "A Report from Canada's 'Gender War Zone': Reforming the Child-Related Provisions of the Divorce Act" (1999) 16:2 Can J Fam L 163; Tina Maisonneuve, "Child Support under the Federal and Quebec Guidelines: A Step Forward or Behind?" (1999) 16:2 Can J Fam L 284; Department of Justice Canada, *Children Come First: A Report to Parliament on the Provisions and Operation of the*

between these legal changes and proliferating, increasingly complex litigation, and discuss possible explanations that emerge from our data. We lay the groundwork for this analysis by describing our data and methods and then providing, in section II, a high-level overview of what a citation network clustering analysis shows about the evolution of Canadian family law from 1980-2015.

I. MATERIALS AND METHODS

A. DESCRIPTION OF THE DATA

1. Source of court decisions

Our citation network data consists of judgments from the Canadian "Cases and Decisions" database of WestlawNext Canada (WLC). We use the names and dates of judgments, the citations between judgments, and the legal topics in each judgment.

The vast majority of cases in the database also have associated with them information from two other, formerly print, sources: the Canadian Abridgement Digests (CAD) and Canadian Case Citations (CCC).[19] The CAD are short

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Federal Child Support Guidelines (Ottawa: Department of Justice Canada, 2002); Douglas W. Allen & Margaret F Brinig, "Child Support Guidelines: The Good, the Bad, and the Ugly" (2011) 45:2 Family LQ 135.

19 WLC asserts that the CAD "covers virtually every case reported in Canada since 1803, and every unreported case received from the courts since 1986", except Quebec civil law cases: "A Short Guide to the Canadian Abridgment in Print and on WestlawNext Canada" (Toronto: Carswell, 2014). According to WLC, the online version of the CCC

summaries of judgments, organized hierarchically by topic and sub-topic. Family law ("FAM") has twenty highest-level topics, including custody and access, division of family property, and child protection, each of which is broken down into sub-topics, sub-sub-topics, and so on. "FAM.III.3.c.i", for example, means "Family law; III. Division of family property; 3. What constitutes property; c. Pension benefits; i. Income from pension." WLC also contains the CAD as a separate source, so that a researcher interested in income from pensions, for example, can readily find the relevant law.[20]

The CCC information provides the case's

("KeyCite Canada") contains the full history of all Canadian reported cases back to 1867, plus judicial treatments of cases that fall within the following coverage: selected reported cases before 1977, all reported cases since 1977, and all unreported cases since 1986 ("KeyCite Canada," (2010), online (pdf): *WestlawNext Canada*, <westlawnextcanada.com/dynamicdata/attacheddocs/lawsource/lawsource_keycitecanada.pdf>. Spot-checking suggests that the coverage in WLC is substantially comprehensive, although perhaps exaggerated with respect to the decisions of the lowest levels of court. We do not have a means of determining how many family law judgments are omitted from our dataset due to being absent from the CAD. However, a comparison against court statistics (see section II.A) shows that our dataset captures the broad movements in number of judgments over our period of interest (1980-2015). Thus, while our data does not cover the full universe of Canadian family law decisions, it is sufficient for the purpose of investigating the relationship between legal developments and the amount and subject of family litigation.

20 As the CAD summaries were written by legal editors, the topics in our dataset were assigned by humans and not by an algorithm. The available old paper editions of the CAD reveal that the CAD classification scheme underwent little change from 1990 to 2018, which covers the period of focus of our analysis in section III.

subsequent legal "treatment", whether it was "Followed", "Considered", "Referred to", "Distinguished", or "Not Followed" by each case that cited it. For a given judgment in the WLC database, the topic information comes from the CAD, and the treatment information comes from the CCC.

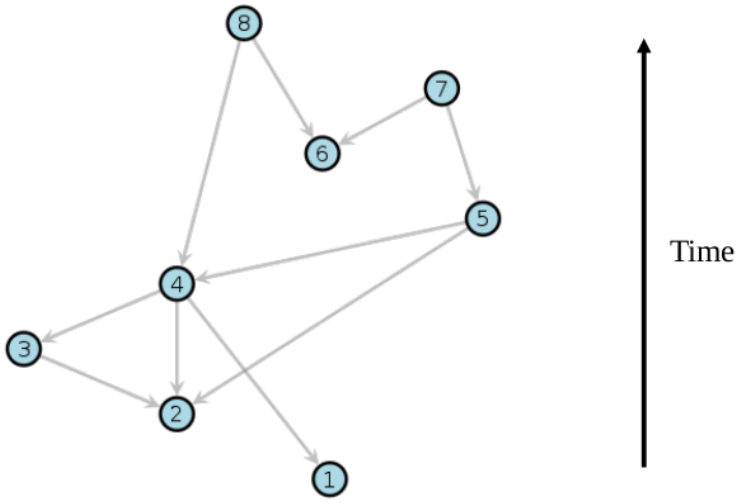
2. Court decisions used in this study

Our dataset consists of all (59,514) of the judgments in the Canadian "Cases and Decisions" database that have at least one lowest-level CAD topic belonging under the heading "Family law (FAM)," plus the citations among all such judgments, up to December 31, 2015. Having found all these judgments, we obtained the citations among them by searching for every judgment in the set that had been cited by at least one other judgment in the set. In the citation network we constructed from this data, the nodes represent judgments and the links represent citations from newer to older judgments.

Fig. 1 shows a small citation network. The number of links (citations) that each node (judgment) receives from later nodes is called the node's "in-degree," k_i^{in}, where the subscript i indicates a particular node, i. The number of links that a node makes to older nodes is the node's "out-degree," k_i^{out}. The total of a node's in-degree and out-degree is its degree, $k_i = k_i^{in} + k_i^{out}$.

[…]

Figure 1: **Schematic example of a citation network**



Note: Example of a citation network with eight nodes and ten links. All links are directed toward the past. The node labelled "4" has degree $k_4 = 5$*, in-degree* $k_4^{in} = 5$*, and out-degree* $k_4^{out} = 3$*.*

16,422 of the 59,514 judgments in our dataset have no citation links to other family law judgments (they have degree $k = 0$). Our citation network therefore contains 43,092 nodes with $k > 0$. Table 1 shows the proportion of judgments issued by the courts of each province, plus the three territories and the Federal Court of Canada, in: i) our full dataset ($k \geq 0$) of 59,514 judgments (third column of table 1); and ii) our citation network ($k > 0$) with 43,092 judgments (fourth column of table 1). Quebec is poorly covered in our data. Otherwise, the ordering of the other nine provinces in table 1 follows their ordering by decreasing population, except that Manitoba has a slightly

larger population than Saskatchewan.[21]

Table 1: Percentage of Judgments by Region

Region	*Abbrev.*	*Citation network ($k > 0$)*	*Full dataset ($k \geq 0$)*	*Region's % of non-QC Cdn pop'n in 2001*
Ontario	ON	32%	34%	50%
British Columbia	BC	24%	23%	17%
Alberta	AB	10%	10%	13%
Saskatchewan	SK	9%	9%	4%
Nova Scotia	NS	8%	7%	4%
Manitoba	MB	5%	5%	5%
New Brunswick	NB	5%	5%	3%
Newfoundland & Labrador	NL	3%	3%	2%
Prince Edward Island	PE	1%	1%	1%
Quebec	QC	1%	1%	-
Territories	TT	1%	1%	<1%
Federal court	FE	<1%	<1%	-

The citation network contains 150,748 links between pairs of nodes. Each link has one of the following "treatment" values, which indicates how the later judge treated the earlier case: "Followed" (19% of links),

21 For population data, see "Population estimates, quarterly," (June 22, 2022), online: Statistics Canada <https://doi.org/10.25318/1710000901-eng>.

"Considered" (45%), "Referred to" (32%), "Distinguished" (3%), or "Not Followed" (0.5%). We refer to these treatment values as F, C, R, D, and N. When, for example, we exclude the "Distinguished" (D) and "Not Followed" (N) links from our analysis, we use the label "FCR" to specify the links we are using. We refer to the F links as "positive", the C and R links as "neutral", and the D and N links as "negative".

B. CLUSTERING METHODOLOGY FOR CITATION NETWORKS

This study uses two "clustering" methodologies to explore the citation network. Clustering methods find groups—clusters—of nodes that are similar to each other.[22] In this study, we apply two different clustering methods.[23] The first groups nodes into clusters based on their temporal

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22 Santo Fortunato & Darko Hric, "Community Detection in Networks: A User Guide" (2016) 659:11 Physics Reports 1.

23 The PhD thesis Joseph Hickey, *A Complex Systems Study of Social Hierarchies and Jurisprudence* (PhD Dissertation, University of Calgary, 2019) [unpublished] contains extensive mathematical descriptions of the two clustering techniques, specification of the parameter values used where applicable, and demonstrations of the robustness of the clustering results as applied to our data. In applying the clustering methods, we do not distinguish between the different types of citations (positive, neutral, and negative) discussed in section I.A—in our research applying the clustering methods to this and other datasets, we did not find a significant advantage to distinguishing between the different types of citations, and found the results to be largely robust even when excluding or changing the relative weights of certain types of citations. However, the different types of citation links are used in some of our analyses that probe the temporal clusters that emerge from our data, section II.

citation behaviour, i.e. the year(s) when the cases they cite were decided. This method illuminates how legal issues and authoritative judgments rise and fall in prominence over time. The second method groups nodes together based on how closely linked they are by their citations; that is, it identifies cases that have similar topics by recognizing their shared jurisprudential lineages and connections. This methodology permits us to examine the evolution of sub-areas of law over time.

E.A. Leicht et al developed the temporal clustering method and applied it to a legal citation network of US Supreme Court judgments.[24] In this method, each cluster is defined in terms of the probability that a node belonging to the cluster links to a node issued in a particular year in the past. For example, judgments issued in the 1980s that only cite past judgments issued in the 1970s would tend to be grouped into one cluster, and judgments issued in the 1990s that only cite judgments from the 1980s would be grouped into a different cluster. The clusters can therefore correspond to different time periods (or "epochs") in the evolution of the citation network.[25]

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24 Leicht et al, *supra* note 6.

25 *Ibid*. Technically, in applying this method, one infers the parameters of a statistical model of the probability that a node belongs to a given cluster given its pattern of citations to nodes issued in particular past years. Given a specified number of clusters, the inference procedure produces two sets of parameters: the share of nodes belonging to each cluster, and a "citation profile" for each cluster, which is a function equal to the probability that a citation made by a node belonging to a particular group extends to a node issued in a particular past year. This "citation profile" is plotted in fig. 4C and discussed in Section II.C. The statistical inference is done using the "expectation-maximization" algorithm. In our study, the choice of five clusters was not arbitrary:

The topical, or thematic, clustering method was developed by Martin Rosvall and Carl T Bergstrom.[26] Conceptually, the method is similar to file compression techniques where one tries to represent a set or a stream of data in a form that requires less information. This method rests on the fact that judgments on related topics cite common precedents: a judgment can be imagined as embedded in a relatively dense set of connections to other judgments on one or more similar topics. One can imagine a person walking from node to node (judgment to judgment) on the citation network by randomly following the links between nodes. The nodes are then grouped into clusters so as to minimize the amount of information required to describe the path of this "random walker". The clusters obtained by this procedure can be quite distinct for citation networks, as recent studies have demonstrated for both scientific and judicial citation networks.[27]

We make no assumptions about what level of court

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we ran the algorithm assuming each of 2, 3, 4, 5, and 6 clusters, and then used the number of clusters (5) that maximizes a statistical quantity (the "expected log-likelihood") central to the inference method. Further technical details, including a description of the expectation-maximization procedure, are available in Hickey, *supra* note 23.

26 Martin Rosvall & Carl T Bergstrom, "Maps of Random Walks on Complex Networks Reveal Community Structure" (2008) 105:4 Proceedings of the National Academy of Sciences 1118.

27 See Lovro Šubelj, Nees Jan van Eck & Ludo Waltman, "Clustering Scientific Publications Based on Citation Relations: A Systematic Comparison of Different Methods" (2016) 11:4 PLoS ONE e0154404; Mirshahvalad et al, *supra* note 7.

may produce the most influential judgments, so we apply both clustering methods to the entire dataset, irrespective of the judgment's level in the court hierarchy. Unsurprisingly, though, judgments of higher-level courts are often both highly-cited and highly-connected (or "central") according to network measures,[28] such that these judgments have a large influence on the structure of the clusters that emerge in our analysis, and they feature prominently in the following sections.

II. EVOLUTION OF CANADIAN FAMILY LAW, 1980-2015

This section examines quantitatively the high-level features of the evolution of Canadian family law over recent decades. We begin by showing the disproportionate rise in family litigation, relative to population growth, in the 1990s. We then show how the preeminence of particular legal topics in family law have changed over time, with cases involving multiple legal topics becoming much more common beginning in the mid-1990s. To position these changes in the broad evolution of Canadian

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[28] Network centrality measures are mainly used to rank the importance of judgments. Applied to our dataset, we find a strong correlation between rankings obtained using several different network centrality measures, such that we focus on the simplest such measure—the total number of citations received by a judgment, k_{in} (also called the "in-degree centrality")—when we wish to rank-order judgments (as in table 2). Since clustering is based on grouping together (rather than rank-ordering) judgments, it can give information about broad or system-level patterns in a citation network that would not be observed by considering centralities alone. An analysis of the network centralities of the judgments in the dataset presented in this article is contained in Hickey, *supra* note 23.

family law, we apply temporal citation network clustering, which identifies five "epochs" and highlights the importance of the two key legal developments (*Moge* and the FCSG) that we examine in detail in section III.

A. INCREASE IN LITIGATION VOLUME

Canadian commentators have identified a crisis of access to justice, often connecting it to the rise of self-represented litigants.[29] Information gathered by Statistics Canada suggests that the issue is not an increase in divorce and family breakdown but instead an increase in prolonged litigation with repeated applications to court, which are especially prevalent in cases involving children and child support.[30] Most Canadian courts do not publish records of litigation volume, but fortunately the Provincial Court of British Columbia has reported the number of new family

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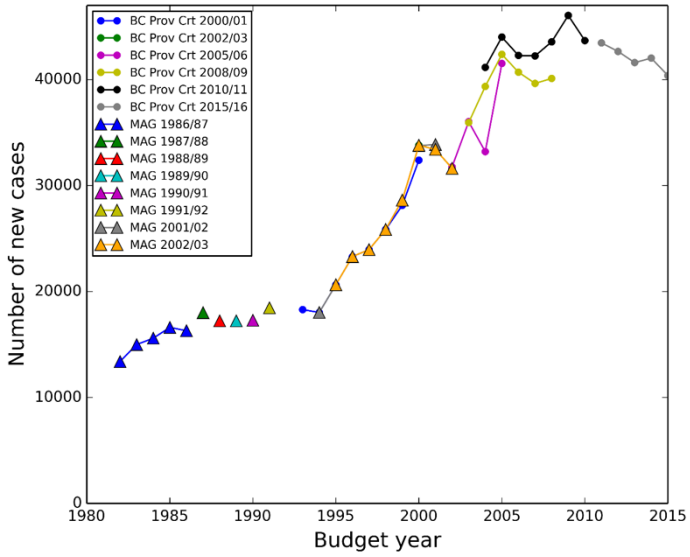
29 McLachlin, *supra* note 1; John-Paul Boyd, "'Family Justice in Canada Is at a Breaking Point' Redux" (8 March 2019), online: *Slaw* <www.slaw.ca/2019/03/08/family-justice-in-canada-is-at-a-breaking-point-redux/>; Julie Macfarlane, "The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants: Final Report" (May 2013), online (pdf): *National Self-Represented Litigants Project (NSRLP)* <representingyourselfcanada.com/wp-content/uploads/2015/07/nsrlp-srl-research-study-final-report.pdf>.

30 Mary Bess Kelly, "Family Court Cases Involving Child Custody, Access and Support Arrangements, 2009/2010" (29 March 2011), online: *Statistics Canada Juristat* <www150.statcan.gc.ca/n1/pub/85-002-x/2011001/article/11423-eng.htm>; Mary Allen, "Family Law Cases in the Civil Courts, 2012/2013" (28 April 2014), online: *Statistics Canada Juristat* < https://www150.statcan.gc.ca/n1/pub/85-002-x/2014001/article/13005-eng.htm>.

law cases and applications covering the full range of family law litigation (including applications for orders for divisions of family property, child support, spousal support, custody and access, child protection, and other issues) received by its courts over most of our time period. This is shown in fig. 2.

Figure 2: **Number of new family law cases and applications in the BC Provincial Court**



Note: Number of new family law cases and applications (including "subsequent applications" in cases initiated in a preceding year) in the BC Provincial Court, as reported by the court[31] *or the BC Ministry*

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31 Provincial Court of British Columbia, "Annual Reports" at 2000-2001, 2002-2003, 2005-2006, 2008-2009, 2010-2011, 2011-2012, and 2015-2016, online: *Provincial Court of British Columbia Court Reports*

of the Attorney General (MAG).[32] *Data points connected by line segments come from the same annual report. Data points for "BC Prov Crt 2002/03" are covered by "MAG 2002/03." Discrepancies between data from different annual reports arise from delays in data entry or changes to the method of extracting data.*[33]

Fig. 2 shows a dramatic increase in the number of new cases and applications brought annually, beginning about 1994 and peaking about 2008. This increase—from about 17,500 to about 42,500 per year, or about 250%—outstrips BC's population growth of about 130% from 1991 to 2006.[34] A similar increase is seen in our data, as shown in fig. 4a, further below.

B. EMERGENCE OF MULTI-TOPIC JUDGMENTS IN THE 1990S

In addition to the increase in the amount of litigation occurring in the 1990s, our data also reveal the rapid emergence of more complex, multi-topic judgments (judgments with two or more legal topics) in the 1990s.

<www.provincialcourt.bc.ca/news-reports/court-reports>. [www.provincialcourt.bc.ca/Archive].

32 British Columbia Ministry of the Attorney General, "Annual Report" (Victoria, BC: Ministry of the Attorney General, 1987-1992, 2002, 2003).

33 See Provincial Court of British Columbia, "Annual Report 2011-2012", *supra* note 31 at appendix 3.

34 Government of British Columbia, "2016 Census: Population and Dwelling Counts" (8 February 2017), online: *BC Stats* <www2.gov.bc.ca/assets/gov/data/statistics/people-population-community/population/pop_census_2016_highlights_population_dwellings.pdf>.

The judgments in our data bear at least one topic from the CAD classification scheme. Fig. 3 shows the twenty most frequently-appearing topics in our citation network. The grey curves show the total number of judgments with each topic in each year. The solid black curves show the number of judgments with only that topic, and the dashed black curves show the number with that topic and at least one other (the multi-topic judgments). In each panel, the solid and dashed black curves add up to the grey curve.

Panels (fig. 3a-g) show the change in the seven most frequently-appearing topics from 1970 to 2015: child support, spousal support, custody, family property, costs, child protection and domestic settlements. Before the mid-1990s, when a judgment involved the topic of child support, spousal support, custody, family property, or domestic settlements, that topic tended to be the only one in the case; however, after the mid-1990s, these topics began more often to co-occur with one another and with other topics (in fig. 6a-d and g, the dashed and solid black curves cross).[35] The rise of multi-topic judgments occurred simultaneously with the overall increase in family litigation. This is a key feature of the data that we examine in more detail in section III. The per-year numbers of judgments with less frequently-occurring topics (fig. 3h-p) remained steady or decreased over time, with the exception of restraining orders (fig. 3m) and relationship of parent

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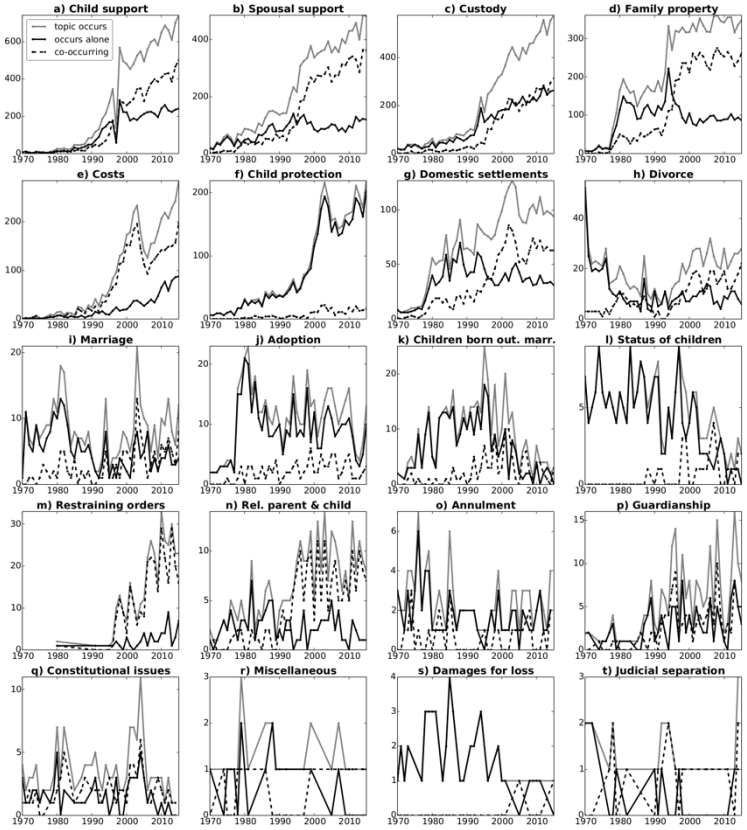
35 The emergence of multi-topic judgments is not mainly due to an increase in judgments about costs. Of all judgments with precisely two topics, only 12.5% have costs as one of the topics.

and child (fig. 3n), which increased.[36]

Figure 3: **Frequencies of legal topics in family law over time**



Note: The 20 most frequently occurring legal topics in the citation network. The x-axes show time, from 1970-2015. The y-axes show the number of judgments: associated with the indicated topic (grey curve); associated with the indicated topic and no other topic (solid black

36 Hickey, *supra* note 23 discusses other changes in family litigation revealed in fig. 3.

curve); associated with the indicated topic and at least one other topic (dashed black curve). The highest level of the CAD classification contains 20 topics, one of which, "support," is sub-divided into sub-topics for spousal support and child support. We consider spousal support and child support to be highest-level topics, giving 21 topics in total. The least frequently occurring topic, "habeas corpus involving children," is not shown but is included in our analysis.

C. TEMPORAL "EPOCHS" AND CITATION FREQUENCIES OF LANDMARK JUDGMENTS

Temporal clustering of the citation network reveals five epochs characterized by citations to thirteen SCC judgments, listed in table 2, including the ten most highly cited judgments in our data date from 1987 to 2006. The other three lie outside of this time window: the most cited post-2006 judgment and the two most cited pre-1987 judgments. We call these thirteen judgments landmarks.

Fig. 4b shows the five clusters that emerge.[37] As can be seen, each cluster dominates for several years, in that over half of the judgments issued in that time period belong to it. After a while, a new dominant cluster emerges. The five epochs are the five time periods in which the majority of judgments belong to a particular cluster.

Fig. 4c shows the statistical quantity (the "citation

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37 The number of clusters (five) was chosen using a quantitative criterion (maximization of the expected log-likelihood of the statistical model) and confirmed by several robustness checks. In particular, the main divisions between temporal epochs observed in the statistically optimal clustering (five clusters) are maintained even when using the method to extract four or six clusters. These points are described in detail in Hickey, *supra* note 23.

profile") that is primarily responsible for defining the clusters. A peak in a cluster's curve indicates that the judgments in the cluster frequently cite one or more judgments issued in the year of the peak. For example, the peak at 1999 in the curve for the fourth (star markers) cluster indicates that judgments in cluster 4 often cite one or more judgments from 1999, in that case *Bracklow*.[38] Similarly, the peak at 2006 for the fifth cluster (circle markers) indicates that judgments in cluster 5 frequently cite at least one judgment from 2006, in fact *D.B.S.* [39] The peaks in fig. 4c are earlier than the maximum values for the corresponding clusters in fig. 4b because the citations accumulate after a judgment is issued. The five epochs that emerge from the temporal clustering therefore reflect widespread judicial attention to a judgment or a group of judgments issued in a certain, earlier year.

The temporal clustering method does not directly identify key statutory changes, but transitions between clusters often emerge from such developments when judgments interpreting new legislation become landmarks. The first epoch ends with the enactment of various provincial matrimonial property statutes in the later 1970s, which enhanced wives' rights to property when the marriage broke down and superseded previous common-law approaches.[40] The shift from cluster 2 to 3 followed major changes in the *Divorce Act* of 1986, the first since

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38 *Bracklow v Bracklow*, [1999] 1 SCR 420, 1 DLR (4th) 577 [*Bracklow*].

39 *DBS v SRG*, 2006 SCC 37, [2006] 2 SCR 231 [*DBS*].

40 Julien D Payne & Marilyn A Payne, *Canadian Family Law*, 3rd ed (Toronto: Irwin Law, 2008) at 564.

1968. The *Federal Child Support Guidelines* (FCSG) were implemented in 1997, which marks the transition from cluster 3 to 4. Amendments to the FCSG effective in 2006 precede the transition from cluster 4 to 5.[41]

[…]

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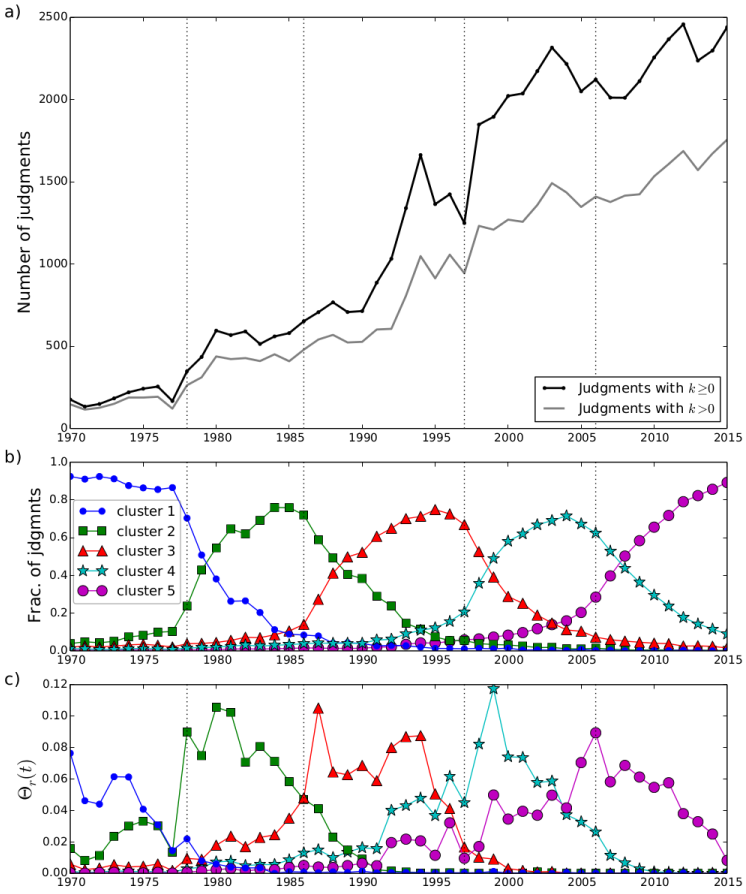
[41] While the landmark judgments most cited by each cluster (peaks in fig. 4c) occur after the important statutory change, the judgments that belong to a given cluster will also often cite judgments that pre-date the change. For instance, the y-axis values in fig. 4c for cluster 4 (star markers) and cluster 5 (circle markers) are greater than zero for 1992-1996, before the FCSG were implemented: judgments from these years are still cited by judgments belonging to clusters 4 and 5, although not as frequently as the judgments responsible for the peaks in fig. 4c for those clusters.

Figure 4: **Number of family law judgments per year and five temporal epochs**

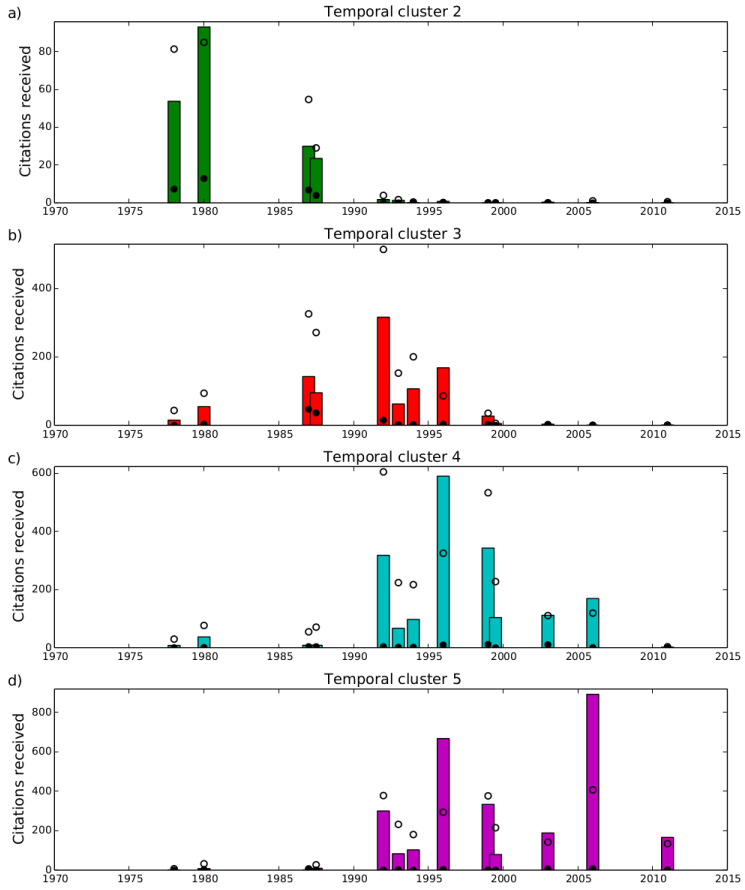


Note: a) Number of family law judgments issued per year: regardless of whether the judgment makes or receives a citation (solid black curve) (k ≥ 0); that make or receive at least one citation (grey curve) (k > 0). b) The fraction of judgments belonging to each of the five temporal clusters, in each year, t (for any t, the five y-axis values sum to 1). c) The probability, $\Theta_r(t)$, that a judgment belonging to cluster r (where r ranges from 1 to 5) makes a citation to a judgment issued in year t. $\Theta_r(t)$ is normalized such that it sums to 1 for a given cluster, r, across all years t, i.e., $\sum_{t_{min}}^{t_{max}} \Theta_r(t) = 1$. Peaks in a given coloured

curve in panel (c) indicate that the judgments belonging to the corresponding cluster (depicted in panel (b)) have a high probability of citing one or more judgments that were issued in the year of the peak. Dashed vertical lines in all panels indicate years of significant legislation. 1978 saw the beginning of a two-year wave of new provincial matrimonial property acts. The federal Divorce Act *was overhauled in 1986. The FCSG came into effect in 1997 and were modified in 2006.*

[…]

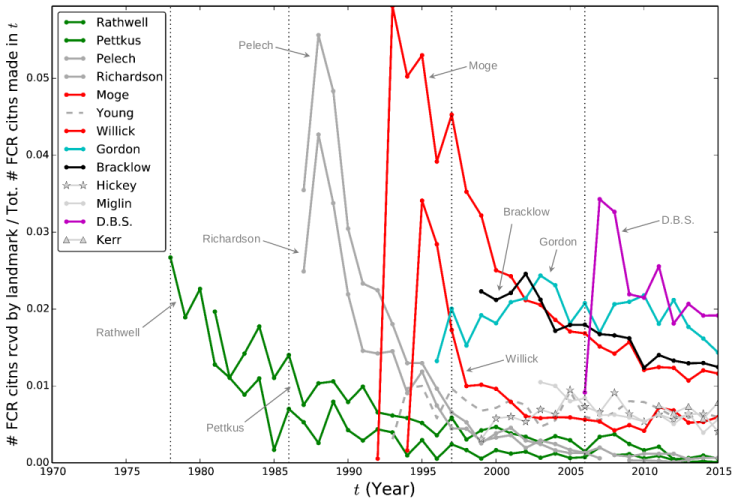
Figure 5: **Citations received by landmarks from judgments in temporal clusters 2 to 5**



Note: Each panel shows how often each of the thirteen landmark SCC judgments listed in table 2 is cited by the judgments belonging to a particular temporal cluster. Vertical bars show the number of "Followed" citations; e.g., in (a) Pettkus *(positioned at 1980 on the x-axis) received approximately 100 "Followed" citations from judgments in temporal cluster 2. Closed circles indicate the number of "Distinguished" or "Not Followed" citations, and open circles the number of "Considered" or "Referred to" citations (right y-axis). Of the two 1987 landmarks,* Pelech *is on the left and Richardson on the*

right, and of the two 1999 landmarks, Bracklow *is on the left and* Hickey *on the right.*

Figure 6: **Scaled citation frequencies of landmark judgments**



Note: Number of non-"negative" (FCR) citations received per year t by the thirteen landmark judgments listed in table 2, scaled by the total number of FCR citations made by all judgments issued in year t. The y-axis therefore represents the "share" of FCR citations made by all judgments in year t that went to a given landmark. This scaling allows a comparison of landmark citation frequency behaviour over several decades during which the number of nodes (judgments) and the number of links (citations) in the citation network increased. Landmarks are listed in chronological order in the legend. Dashed vertical lines indicate the same changes in family legislation as in fig. 4. A curve's colour indicates the cluster in fig. 5 that is most strongly characterized by the landmark.

Temporal clusters tend to be determined not by one landmark judgment but by a certain combination of them. Certain legal issues and ways of approaching them define each epoch. Fig. 5 shows the salience of different sets of

judgments in the four epochs from 1980 to 2015, in terms of the number of times the landmark SCC judgments are cited by the judgments in clusters 2 through 5.[42] Cluster 2, which spans most of the 1980s, features references to *Pettkus v Becker* (1980) and *Rathwell v Rathwell* (1978), cases that addressed the division of property.[43] The cases *Pelech v Pelech* (1987) and *Richardson v Richardson* (1987) are often cited by judgments in cluster 3, but also receive a significant number of "negative" ("Distinguished" and "Not Followed") citations from judgments in this cluster.[44] These cases articulated a "clean break" approach to spousal support that was initially influential but was superseded five years later by the dominant case in cluster 3, *Moge v Moge* (1992), which reinterpreted the principles behind spousal support in light of the new 1986 *Divorce Act*.[45] The second-most cited case in cluster 3, *Gordon v Goertz* (1996), concerned a parent's wish to change an order for custody and access in order to move to Australia with the child. The epoch corresponding to cluster 4 (spanning most of the 2000s) shows the continued importance of *Gordon*, the persistence of references to *Moge*, and the appearance of *Hickey*, which evaluated revising intertwined orders for child and spousal

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42 Cluster 1 predates our period of interest, from 1980 to 2015.

43 *Pettkus v Becker*, [1980] 2 SCR 834, 117 DLR (3d) 257 [*Pettkus*]; *Rathwell v Rathwell*, [1978] 2 SCR 436, 83 DLR (3d) 289 [*Rathwell*].

44 *Pelech v Pelech*, [1987] 1 SCR 801, (1987) 38 DLR (4th) 641 [*Pelech*]; *Richardson v Richardson*, [1987] 1 SCR 857, 38 DLR (4th) 699 [*Richardson*].

45 *Moge, supra* note 15.

support.[46] The fifth epoch featured the 2006 landmark *DBS*, which concerned retroactive orders for child support. The open circles in fig. 5d—for "Considered" and "Referred to"—stayed high for *Moge* and *Hickey*: even when courts were not actually following these cases they still referred to them.

[…]

46 *Hickey v Hickey*, [1999] 2 SCR 518, 172 DLR (4th) 577 [*Hickey*].

Table 2: Set of Thirteen SCC Landmark Judgments

Landmark	*Citation*	*F*	*C*	*R*	*D*	*N*	*Total*
Moge	[1992] 3 SCR 813	937	987	516	19	0	2459
Gordon	[1996] 2 SCR 27	1428	441	265	16	1	2151
Bracklow	[1999] 1 SCR 420	704	571	376	16	0	1667
DBS	2006 SCC 37	1062	328	200	8	0	1598
Willick	[1994] 3 SCR 670	307	357	242	4	0	910
Young	[1993] 4 SCR 3	215	374	237	6	0	832
Pelech	[1987] 1 SCR 801	183	338	104	59	0	684
Hickey	[1999] 2 SCR 518	188	223	226	0	0	637
Richardson	[1987] 1 SCR 857	137	316	83	40	5	581
Miglin	2003 SCC 24	304	152	103	17	0	576

Pettkus	[1980] 2 SCR 834	196	199	92	21	0	508
Kerr	2011 SCC 10	169	89	50	2	0	310
Rathwell	[1978] 2 SCR 436	88	140	37	8	0	273

*Note: The thirteen landmark judgments consisting of the ten most cited judgments in the citation network, plus the two most cited pre-1987 judgments (*Rathwell and Pettkus*) and the most cited post-2006 judgment (*Kerr*). The columns F, C, R, D, and N indicate the number of "Followed", "Considered", "Referred to", "Distinguished", and "Not Followed" citations received by each judgment. The last column shows the total number of citations received by each judgment.*

Fig. 6 shows patterns in how frequently the landmark judgments were cited favourably or neutrally (FCR citations). Many of the landmark cases were initially cited frequently, with citations dropping off as new landmarks took their places. *Pelech* and *Richardson* had short-lived high impact, while *Moge* had a longer-lived high impact. *Bracklow* had a longer lasting but lower impact, similar to *Pettkus*. Other judgments that did not peak and decline, such as *Young* and *Gordon*, have a longer duration of impact. A quantitative comparison of the level and duration of impact of the landmarks is done by fitting an exponentially decaying function $y = Ae^{-t/\tau}$ to the curves in fig. 6. Table 3 lists the seven landmarks for which a reasonable fit of this function can be obtained, along with the corresponding values of the parameter τ. This parameter quantifies the rate of decline of the landmark's citation frequency, where a larger value of τ corresponds

to a slower decline. Judgments with a large peak value in fig. 6 therefore have a high level of impact, and judgments with a large value of τ have a long duration of impact.[47]

Table 3: Decay Constants of Landmark Citation Frequencies

Landmark	τ
Rathwell (1978)	9.1 ± 0.8
Pettkus (1980)	11.5 ± 0.8
Pelech (1987)	4.4 ± 0.2
Richardson (1987)	6.7 ± 0.3
Moge (1992)	12.8 ± 0.7
Bracklow (1999)	23 ± 2
DBS (2006)	14 ± 4

Note: Values of τ obtained from least-squares fits (Levenberg-Marquardt algorithm)[48] *of the function ln(y) = ln(A) − t/τ, for seven landmarks with decaying citation frequencies. Error values are equal to the square-root of the variance estimate for the fitted parameter τ.*

Figs. 5 and 6 point to important transitions in Canadian family law. The first epoch ends at the point that provincial legislation provided remedies that made

47 Although the citation frequency for *Willick* has a peak and decline, it is not included in table 3 because the exponential function does not fit well. The citation frequency decreases rapidly but then levels out as of 2002, whereas an exponential function would continue to decay after 2002.

48 William H Press et al, *Numerical Recipes: The Art of Scientific Computation*, 3rd ed (Cambridge, UK: Cambridge University Press, 2007).

previous common law approaches less relevant. *Murdoch v Murdoch*,[49] *Rathwell*, and *Pettkus* drew attention to the legal vulnerability of wives whose names did not appear on land titles and raised the spectre of a proliferation of trust-based litigation. New provincial legislation rendered this type of litigation less important for legally married spouses, but the doctrines of resulting and constructive trust remained relevant for legally unmarried couples.

The transition from the second to the third epoch begins with the overhaul of the federal *Divorce Act* in 1986. The first SCC judgments following the 1986 changes were the *Pelech* trilogy issued in 1987: *Pelech*, *Richardson*, and *Caron*.[50] In these cases, the Court adopted a "clean break" approach to spousal support claims, refusing to reopen support agreements that did not provide for long-term support unless a radical change in circumstances had taken place. Initially highly cited, these cases were largely superseded by *Moge v Moge* (1992). *Moge* marks a turning point in Canadian family law, as it not only revised the law on spousal support but established the broader principle that the *Divorce Act* was intended to promote the equitable sharing of the economic consequences of marriage and marital breakdown. The transition from the second to the third epoch is therefore marked by the short-lived but high-impact *Pelech* trilogy cases followed by the spike in citations to *Moge*, which had equally high impact but a longer duration and dominates the third epoch as shown in fig. 5. *Moge*'s longevity is evident in its high decay

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49 [1975] 1 SCR 423, 41 DLR (3d) 367.

50 *Caron v Caron*, [1987] 1 SCR 892, (1987) 38 DLR (4th) 735 [*Caron*].

constant, τ (see table 3).

Citations to *Willick* (1994) and *Gordon* (1996) also characterize the judgments in temporal cluster 3. Fig. 6 shows that *Willick*, like *Moge*, peaked and then tapered off. *Moge*, however, has remained highly cited: the open circles in figs. 5c and d show that it continued to be "considered" and "referred to," even when judges were more conspicuously "following" other cases. While principles articulated in *Willick*—an application to vary child support—continued to be relevant in spousal support variation cases, *Willick* undoubtedly became less important with the passage of the FCSG in 1997, hence its rapid decay from its peak in fig. 6.[51]

The fourth temporal epoch, in the 2000s, is marked by the persistence of *Moge*, references to *Gordon* (SCC, 1996), the appearances of *Bracklow* [52] (fig. 5c taller bar) and *Hickey* (shorter bar) in 1999, and the beginning of the rise in citations of *D.B.S*. *Bracklow* did not constitute a transition point because it elaborated on the *Moge* principles in the context of a spouse who had become unemployable due to illness. About 60% of judgments that cite *Bracklow* also cite *Moge*.[53] *Hickey* (1999), likewise,

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51 *Willick v Willick*, [1994] 3 SCR 670, 119 DLR (4th) 405 [*Willick*]. See also fig. 5.

52 *Bracklow v Bracklow*, [1999] 1 SCR 420, 1 DLR (4th) 577 [*Bracklow*].

53 Carol Rogerson predicted that because *Bracklow* offered no particular test but made spousal support extremely discretionary, it was unlikely to be as influential as *Moge* or *Pelech*. This hypothesis is borne out in our data. See Carol Rogerson, "Spousal Support Post-Bracklow: The

followed *Moge* and *Bracklow* in speaking of the equitable division of the economic consequences of marriage, this time in the context of an application to vary both spousal and child support in the face of inflation and changes in the children's needs. *Hickey*'s ruling that inflation constitutes a significant change in circumstances for the purposes of reassessing support awards has evidently remained consistently important, but in a limited way.

As fig. 6 shows, *Gordon* (1996) and *Young* (1993) maintain fairly constant scaled citation frequencies over time. Both were difficult, fact-driven cases concerning changes to custody and access orders. *Gordon* concerned moving a child to Australia. In *Young*, the children and their mother, the custodial parent, objected to the father's religious instruction.[54] *Young* appears as a lesser landmark in the data (see fig. 5). Citations to *Gordon* have been frequent but have not risen or fallen dramatically: apparently it reflected an increasingly significant problem for former spouses and their children. Evidently the judicial reasoning in *Young* and *Gordon*, as in *Hickey*, had not been superseded by case law or legislation by 2015, when our dataset ended. The beginning of the fourth epoch, then, is defined most significantly by the appearance of the FCSG.

The case whose appearance, in fig. 6, coincides with the beginning of the fifth epoch is *DBS*, issued in 2006. This judgment decided four appeals pertaining to

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Pendulum Swings Again?" (2001-02) 19 Can Fam LQ 185.

54 *Young v Young*, [1993] 4 SCR 3, 108 DLR (4th) 193 [*Young*].

retroactive orders for child support pursuant to the FCSG or the new provincial guidelines passed in their wake. The SCC specified the principles governing retroactive child support orders and differences between the federal and provincial legislation. The combination of the release of *DBS* and modifications to the FCGS accounts for the transition to the fifth epoch.[55]

III. CHANGES IN LAW AND THE 1990S FAMILY LITIGATION SURGE

In the third epoch, both the volume of family litigation and the number of judgments with multiple legal topics increased rapidly. The 1992 SCC landmark *Moge* and the 1997 Federal Child Support Guidelines emerge as key. In this section we examine the changes in family law that underlay the temporal clusters to which this methodology draws attention.

A. MOGE'S INFLUENCE: PROVINCIAL DIFFERENCES AND CONNECTIONS BETWEEN SPOUSAL SUPPORT AND FAMILY PROPERTY

Moge is our citation network's most significant landmark: it is the most highly cited judgment (see table 2), it has significant impact as measured by its peak in fig. 6, long

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55 SOR/2005-400, published December 14, 2005 and effective May 1, 2006. These amendments modified the FCSG table amounts, the definition of "extraordinary expenses", the manner of comparing household incomes under the undue hardship provisions, and the method of determining the incomes of foreign residents. See Payne & Payne, *supra* note 40 at xxv.

duration of impact as measured by the decay constant τ in table 3, and it received roughly as many "neutral" citations as the dominant judgments of the fourth and fifth epochs.

The surge in family litigation in fig. 4 began around late 1990, when leave to appeal was granted from the judgment of the Manitoba Court of Appeal.[56] In granting leave, the SCC signalled its willingness to reexamine the law on spousal support—to reconsider such factors as the dependencies developed over a long "traditional" marriage and the need to sever the financial ties between people who had been divorced for some time. The Court heard the case in April 1992 and issued its decision in mid-December.

As shown in fig. 7, the rise in the number of family law cases in each province between 1992 and 1994 correlates with the number of citations to *Moge* in 1994 (this holds true regardless of whether Ontario and British Columbia are included).[57] While correlation does not necessarily imply causation, such a proportionality can arise if there is a causal link between *Moge* and the increase in number of judgments.

[…]

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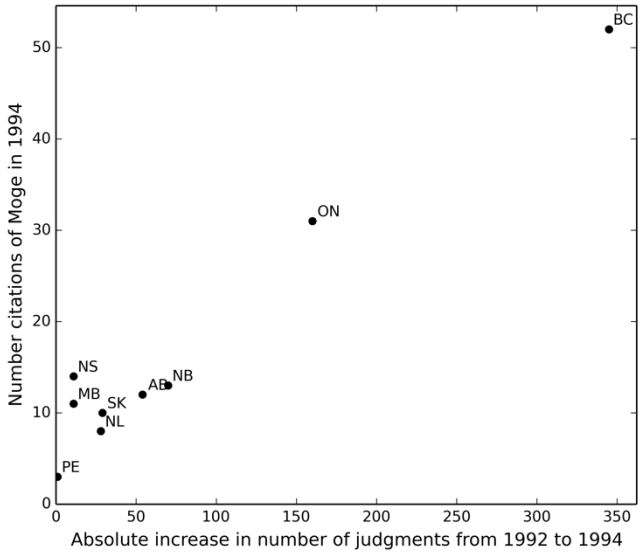
56 *Moge v Moge* (1990), 70 DLR (4th) 236, 64 Man. R. (2d) 172 (CA); "Docket 21979, *Andrzej Moge v Zofia Moge*" (18 July 1994), online: *Supreme Court of Canada* <https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=21979>.

57 fig. 7 includes cases with ($k \geq 0$).

Figure 7: **Citations of *Moge* vs absolute increase in judgments, by province**



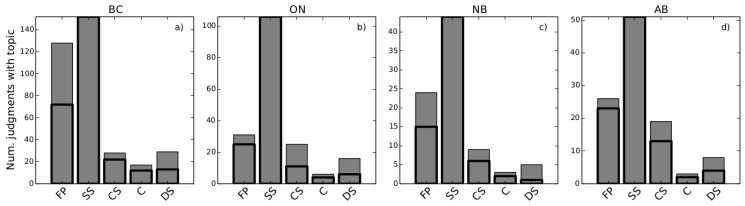
Note: Number of citations of Moge *made by judgments issued in 1994 versus the size of the absolute increase in number of judgments in our full dataset ($k \geq 0$) from the year of the release of* Moge *(1992) to the year of the mid-1990s peak in family law judgments (1994), by province. Correlation coefficient $r = 0.97$ (all data points), $r = 0.75$ (BC and ON excluded).*

Fig. 7 is not scaled for population. Unsurprisingly, Prince Edward Island (PE) had both the smallest increase in number of judgments and the fewest citations of *Moge*. However, in 1994 Ontario had almost three times BC's population but far fewer family judgments and citations of *Moge*. Alberta (AB) had more than 3.5 times the population of New Brunswick (NB), but New Brunswick had more family judgments and more citations of *Moge*.

Moge's interplay with provincial statutes deserves closer examination.

The provinces with the most citations of *Moge* before 1998 (when the FCSG introduce confounding effects) are BC, Ontario, New Brunswick and Alberta. Fig. 8 shows, for these provinces, the number of cases that cite *Moge* and pertain to at least one of family property, spousal support, child support, custody and access, or domestic settlements.

Figure 8: **Topics of judgments that cite *Moge*, by province**



Note: Filled (grey) bars show the number of pre-1998 judgments that cite Moge *and that have the topic indicated on the x-axis, where "FP" is family property, "SS" is spousal support, "CS" is child support, "C" is custody and access, and "DS" is domestic settlements. Open (black) bars show the number of judgments with the indicated topic that also have the topic of spousal support.*

Spousal support, of course, is a dominant concern in these cases, but some cases not tagged as pertaining to spousal support also cite *Moge*. The marked differences that fig. 8 reveals between BC and Ontario call for attention. BC had almost as many family property judgments as judgments about spousal support; Ontario had—both absolutely and relatively—far fewer family property judgments. BC also had far more cases that concerned only family property but that cited *Moge*.

The large number of family property judgments in BC appears to be due at least in part to BC courts applying *Moge* principles to make unequal divisions of property in order to provide lump-sum spousal maintenance. Of the pre-1998 judgments in our dataset that cite *Moge* and have the topic of family property, the four most highly cited are from BC. In two of these cases, the BC Court of Appeal relied on *Moge* in granting lump-sum maintenance in the form of unequal property division, pursuant to a statutory provision that permitted doing so if equal division would be unfair given various factors, including the duration of the marriage, the extent to which the property was acquired by one spouse through inheritance or gift, each spouse's need to be economically self-sufficient, and "any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse."[58] While the role of *Moge* in justifying lump-sum maintenance through unequal property division in BC has been noted before, it does not appear to have been previously examined empirically.[59]

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58 *Family Relations Act*, RSBC 1979, c. 121, s. 51; *Lodge v Lodge* (1993), 79 BCLR (2d) 360, 48 RFL (3d) 365 (CA); *Toth v Toth* (1995), 13 BCLR (3d) 1, 17 RFL (4th) 55 (CA). The third case, *Young v Young* (1990), 50 BCLR (2) 1, 29 RFL (3d) 113 (CA), [1993] 4 SCR 3, mainly concerned child custody and access, although property division and spousal support were addressed. *Moge* was cited at the SCC level regarding the overall economic impact of divorce on women. In the fourth case, between unmarried parties, *Peter v Beblow*, [1993] 1 SCR 980, 101 DLR (4th) 621, the Court expressed its agreement with *Moge* principles while granting a constructive trust remedy.

59 See Rogerson, *supra* note 53.

The BC *Family Relations Act* broadly defined the property to be divided and invited courts to consider many factors justifying unequal division. Ontario, however, more narrowly defined the property to be divided (excluding most gifts and inheritances, for example, and property brought into the marriage). The province likewise required equal division unless it would be "unconscionable," having regard to various factors, many of which had to do with one partner's bad faith with respect to the assets.[60] Unconscionability is a higher threshold than unfairness, and since fewer contentious assets tended to be divided in Ontario, the statutory invitation to consider *Moge* principles appears to have been less compelling than in BC. Of the pre-1998 Ontario cases that cite *Moge*, division of family property was not addressed in the two that were themselves most cited, *Elliot v Elliot* and *Robinson v Robinson*, which suggests the lack of a linkage between *Moge* and property division in Ontario.[61] While the categories of property subject to division differed in New Brunswick and Alberta, both provinces' statutes had lower barriers to unequal property division than in Ontario ("not just and equitable" in Alberta,[62] and "inequitable" in New Brunswick[63]); similarly, the number of judgments involving the topic of division of family property relative to the number of judgments involving spousal support is

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60 *Family Law Act*, RSO 1990, c F-3, ss. 4 & 5.

61 *Elliot v Elliot* (1993), 15 OR (3d) 265, 106 DLR (4th) 609 (CA); *Robinson v Robinson* (1993), 15 OR (3d) 485, 107 DLR (4th) 78 [*Robinson*].

62 *Matrimonial Property Act*, RSA 1980, c. M-9, ss. 3-8.

63 *Marital Property Act*, SNB 1980, c M-1, ss. 1, 3, 6-9.

larger in these provinces than in Ontario.

In summary, *Moge* preceded a significant increase in the number of family law judgments. In most provinces, the size of this increase correlates strongly with the number of 1994 judgments citing *Moge*. *Moge* also preceded the mid-1990s emergence of judgments with multiple legal topics. Fig. 8 shows provincial variation in the development of the post-*Moge* jurisprudence, including a large number of BC judgments concerning family property. BC judges appear to have relied on *Moge* to divide property unequally to compensate for economic disadvantages arising from marriage. In Ontario, spousal support and property division tended to be decided separately, probably largely because the legislation did not render unequal property division as ready a tool in addressing spousal support. *Moge* principles also influenced child support law. In the next section, we examine the role of the *Federal Child Support Guidelines* in the emergence of multi-topic judgments involving child support.

B. INFLUENCE OF THE FEDERAL CHILD SUPPORT GUIDELINES: CO-OCCURRENCE OF CHILD SUPPORT WITH OTHER LEGAL TOPICS

The legal developments of the 1990s led to the tying together of multiple legal topics, indicating an increase in the complexity of family litigation. Before exploring the co-occurrence of child support with other topics, however, we consider what may appear an anomalous feature in the data: the decline and rise in child support judgments in the mid-1990s.

Passed as a regulation pursuant to the *Divorce Act*,

the *Federal Child Support Guidelines* came into effect on May 1, 1997 and changed the law substantially with the goal of making child support more standardized. A table defined amounts of child support based on the paying parent's income, and additional rules took account of other circumstances. Whereas child support awards made before May 1997 were deductible by the paying parent and taxable to the recipient, amounts awarded after May 1, 1997 were neither deductible nor taxable.[64]

Our dataset seems to hint at how family lawyers anticipated and responded to the FCSG. Between about 1994 and 1997, the number of judgments citing no other judgments ($k = 0$)—usually trial court decisions—dropped, while those that did cite other judgments stayed about the same (fig. 4a). These $k = 0$ cases then multiplied after the FCSG came into force. Likewise, cases concerning child support and custody increased in the early 1990s, dropped around 1997, and then jumped up dramatically in 1998, growing less dramatically to 2015 (figs. 3a and c). In the transition period from 1994 to 1999, the number of child support judgments issued monthly varied considerably, as shown in fig. 9. This was the period when the guidelines were being discussed, anticipated, and then finally known and applied—especially the table amounts. In March 1996, the federal budget outlined the guidelines, explaining when they would come into effect and their tax implications.

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64 *The Income Tax Budget Amendments Act*, 1996, SC 1997, c 25, ss 8-12; Government of Canada, *Budget 1996: The New Child Support Package* (6 March 1996) (Chair: Paul Martin); Faye L Woodman, "Tax Aspects of the New Child Support Guidelines: One Year Later" (1998) 15 Can Fam LQ 221.

Until early 1997, Canadian courts continued to issue about 35 judgments per month on child support. The number of child support judgments issued began to decline as the *Divorce Act* amendments were passing into legislation between November 1996 and February 1997.[65] A nadir of three judgments for all of Canada was reached in August 1997.[66]

The FCSG regulation passed on April 8 and took effect on May 1, 1997, with no complicated transitional provisions: orders issued after May 1, 1997 were made under the new regulations. The 1997 decline in the number of child support judgments issued may reflect hard-to-measure factors such as lawyers waiting until they understood the implications of the regulations before applying for new orders, which then would have taken time to be processed by courts. Early 1998 brought a huge increase in the number of judgments, which climbed to a new post-guidelines high of about 65 judgments per month, with seasonal fluctuations. These effects are likely the result of uncertainties about how the new rules would apply and the need to navigate the new regime's focus on proving and calculating payers' incomes, rather than simply

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65 *House of Commons Journals*, 35-2, No 101 (18 November 1996) at 861–862 (third reading); Senate Journals, 35-2, No 71 (13 February 1997) (third reading); *An Act to Amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act, the Garnishment, Attachment and Pension Diversion Act and the Canada Shipping Act*, SC 1997, c. 1 [*Divorce Amendment Act*, 1997].

66 An annual low in July or August is normal in our data, but the February 1997 level is much lower than the levels in February 1995 and February 1996.

assessing children's expenses.[67] Judges also may have taken advantage of the winter recess to complete their judgments on the new issues these cases presented.

In sum, then, the spike in judgments in early 1998 probably arose from a combination of strategic, institutional, and legal factors. But after the spike, the number of applications heard in court stayed high.

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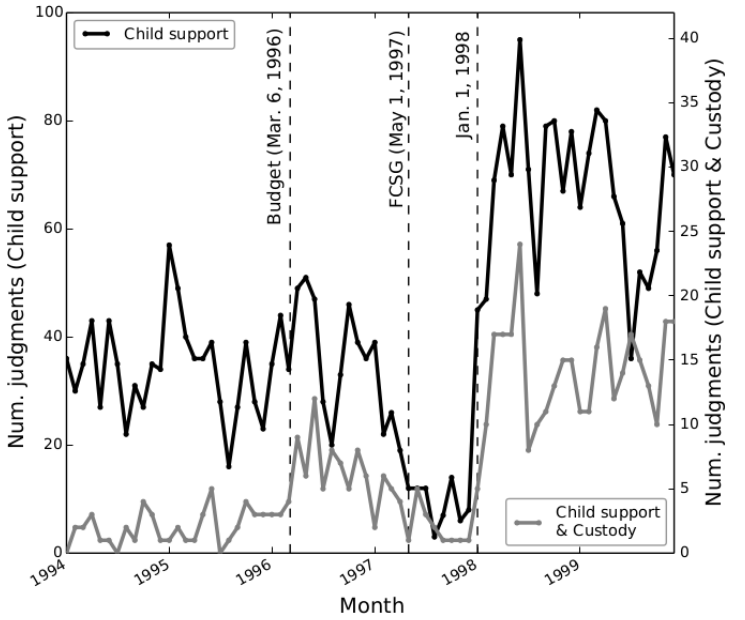
[67] Hypotheses such as parties seeking tax advantages from the new regulations, courts introducing case management practices, or lawyers for unmarried couples waiting for corresponding provincial legislation to amend the rules applicable in these cases do not seem to account for the surge in litigation in 1998, as when they occurred at all, they occurred unevenly across the provinces over subsequent years.

Figure 9: **Monthly number of child support judgments before and after FCSG**



Note: Number of judgments ($k \geq 0$) with the topic of child support, and number of judgments ($k \geq 0$) with the topics of both child support and custody and access. The dashed lines indicate the publication date of the 1996 Federal Budget (Mar. 6, 1996), the date the Federal Child Support Guidelines *came into effect (May 1, 1997), and the beginning of the 1998 taxation year (Jan. 1, 1998).*

In section III.A, we identified different effects in different provinces of *Moge*'s linkage of spousal support to family property. The FCSG were of course federal rules, and their impact on co-occurrence is appreciable across the country. Before 1994, only about 5-10% of judgments on custody and access, spousal support and family property also involved child support (see fig. 10). Since 1997, more than 30% of cases on these topics have involved child

support as well. The co-occurrence of custody and access with child support initially increased around March 1996, when the FCSG were announced in the federal budget, with the news that the guidelines would adjust support amounts in cases of split or shared custody.[68] Concern about how this would actually work seems reflected in the preeminence of citations to *Levesque* (AB CA, 1994) in judgments from 1994 to 1997 involving both child support and custody and access.[69]

Levesque apportioned support between two income-earning parents, considering the costs of custody and access and adjusting for income tax consequences. Even before the FCSG, then, *Levesque* anticipated the coming changes and called for judges to consider proposed custody arrangements more carefully. Cases involving the co-occurrence of child support with spousal support (solid black curve) and family property (grey curve) also began to rise in 1995. These increases may be due to the combined influence of *Moge*, which provided that an equitable sharing of the economic consequences of marriage and divorce "can be achieved in many ways: by spousal and child support, by the division of property and assets or by a combination of property and support entitlements",[70] and *Willick* (1994), which closely followed the *Moge* approach.

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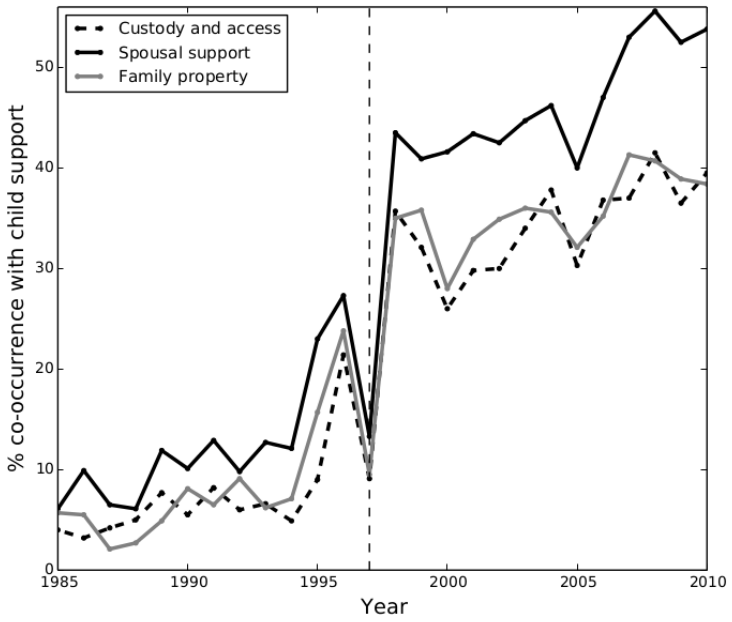
68 Government of Canada, *supra* note 64.

69 In judgments with these topics, *Levesque v Levesque* (1994), 20 Alta LR (3d) 429, 116 DLR (4th) 314 (CA) [*Levesque*] was the most-cited case in 1995 judgments (4 citations), the second most-cited in 1996 (7 citations—*Moge* had 9), and the most-cited in 1997 (6 citations).

70 *Moge*, *supra* note 15 at para. 46.

Figure 10: **Co-occurrence of various topics with child support, before and after FCSG**



Note: Percentage of judgments ($k \geq 0$) with the topic indicated in the figure legend that also involve the topic of child support. The dashed line is at 1997, the year the FCSG came into effect.

In the remainder of this section, we use the thematic clustering analysis introduced in section I.B to probe how the implementation of the FCSG in 1997 linked together child support and custody and access (shown in fig. 10). This method finds clusters of judgments with similar topics, based purely on the citation structure of the network. For example, the largest cluster (thematic cluster 1) contains many judgments with the topic of custody and access, while clusters 2 and 3 contain many judgments with the topics of child protection and child support

respectively. The clustering results allow us to infer which issue in a multi-topic judgment is dominant and which are secondary.[71] For example, if a judgment that has both the topics of custody and access and child support is assigned by the thematic clustering method to cluster 1, then we infer that the judgment's dominant topic is custody and access, with child support secondary. Similarly, a different judgment that has the same two topics but that is assigned to cluster 3 would have child support as its dominant topic, and custody and access secondary. Fundamentally, this method works because a judge with a difficult custody and access issue but a straightforward question of quantum of support will tend to cite more cases (thus generating more links in our dataset) while wrestling with custody and access: our method will identify the judgment's dominant topic as custody and access with child support secondary. The method identifies not the issue that was necessarily more important to the parties but the one that rested on more analysis of past cases.

Examining the set of judgments involving custody and access and at least one other topic reveals an approximately equal number of judgments in which: (i) custody and access is dominant and child support or

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[71] We first apply the thematic clustering method, using only the citation structure of the network. Then, to verify our results, we examine the judgments in each cluster. It turns out that each cluster is indeed dominated by a certain topic or set of topics, which, unsurprisingly, align with the topics assigned by the CAD editors but are not determined by them (and they do not purport to identify dominant or secondary topics in cases). The thematic clustering method and our dominant/secondary topic inference are explained in extensive detail in Hickey, *supra* note 23.

another financial matter is secondary, and (ii) a financial matter (child support, spousal support, or division of family property) is dominant with custody and access secondary.[72] The significant presence of custody and access as a subject of litigation in cases that are primarily about financial matters invites an examination of the aspects of the FCSG that may have inspired or facilitated this phenomenon.

Table 4 lists the ten most cited judgments in which child support is the dominant topic and custody and access is secondary. Three of these judgments, *Green*, *Froom* and *Spanier*, concerned section 9 of the FCSG, which allows for a reduction of the paying parent's child support obligation if the parent cares for the child at least 40% of the time (the so-called "40% threshold").[73] These cases explored aspects of the operationalization of these provisions, such as how to reduce the amounts and whether to use hours or days in the calculation. In two other judgments in table 4, *Omah-Maharajh* and *Dergousoff*, high-income fathers sought to adjust custody and access terms in order to reduce their payments under the FCSG.[74] The other five judgments in table 4 are more strictly about

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72 See Hickey, *supra* note 23 for further details.

73 FCSG, SOR/97-175, s 9; *Green v Green*, 2000 BCCA 310, 75 BCLR (3d) 306 [*Green*]; *Froom v Froom* (2005), 11 RFL (6th) 254, 194 OAC 227 [*Froom*]; *Spanier v Spanier* (1998), 52 BCLR (3d) 343, 40 RFL (4th) 319 (SC) [*Spanier*].

74 *Dergousoff v Dergousoff*, (1999), 177 Sask R 64, 48 RFL (4th) 1 (CA) [*Dergousoff*]; *Omah-Maharajh v Howard*, 1998 ABQB 81, 58 Alta LR (3d) 236 [*Omah-Maharajh*] (in which the father argued that his high access costs should be considered an "undue hardship" that would justify reducing the child support amount).

financial calculations and do not speak much to the relationship between child support and custody and access.[75] In these second five cases, the secondary topic of custody and access appears to be more distinct from child support than in the first five.

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75 See *Tauber v Tauber* (2000), 48 OR (3d) 577, 187 DLR (4th) 1 (CA); *Cornelissen v Cornelissen*, 2003 BCCA 666, 21 BCLR (4th) 308; Homsi v Zaya, 2009 ONCA 322, 65 RFL (6th) 17; *Meade v Meade* (2002) 31 RFL (5th) 88 (ON SCJ); *Titova v Titov*, 2012 ONCA 864, 29 RFL (7th) 267.

Table 4: Ten Most Cited Judgments with Dominant Topic Child Support and Secondary Topic Custody and Access

Judgment	*Citation*	*Court*	k^{in}	*Income*
Green v Green	2000 BCCA 310	BC-Ap	100	82,000
Homsi v Zaya	2009 ONCA 322	ON-Ap	83	19,000*
Tauber v Tauber	(2000) 48 O.R. (3d) 577	ON-Ap	58	2,500,000
Dergousoff v Dergousoff	(1999) 177 Sask R. 64	SK-Ap	44	179,000
Meade v Meade	(2002) 31 RFL (5th) 88	ON-Tr	41	53,000*
Titova v Titov	2012 ONCA 864	ON-Ap	26	98,000
Froom v Froom	(2005) 11 RFL (6th) 254	ON-Ap	26	46,000
Omah-Maharajh v Howard	1998 ABQB 81	AB-Tr	23	219,000
Spanier v Spanier	(1998) 40 RFL (4th) 329	BC-Tr	19	93,000
Cornelissen v Cornelissen	2003 BCCA 666	BC-Ap	18	522,000

Note on table 4: The column "Court" indicates province and court level (trial, "Tr", or appellate, "Ap") for the judgment. The last column shows income of the parent paying child support, rounded to nearest $1000.
** Income imputed by judge for purpose of calculating child support amounts.*

The eleven most cited cases in which custody and access is dominant and child support secondary appear in table 5. We consider eleven rather than ten judgments, because the most cited judgment, *Talbot v Henry* (1990), pre-dates the FCSG.[76] As table 5 shows, in the ten post-FCSG cases in which custody and access was dominant and child support secondary, the median income of the paying parent ($37,000) was significantly lower than in the cases in which the dominant and secondary topics were reversed (median $95,500, in table 4). As one would expect from a reliable clustering method, these cases centred on the appropriateness of the actual custody and access arrangements, with financial matters secondary. Five of these cases primarily concerned ordering shared parenting when the parents were uncooperative or experiencing considerable conflict.[77] Another two cases considered terminating the father's access in situations of even greater

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[76] *Talbot v Henry*, [1990] 5 WWR 251, 84 Sask R 170 (CA) [*Talbot*]. The case concerned the test for a change of circumstances that would justify reopening a child support order, a matter rendered moot by the FCGS.

[77] *Lawson v Lawson* (2006) 81 OR (3d) 321, 214 OAC 94; *Ladisa v Ladisa* (2005), 193 OAC 336, 11 RFL (6th) 50; *Stewart v Stewart* (1994) 41 BCAC 213, 2 RFL (4th) 53 [*Stewart*]; *Ursic v Ursic* (2006), 32 RFL (6th) 23, 149 ACWS (3d) 103 (ON CA); *Baker-Warren v Denault*, 2009 NSSC 59, 277 NSR (2d) 271.

conflict.[78] The three other post-FCSG judgments in table 5 addressed moving with the child to another jurisdiction.[79]

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78 *Jennings v Garrett* (2004), 5 RFL (6th) 319, [2004] OTC 460 (SCJ); *Dixon v Hinsley* (2001), 22 RFL (5th) 55 (ON CJ).

79 *Falvai v Falvai*, 2008 BCCA 503, 86 BCLR (4th) 47 [*Falvai*]; *One v One*, 2000 BCSC 1584, 81 BCLR (3d) 315; *JAD v LDD*, 2010 NBCA 69, 364 NBR (2d) 200.

Table 5: Eleven Most Cited Judgments with Dominant Topic Custody and Access and Secondary Topic Child Support

Judgment	*Citation*	*Court*	k^{in}	*Income*
Talbot v Henry	[1990] 5 WWR 251	SK CA	100	Unstated†
Lawson v Lawson	(2006), 81 OR (3d) 321	ON CA	89	66,000∗
Ladisa v Ladisa	(2005), 193 OAC 336	ON CA	85	26,000∗
Stewart v Stewart	(1994), 41 BCAC 213	BC CA	70	0†
Falvai v Falvai	2008 BCCA 503	BC CA	68	60,000†
Ursic v Ursic	(2006), 32 RFL (6th) 23	ON CA	65	56,000
One v One	2000 BCSC 1584	BC SC	56	54,000
Jennings v Garrett	(2004), 5 RFL (6th) 319	ON SCJ	50	41,000∗
JAD v LDD	2010 NBCA 69	NB CA	47	33,000
Baker-Warren v Denault	2009 NSSC 59	NS SC (FD)	47	20,000∗
Dixon v Hinsley	(2001), 22 RFL (5th) 55	ON CJ	43	21,000∗

*Note: *Income imputed by judge for purpose of calculating child support amounts.*

†No income was stated in Talbot; in Stewart, the judge found the father

had "no significant income"; in the trial judgment of Falvai (2008 BCSC 79, [2008] B.C.W.L.D. 1796), the judge suggested the father was capable of earning $30/hour but adjourned the question of child support without imputing an income ($60,000 is our estimate based on full time work at $30/hour: this allows calculation of a median income of the cases in the table).

We have described the *Moge* reasoning that support and family property are intrinsically connected and must be taken together in addressing the economic consequences of the marriage and its breakdown. The data show the interrelationship of spousal support and family property especially in BC, where the legislation, read alongside *Moge*, invited judges to provide "lump-sum maintenance" by apportioning the recipient spouse a larger share of the family property. Similarly, child and spousal support became explicitly linked under the FCSG, which required judges to consider them together and reduce spousal support in favour of child support if the payer lacked the means to provide both.[80] The FCSG's 40% threshold linked child support and custody so that sometimes applications to increase child support were countered with applications to increase access time or to consider access costs. The cases in table 5 suggest that the FCSG may have created more litigable issues in custody and access battles, such as the imputation of income to a parent resisting financial disclosure.[81] Cases involving children, and particularly access and support, have been shown to remain in the court system longer than other family cases.[82]

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80 *Divorce Amendment Act*, 1997, s. 15.3.

81 See e.g. *Coadic v Coadic*, 2005 NSSC 291, 237 NSR (2d) 362.

82 Allen, *supra* note 30; Kelly, *supra* note 30.

C. THE INCREASE OF FAMILY LITIGATION IN THE 1990S

The underlying causes of the great increase in family litigation since the early 1990s are presumably largely social and economic. In many Western countries, including Canada, the 1990s were a period of austerity in which social services were cut back drastically and the economy transformed by globalization.[83] In Canada, social services received massive cuts to federal funding shortly after the implementation of the *Canada-USA Free Trade Agreement* of 1989 and again after its successor, the *North American Free Trade Agreement* of 1994.[84] During a serious economic recession in the early 1990s, unemployment rates were above 10% in much of the country.[85] Between 1989 and 1994, Ontario lost 189,000 manufacturing jobs, which accounted for 80% of the province's job losses.[86] Although the unemployment rate decreased in the mid-1990s, part-time and temporary work grew considerably.[87]

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[83] Christophe Guilluy, *No Society* (Paris: Flammarion, 2018); Savina Gygli et al "The KOF Globalisation Index—Revisited" (2019) 14:3 Rev of International Organizations 543.

[84] John W Foster & John Dillon, "NAFTA in Canada: The Era of a Supra-Constitution," in Karen Hansen-Kuhn & Steve Hellinger, eds, *Lessons from NAFTA: The High Cost of "Free Trade"* (Ottawa: Canadian Centre for Policy Alternatives, 2003) 83 at 92-94.

[85] Dave Gower, "Canada's Unemployment Mosaic in the 1990s" (1996) 8:1 Perspectives on Labour & Income 16.

[86] Department of Finance, "The Economy 1994" (March 1994) online (pdf): *Newfoundland and Labrador Finance* <https://www.gov.nl.ca/fin/files/archives-e1994-1994-med.pdf>.

[87] Leah F Vosko, Nancy Zukewich & Cynthia Cranford, "Precarious

These economic conditions undoubtedly led to greater stress on households and family relationships, and probably to more family breakdowns. Indeed, the number of lone parent families increased sharply from 1990 to 1994.[88] With less state funding supporting families directly and indirectly, separated spouses were left to turn (with or without success) to their former partners for support for themselves and their children, a shift Brenda Cossman has called "reprivatization".[89] Increasing self-representation in Canadian courts, partly due to the shortage of state-funded legal aid,[90] has probably contributed to more time-

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Jobs: A New Typology of Employment" (2003) 15:4 Perspectives on Labour & Income 39.

88 Sharanjit Uppal, "Employment Patterns of Families with Children" (24 June 2015), online: *Statistics Canada* <https://www150.statcan.gc.ca/n1/pub/75-006-x/2015001/article/14202-eng.htm>.

89 Brenda Cossman, "Family Feuds: Neo-Liberal and Neo Conservative Visions of the Reprivatization Project," in Brenda Cossman & Judy Fudge, eds, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002), 169 at 169.

90 On cuts to legal aid in the 1990s and the impact on family litigants, see Katie Davis, "Legal Aid in Canada: Resource and Caseload Statistics 2002/03" (February 2004), online: *Statistics Canada Canadian Centre for Justice Statistics* < https://www150.statcan.gc.ca/n1/en/catalogue/85F0015X2003000>; Andrea Taylor-Butts, "Justice Spending in Canada, 2001/01" (October 2002), online: *Statistics Canada Juristat* <https://www150.statcan.gc.ca/n1/en/catalogue/85-002-X20020118430>. Lawyers' fees may also have increased in the 1990s. Canadian Lawyer magazine's annual survey of lawyers' fees shows a roughly 130% increase from 2005 to 2015 in the national average hourly rate charged by lawyers 5 and 10 years post-call, after adjusting for inflation. See Michael McKiernan, "The Going Rate" (June 2015),

consuming litigation, with more interlocutory judgments and more applications to reopen existing arrangements.

Major legal changes also occurred in the early to mid-1990s. The *Pelech* trilogy's "clean break" approach to relationship breakdown—with its optimistic assumption that former spouses would soon be financially self-sufficient—declined in these hard times and was superseded by the *Moge* approach of compensating for the economic disadvantages experienced by spouses who took care of the home during the marriage. *Moge* was the beginning of a wave of legal developments that allowed for the reopening of orders. First, the threshold for changing a spousal support order was adjusted by *Moge* from a "radical change" (*Pelech* trilogy) to a "material change". This change probably contributed to the sharp increase in number of judgments from 1992 to 1994 (fig. 4a, black curve). Two years after *Moge*, in 1994, *Willick* elaborated on the *Moge* test for "material circumstances" and indicated that larger support payments would be awarded. This signalling and the impending FCSG may have temporarily pushed litigation rates downward, by encouraging potential payers—largely men—to negotiate rather than contest support claims in court, which may have contributed to the crash in the number of judgments from

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online (pdf): *Canadian Lawyer Magazine* < https://www.canadianlawyermag.com/staticcontent/images/canadianlawyermag/images/stories/pdfs/Surveys/2015/CL_June_15_GoingRate.pdf>; Kirsten McMahon, "The Going Rate 2005" (September 2005), online (pdf): *Canadian Lawyer Magazine* <https://www.canadianlawyermag.com/staticcontent/images/canadianlawyermag/images/stories/pdfs/Surveys/2005/04June%20-%20Legal%20Fees%20Survey%20.pdf>.

1994 to 1997 (fig. 4a, black curve). This hypothesis could be investigated further by studying the rate of male-initiated versus female-initiated cases before and after *Willick*. Overall, though, conflicts over family resources moved into courtrooms. The FCSG (1997) allowed for the variation of pre-existing child support orders and, going forward, permitted variation orders whenever any change in circumstance took place that would call for a different table amount, or, when table amounts were inapplicable (such as for high-income spouses), when any change took place to "the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support."[91] Having care of a child more than 40 percent of the time, for example, reduced a paying parent's out-of-pocket expenses, and former step-parents and others found themselves with unexpected and unwelcome support obligations which they challenged. In *Gordon* (1996), the Court's approach to amending custody and access arrangements when the custodial parent wished to relocate did little to reduce the uncertainty in these situations and may well have led to more litigation.[92] Taken together these changes probably contributed to the rise in variation applications and judgments.

The increased complexity of the calculations and considerations introduced to improve fairness may be another factor leading to more judgments.[93] For example, while the FCSG aimed at "improving the efficiency of the

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91 FCSG, SOR/97-175, s 14.

92 *Gordon*, at paras 26-48.

93 Allen, *supra* note 30; Kelly, *supra* note 30,

legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement,"[94] researchers have noted substantial contestation over aspects of the FCSG such as the determination of parents' incomes, special expenses, undue hardship, and responsibility for children over the age of majority.[95] As well, to accompany the FCSG, the federal government set aside substantial funds to assist provinces and territories in establishing and improving their programs and procedures to help parents obtain and vary child support orders.[96] Along with other measures for increasing access to justice, these initiatives presumably led to more attempts to obtain child support and an increase in the number judgments—and the load on courts.

IV. CONCLUSION

The volume of family litigation in Canada increased dramatically in the 1990s. This was also a time of great dynamism in family law as courts, urged on by advocates of necessary family law reform, worked to reshape the law to reflect the costs and benefits of marriage and its breakdown more fairly, all against a backdrop of widespread austerity and a reduction of state support for families. This article has quantitatively examined the relationships between two phenomena: the increase in the amount and complexity of family litigation in Canada that occurred in the 1990s, and changes in the law (landmark

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94 FCSG, SOR/97-175, s 1(c).

95 *Rogerson*, *supra* note 18.

96 Department of Justice Canada, *supra* note 18.

court judgments and key statutes) that occurred around this time. While our analysis does not prove causation, and social and economic factors are likely the main drivers underlying litigation patterns, our analysis empirically demonstrates intriguing correlations between legal changes and changes in the amount and type of family litigation. These results in the family law domain are analogous to effects of judicialization in the political sphere that sociolegal theorists have described[97] and, further, demonstrate how probable relationships can emerge through the holistic study of a dataset covering a very broad set of Canadian family law judgments.

To obtain a high-level view of the evolution of the law over several decades, we applied temporal clustering to our citation network. This approach identified five major epochs which, although defined purely based on the link structure of the citation network, begin and end at points in time that correspond closely to the dates of key statutes. The third epoch contains the key 1990s changes in amount and subject of litigation revealed in our data. We therefore focus on the legal developments that define this epoch in our search for possible explanations of the 1990s litigation changes. The third epoch began shortly after the 1986 overhaul of the federal *Divorce Act* and declined with the 1997 enactment of the Federal Child Support Guidelines. During this epoch two sets of landmark judgments laid out opposing visions of the law of spousal support. The first, the *Pelech* trilogy (1987), advocated a "clean break" approach, emphasizing that separation agreements should

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97 See e.g. Martin Shapiro & Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford: Oxford University Press, 2002).

be final and, usually, that both spouses would achieve self-sufficiency. The second set, centred around *Moge* and followed by *Willick*, reduced the barrier to re-opening pre-existing orders for spousal and child support and sought to compensate spouses (usually wives) for economic disadvantages flowing from their role in the marriage.

Both *Moge* and the FCSG instructed courts to examine a wider range of circumstances and allowed for the reopening of orders. Each preceded the rapid emergence of judgments with multiple legal topics. *Moge* appears to have led to the use of unequal division of family property as a means of providing financial compensation to former spouses in provinces where the property division legislation was sufficiently flexible, especially in British Columbia. The FCSG is associated with the emergence of judgments that combined child support, in various ways, with division of family property, spousal support, and custody and access. With the goal of fairer, more holistic results, *Moge* and the FCSG appear to have increased the complexity of litigation by inviting multiple legal issues to be argued together. For example, thematic clustering shows that custody and access issues are litigated just as often in cases where the dominant issue is financial (such as child support, spousal support, or division of family property) as in cases where the dominant issue is custody and access, whereas previously these issues were mainly litigated independently.

The findings of our study raise several questions for future research. Tables 4 and 5 suggest that, for example, cases in which custody and access is the dominant issue may arise in different economic circumstances from cases in which child support dominates. A close textual analysis

of these judgments would allow further exploration of how the FCSG affected family litigation and how the characteristics of these two groups of judgments evolved over time, as the legal system adapted to the FCSG regime and to post-FCSG statutory revisions and new landmark judgments.

A broader avenue for future research relates to the argument that legal reform can "open the floodgates" to litigation. Statutory changes can clearly lead to surges in new cases, as occurred for divorces in Canada immediately following the revisions to the *Divorce Act* in 1986;[98] however, anticipated surges do not always occur, as in the case of Ireland's 1996 constitutional amendment allowing divorce.[99] Our results (fig. 7 in particular) suggest that landmark judgments can also contribute to surges in new cases, because they both raise new legal questions and open new strategic angles for litigants. Further qualitative and quantitative analysis—possibly of a comparative nature—could illuminate the mechanisms and suggest methods for addressing the inherent human and financial "transaction costs" of law reform, to reduce the costs they externalize to individuals and families and secure the improvements in access to justice that are the goal of law reform efforts.

Driven by underlying social and economic forces

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98 Statistics Canada, "A fifty-year look at divorces in Canada, 1970 to 2020" (9 March 2022), online: *The Daily* <www150.statcan.gc.ca/n1/daily-quotidien/220309/dq220309a-eng.htm>.

99 Jenny Burley & Francis Regan, "Divorce in Ireland: The Fear, the Floodgates, and the Reality" (2002) 16:2 Int J Law Pol Fam 202.

and prevailing views about how these should be addressed, family litigation has increased, with concomitant costs to individuals and the legal system. Our data and analysis suggest that landmark family law judgments and key legislation have widened the invitation to use courts to increase—or sometimes decrease—spousal and child support to address the resources of those involved. With lawyers and without them, and against a broader backdrop of austerity measures, individuals have responded by turning to the courts, contributing to the increase in family litigation since the early 1990s. This study has highlighted some specific ways in which legal changes in Canada appear to be connected to increased amount and complexity of family litigation; going forward, reformers seeking to reduce pressure on families and the legal system should examine these examples further and search for direct causal links, to help anticipate the possible effects of future statutory or precedential changes.