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**DOMESTIC VIOLENCE, PRECARIOUS
IMMIGRATION STATUS, AND THE
COMPLEX INTERPLAY OF FAMILY LAW
AND IMMIGRATION LAW**

Janet Mosher * **

Survivors of domestic violence must frequently navigate multiple legal processes, as well as the various administrative systems that provide crucial supports and resources. For women with precarious immigration status, navigation is made all the more challenging not only because immigration and/or refugee law processes are added to the array of legal domains to be navigated, but because their access to supports and resources is both restrictive and in flux, shifting along with the changes in their immigration status.

Drawing from interviews with experienced lawyers and case law searches, I explore many of the intersections between family law and immigration law in cases of domestic violence. The picture that emerges is one of profound cross-domain influences: the mere existence of a

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family law legal proceeding, the evidence adduced, the findings made, and the outcome will each bear on decisions taken in the immigration realm, including whether a survivor will be removed from Canada, with or without her children. Similarly, a survivor's precarious immigration status impacts family law decision-making in a multiplicity of ways, including in assessing allegations of "family violence" and in contextualizing the challenges of mothering in the context of deportability, both of which have enormous consequence for the safety and well-being of survivors and their children.

As the lawyers interviewed made abundantly clear, the complex interplay of these domains and the grave harms that can materialize when there is lack of coordination calls out not only for experienced legal counsel in each domain, but intense collaboration and cooperation between counsel. The reality on-the-ground however is that the failure of many system actors to appreciate how actions taken in one domain will reverberate materially in another and the inadequacy of funding for representation in each of family law and immigration law and virtually no funding and no structure to support collaboration, significantly impair survivors' access to justice.

INTRODUCTION

Survivors of domestic violence must frequently navigate multiple legal processes (criminal, family, and child welfare, for example), as well as the various administrative systems that provide crucial supports and resources (social assistance, social housing, and health care among them).¹ For women with precarious immigration status, navigation is made all the more challenging both because immigration and/or refugee law processes are added to the array of legal domains to be navigated and because their access to supports and resources is limited and variable, shifting along with any changes to their status.

In what follows, I focus on the complex and dynamic interplay between family law and immigration law in cases of domestic violence, although I draw in, on occasion, other intersecting legal domains.² Drawing from

¹ See e.g., Jennifer Koshan, Janet Mosher & Wanda Wiegers, “The Costs of Justice in Domestic Violence Cases: Mapping Canadian Law and Policy” in Trevor CW Farrow & Lesley A Jacobs, eds, *The Justice Crisis: The Cost and Value of Accessing Law* (Vancouver: UBC Press, 2020) 149. For a definition of “domestic violence,” see the Introduction to this volume. I use the term “family violence” where this is the terminology in the statute, regulation, or guideline being discussed.

² In what follows I focus on the interactions between immigration law and family law that are most pertinent in cases of domestic violence. There are, however, many other interactions that arise between the two legal domains. While there is very limited Canadian literature on these interactions, there is considerable American literature on family law’s treatment of mixed status families. See e.g. David B Thronson, “Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in US Family Courts” (2005) 11 *Tex Hispanic J L & Pol’y* 45; Patrick Glen, “The Removability of Non-

interviews with experienced lawyers and case law searches, the picture that emerges is one of profound cross-domain interactions: the mere existence of a family law legal proceeding, the evidence adduced, the findings made, and the outcome will bear on decisions taken in the immigration realm, including whether a survivor will be removed from Canada, with or without her children. Similarly, a survivor's precarious immigration status impacts family law decision-making in a multiplicity of ways, including in assessing allegations of "family violence" and in contextualizing the challenges of mothering in the context of deportability, both of which have enormous consequences for the safety and well-being of survivors and their children.

As the lawyers interviewed made abundantly clear, the complex interplay of these domains and the grave harms that can materialize when there is lack of coordination call out not only for experienced legal counsel in each domain, but intense collaboration between counsel. The reality on-the-ground, however, is that the failure of many system actors to appreciate how actions taken in one domain will reverberate materially in another and the inadequacy of funding for representation in each of family

Citizen Parents and the Best Interests of Citizen Children: How to Balance Competing Imperatives in the Context of Removal Proceedings" (2012) 30:1 Berkeley J Int'l L 1. See also literature on "famigration," which draws on family law principles and concepts to critically examine the definition and treatment of families within the immigration realm. See e.g. Kari E Hong, "Famigration (Fam-Imm): The Next Frontier in Immigration Law," (2014) 100:1 Virginia L Rev 63. Particularly considering the increase in cross-border marriages and mixed-status families in Canada, the interplay of family law and immigration law calls out for more research.

law and immigration law—and virtually no funding and no structure to support collaboration—significantly impair survivors’ access to justice.

Part I provides a brief description of the methodology for the paper. Part II delves into immigration law, beginning with a definition of “precarious status” and then exploring the potential pathways to enhanced status security. This Part draws attention to how family law proceedings and outcomes potentially impact decision-making in the immigration realm and introduces the forms of status and the immigration processes that are essential to an understanding of the issues raised in Part III. Part III shifts the focus to family law, exploring the ways in which a survivor’s immigration status and her engagement with immigration processes are relevant, especially in assessing “family violence” and determining the best interests of a child. Part IV, the conclusion, draws out the vital importance of well-funded, coordinated, expert legal representation and of enhanced status security for survivors.

I. METHODOLOGY

Semi-structured interviews of approximately sixty to ninety minutes were conducted with six lawyers in Ontario. Each of these lawyers has extensive experience in representing survivors with precarious immigration status, with three specializing in immigration law, two in family law, and one in both areas. In recruiting lawyers to be interviewed for the project, I approached two lawyers who I knew to have this expertise, and they, in turn, referred me

to others. The interviews were conducted via Zoom, audio-recorded, and transcripts prepared.³

In addition, using multiple search term combinations, I reviewed reported Canadian family law decisions between January 2008 and August 2022 where domestic violence was in issue or provided as part of the factual context in the case and one of the parties was facing potential removal from Canada or where threats of deportation were part of the factual matrix. I also reviewed reported Federal Court decisions, primarily judicial review applications (and related stay applications), addressing “family violence” as a factor in Humanitarian and Compassionate (H&C) permanent resident applications, and those related to the deferral of a removal order based on an ongoing family law proceeding. Operational guidelines prepared by Immigration, Refugees and Citizenship Canada to guide frontline immigration officers in their assessment of H&C claims and applications for Family Violence Temporary Resident Permits were also reviewed.

II. PRECARIOUS IMMIGRATION STATUS, ROUTES TO ENHANCED SECURITY, AND FAMILY LAW’S IMPACT

Precarity of status captures the reality that apart from citizenship, the right to remain in Canada is fragile and not guaranteed (even citizenship, the quintessential form of permanence, is not entirely so). But the circumstances in which a person physically present in Canada can be

³ The research was approved by both the University of Calgary and York University’s Research Ethics Boards.

“removed” are more expansive for some than others.⁴ Those whose status is precarious include sponsored spouses, refugee claimants, H&C applicants, visitors, and students.⁵ While those with “permanent resident” status enjoy greater security than, for example, H&C applicants or visitors, given the expansion in recent years of grounds of inadmissibility for permanent residents and hence the potential for removal, the nomenclature of “permanent resident” is increasingly inapt. Those most vulnerable to removal—and with the most restrictive access to services

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- ⁴ There are three forms of removal orders: departure orders, exclusion orders, and deportation orders. Deportation orders are issued for matters such as criminality; departure orders where, for example, a refugee claimant’s application has been heard and denied; and exclusion orders where, for example, a person fails to leave at the end of a period of authorized stay or is inadmissible for health and other specified reasons. A departure order requires the subject of the order to leave Canada within 30 days; failing to do so (or to confirm that one has left) has the effect of converting the departure order into a deportation order. The key distinction among these relates to the circumstances in which one might be eligible to re-enter Canada. A deportation order results in a permanent bar on re-entry unless granted an Authorization to Return to Canada (ARC), while an exclusion order bars re-entry for one year or five years (the latter in the case of misrepresentation), unless permission to return is obtained. ARCs are not easily accessed. With a departure order one can re-enter Canada in the future if one meets the entry requirements at the time. See Immigration, Refugees and Citizenship Canada, *ENF 10 Removals* (2017), online (pdf): *Government of Canada* <www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf10-eng.pdf>. See also *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss 224–229 [IRPR]; *Immigration and Refugee Protection Act*, SC 2001, c 27, s 40(2)(a) [IRPA].
- ⁵ One interviewee reported that they are seeing increasing numbers of international students who are experiencing domestic violence in Canada.

and supports—are persons “without status”; that is, those who are present in Canada without permission of the federal government.⁶ Many situations may lead to circumstances where a woman is without status. For example, she may have arrived on a visitor or student visa, formed an intimate relationship, and remained in Canada beyond the duration of the authorization for her stay based on a promise by her partner of a family class sponsorship, or having arrived as a permanent resident her status may have been revoked as a result of a finding by an immigration officer that the marriage was one of convenience. Throughout, I use the term “precarious status” to include those without status, although where important to the analysis, I indicate the more precise form of precarious status in issue.⁷

⁶ Estimates of the number of persons in Canada without status range from 20,000–500,000 but as Hudson et al point out, there seems to be no empirical bases for these estimates; see Graham Hudson et al, “(No) Access T.O.: A Pilot Study on Sanctuary City in Toronto, Canada,” (2017) Toronto Metropolitan Centre for Immigration and Settlement Working Paper No 2017/1 at 5; Immigration, Refugees and Citizenship Canada, “CIMM – Undocumented Populations – March 3, 2022” (last modified 15 June 2022), online: *Government of Canada* <www.canada.ca/en/immigration-refugees-citizenship/corporate/transparency/committees/cimm-mar-03-2022/undocumented-populations.html>.

⁷ For a discussion of precarious immigration status as an umbrella category that produces multiple forms of vulnerability, see Luin Goldring & Patricia Landolt, “The Conditionality of Legal Status and Rights: Conceptualizing Precarious Non-citizenship in Canada” in Luin Goldring & Patricia Landolt, eds, *Producing and Negotiating Non-Citizenship: Precarious Legal Status in Canada* (Toronto: University of Toronto Press, 2013) 3.

I have framed the sections in this Part under an umbrella of routes to enhanced status security, whether temporary or permanent. In reading the family law decisions, a common element in the factual matrices is that mothers with precarious status have pursued—or are in the process of pursuing—various options to secure enhanced permanency of status and prevent their removal from Canada. They are, in other words, intensively engaged in multiple processes simultaneously. I focus on the avenues possible within the immigration realm, leaving out refugee claims, although in some instances, this too is a path that women pursue.⁸ In reviewing these pathways, I have attempted to highlight where and how any related proceeding in the family law realm becomes relevant to the immigration application.

As the section below makes clear, the pathways to enhanced status security for survivors of domestic violence

⁸ For a person to succeed in their refugee claim, they must establish a well-founded fear of persecution based on one or more of five grounds—race, religion, nationality, membership in a particular social group, or political opinion—or show that they face personalized risks in their home country; see *IRPA*, *supra* note 4, ss 96, 97. While gender is not an enumerated ground for a well-established fear of persecution, “women” or sub-groups of women, may constitute a “particular social group”; see “Chairperson’s Guideline 4: Gender Considerations in Proceedings Before the Immigration and Refugee Board” (18 July 2022), online: *Immigration and Refugee Board of Canada* <irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir04.aspx>. Note that these guidelines were substantially revised in July 2022. Research indicates that particular forms of gender-based claims related to, for example, female genital cutting, or other practices perceived as “exotic” are more likely to succeed than claims based on domestic violence; see Efrat Arbel, “The Culture of Rights Protection in Canadian Refugee Law: Examining the Domestic Violence Cases” (2013) 58:3 McGill LJ 729.

are limited and complex. Moreover, the pathways are rarely linear, leading assuredly from precarity to greater security; rather, over a period to time, a survivor may experience multiple forms of precarious immigration status.⁹ To complicate matters further, each change in status alters the matrix of resources and supports to which a survivor has, at least in theory, access.

(A) FAMILY CLASS SPONSORSHIP

One avenue to acquire permanent resident status is through the family class.¹⁰ Presumptively a family class application (which includes spouses, as well as common-law or conjugal partners) is made from outside of Canada and permanent resident status is granted before arrival. Additionally, a citizen or permanent resident may initiate an inland sponsorship of a spouse or common-law partner through the “Spouse or Common-Law Partner in Canada Class” (SCLPC) if they are cohabiting together in Canada.¹¹ All family class applications require a

⁹ See Luin Goldring, Carolina Berinstein & Judith K Bernhard, “Institutionalizing Precarious Migratory Status in Canada” (2009) 13:3 Citizenship Studies 239.

¹⁰ *IPRA*, *supra* note 4, s 12(1). There are three main streams of immigration to Canada that provide routes to permanent resident status: the family class (in which women are over-represented), the economic class, and the Convention refugee or protected person class.

¹¹ To be eligible the person sponsored must have temporary resident status (or be exempt from such requirement); see *IRPR*, *supra* note 4, s 124. These exemptions include where the sponsored person is inadmissible because they overstayed a visa, visitor record, work permit, or study permit, or entered Canada without a visa or other required document; see Government of Canada, “Sponsor your spouse, common-law partner, conjugal partner or dependent child – Complete

sponsorship and undertaking from the Canadian citizen or permanent resident spouse (or common-law or conjugal partner). The sponsor undertakes to provide for the basic needs of the sponsored person and to reimburse the state should the sponsored person receive social assistance.¹² For spouses, the length of the sponsorship is three years. For applications made through the SCLPC class, the sponsor can withdraw the application at any time prior to the granting of permanent residency, the consequence of which is that no decision will be made on the application and the sponsored person will be left without status and subject to potential removal.¹³

In the period of October 2012 to April 2017 sponsored spouses/partners who were in a relationship of less than two years or had no children together received only conditional permanent resident status; they were required to remain in a conjugal relationship and cohabit with their sponsor for a two-year period. Failing this, their permanent residency could be revoked, and they would be subject to removal.¹⁴ Significant concerns that conditional

Guide (IMM 5289)" online: <www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5289-sponsor-your-spouse-common-law-partner-conjugal-partner-dependent-child-complete-guide.html#incanada>.

¹² *IRPR*, *supra* note 4, ss 127, 130–133.

¹³ *IRPR*, *supra* note 4, s 126.

¹⁴ Rupaleem Bhuyan & Ellen Tang, "Spousal Sponsorship and Conditional Permanent Residence" (28 November 2016) at 1–2, online (pdf): *Migrant Mothers Project* <www.migrantmothersproject.com/wp-content/uploads/2017/01/Policy-Brief-CPR-Regulations-Nov-28-2016.pdf>. Their report also highlights the gendered and racialized nature of conditional status: in the period of their study, 63% of immigrants with conditional status were female and

permanent residency would lock women in abusive relationships and put yet more power in the hands of their abusive partners led to the creation of a “family violence” exception.¹⁵ While conditional permanent residency was ended in 2017, the interviews for this project revealed that it remains important: the lack of access to current and accurate information means that in some communities there persists the belief that one must cohabit in the conjugal relationship for two years or risk removal from Canada; and the hype regarding purported marriage fraud has created a context in which an abuser’s false report that a marriage was one of convenience continues to find traction (triggering an investigation, the potential loss of permanent resident status, and a removal order). As one interviewee put it, noting that allegations of marriage fraud remain an issue: “[if she leaves] I can’t even say, as a lawyer, 100% you’re not going to be investigated. I’m not able to say that.”¹⁶ Another lawyer explained,

racialized immigrant spouses were disproportionately impacted. See also Rupaleem Bhuyan, Anna C Korteweg & Karin Baqi, “Regulating Spousal Migration through Canada’s Multiple Border Strategy: The Gendered and Racialized Effects of Structurally Embedded Borders” (2018) 40:4 Law & Pol’y 346.

¹⁵ Bhuyan & Tang, *ibid* at 3. The exemption was crafted after considerable advocacy by and with input from frontline service providers. The description of family violence and the guidance provided to immigration officers reflect a nuanced understanding not only of family violence, but of the circumstances of sponsored spouses. One interviewee noted that their Clinic continues to rely on the language from this exemption in their H&C and deferral applications; Interview 27 April 2022.

¹⁶ Interview 27 April 2022.

If he gets to CBSA [Canada Border Services Agency] before you [as her counsel] can get anything into the system about the abuse, she's going to be reported as somebody that married him to get into the country.¹⁷

As discussed more fully in Part III, in the context of abusive relationships, promises to initiate—and threats to withdraw—a family class sponsorship application are commonplace and women's dependence upon abusive partners for status makes leaving, especially when there are Canadian-born children, exceptionally difficult.¹⁸

(B) HUMANITARIAN AND COMPASSIONATE APPLICATIONS

A humanitarian and compassionate (H&C) application for permanent resident status is granted at the discretion of the Minister to those who are otherwise inadmissible or who do not meet the requirements of the *Immigration and Refugee Protection Act (IRPA)*.¹⁹ Governed by section 25 of *IPRA*, this discretion is a form of equitable relief; an exceptional measure and not an alternate scheme for permanent resident applications.²⁰ Rather, the

¹⁷ Interview 31 May 2022 (this lawyer also pointed out the stereotypical reasoning often seen in the immigration realm that if a “client has any kind of a disability, then obviously, she married him to get into the country”).

¹⁸ See, e.g. *SM v PPR* 2012 ONCJ 202.

¹⁹ *IRPA*, *supra* note 4, s 25.

²⁰ See e.g. *Phara Delille v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 508 at para 30.

decisionmaker need assess whether the “facts, established by the evidence ... would excite in a reasonable man [*sic*] in a civilized community a desire to relieve the misfortunes of another.”²¹ Frontline officers are provided guidance in the exercise of this discretion through the Operational Instructions and Guidelines (Guidelines).²²

Importantly, section 25 requires that the decisionmaker “tak[e] into account the best interests of a child directly affected.”²³ The decisionmaker must be, in the words of the Supreme Court of Canada, “alert, alive and sensitive” to the best interest of any children affected by the decision.²⁴ The courts have been clear, as are the Guidelines, that unlike the family law realm in which the best interests of the child is determinative, it is only one of several factors that must be given serious attention in the immigration context. While only one factor, it is an important one and as held by the Supreme Court of Canada in *Kanhasamy v Canada*, “decision-makers must do more than simply *state* that the interests of a child have been taken into account ... Those interests must be 'well

²¹ *Kanhasamy v Canada (Citizenship and Immigration)* 2015 SCC 61 at para 13 [*Kanhasamy*], citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338.

²² Immigration, Refugees and Citizenship Canada, Operational Instruction and Guidelines, “Humanitarian and compassionate consideration,” (last modified 24 July 2014) online: *Government of Canada* <www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration.html>.

²³ *IRPA*, *supra* note 4, s 25. This language was inserted following the landmark case of *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*].

²⁴ *Baker*, *supra* note 23 at para 75.

identified and defined' and examined 'with a great deal of attention' in light of all the evidence."²⁵

Among the factors listed in the Guidelines to be considered when assessing an H&C application is "family violence."²⁶ The Guidelines expressly acknowledge that spouses in abusive relationships who are not Canadian citizens "may feel compelled to stay in the relationship or abusive situation so they may remain in Canada; this could

²⁵ *Kanhasamy*, *supra* note 21 at para 39, quoting from *Legault v Canada (Minister of Citizenship and Immigration)* 2002 FCA 125 and *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165. See Emily Chan & Jennifer Stone, "Where no court has gone before: Primacy and centrality of the best interests of the child principle – Case Comment on *Kanhasamy v Canada*" (2016) 29:2 Can J Admin L & Prac 219; Sharryn Aiken & Sheena Scott, "*Baker v Canada (Minister of Citizenship and Immigration)* and the Rights of Children" (2000) 15 JL & Soc Pol'y 211.

²⁶ Immigration, Refugees and Citizenship Canada, "The humanitarian and compassionate assessment: Dealing with family relationships" (last modified 4 February 2021), online: *Government of Canada* <www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing/assessment-dealing-family-relationships.html> [Family relationships]. It is important to appreciate that the weight assigned to each factor is a matter of discretion and the outcome is unpredictable. See Anthony Delisle & Delphine Nakache, "Humanitarian and Compassionate Applications: A Critical Look at Canadian Decision-Makers' Assessment of Claims from 'Vulnerable' Applicants" (2022) 11:3 *Laws* 40: As one officer explained, "The discretion is just so different from officer to officer ... I can look at it with my eyes and approve; another person can look at it with their eyes and refuse" at 43. They also note two trends: a sharp increase in the number of H&C applications and increasingly higher refusal rates.

put them in a situation of hardship.” The Guidelines go on to counsel officers to be “sensitive to situations in which the spouse (or other family member) of a Canadian citizen or permanent resident leaves an abusive situation and, as a result, does not have an approved family class sponsorship.” In assessing family violence, officers are directed to consider police, medical, and shelter reports, as well as convictions. Officers are also to consider the applicant’s degree of establishment, including such matters as a history of stable employment, the degree of integration, and whether the applicant and her family have a good civil record (“e.g., no criminal charges or interventions by law enforcement officers or other authorities for domestic violence or child abuse”).²⁷

The Guidelines set out, in a section titled “dealing with family relationships,”²⁸ several considerations pertaining to family violence and to the potential separation of parent and child through removal. Among the considerations are the “circumstances of all family members, with particular attention given to the interests

²⁷ Immigration, Refugees and Citizenship Canada, “Humanitarian and compassionate assessment: Establishment in Canada” (last modified 3 February 2017), online: *Government of Canada* <www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing/assessment-establishment-canada.html>. These establishment criteria are troubling: without recognition of the reality that abuse often manifests as control—including in ways that profoundly limit women’s employment, community involvement, and social integration—these criteria can be applied in a manner that denies women a favourable outcome because they have “failed” to establish themselves.

²⁸ Family relationships, *supra* note 26.

and situation of any dependent children with legal status in Canada; the particular circumstances of any children of the applicant ... ; court order in relation to custody arrangements; if the applicant is the non-custodial parent, [whether they have] been exercising their visitation rights; information indicated in the family court documents about the family's circumstances...; [and] the impact on family members, especially children, if the applicant is removed.” As is clear here, immigration officers are explicitly directed to consider the evidence and findings in a related family law proceeding.

Taken together, holdings in the family law realm regarding a child's best interests, the existence of family violence, possession of the matrimonial home, and a mother's entitlement to support have potentially significant implications for the success of an H&C application and thus, whether a survivor of domestic violence is ultimately able to remain in Canada.

(C) DEFERRALS & STAYS

The filing of an H&C application does not create an automatic bar to the enforcement of a valid removal order. However, notwithstanding that removal orders are to be enforced “as soon as possible,”²⁹ a request can be made of

²⁹ *IRPA*, *supra* note 4, ss 48(2)–49(1). In many circumstances, a permanent resident or refugee (but not a foreign national) ordered removed may appeal to the Immigration Appeal Division (IAD). The IAD has the jurisdiction to allow the appeal or to stay the order on terms: *IRPA*, *supra* note 4, ss 62–68 (including where, “taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case” at s 67). In

an enforcement officer that removal be deferred, and if this request is denied, to initiate a legal proceeding for a stay of enforcement of the removal order. The discretion to defer is of a very limited scope, allowing only for a “short-term” scoping of a child’s best interests.³⁰ In this “short-term” scoping, officers are to consider, for example, whether the child should be permitted to complete the school year, there are adequate arrangements for the care of the child in Canada if a parent is to be removed without the child, and the parents have had a reasonable amount of time to sort out custody.³¹ The Courts have been explicit that, “[h]owever unfortunate and painful the situation might be for [the child] ... illegal (*sic*) immigrants cannot avoid the execution of a valid removal order simply because they are

many of the reported decisions, fathers with permanent resident status who are facing removal because of convictions for domestic violence-related offences argue that the best interests of their child in Canada requires that they not be removed. Frequently they have had little involvement in their child’s life but forestalling their removal may prompt action in the family law realm to seek parenting time or shared decision-making authority.

³⁰ A leading case is *Munar v Canada (Minister of Citizenship and Immigration)*, 2006 FC 761 [*Munar*]. See also *Crawford v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FC 743 [*Crawford*]; *Lewis v Minister of Public Safety and Emergency Preparedness*, 2017 FCA 130 (the latter holding that the test has not been altered by the SCC decision in *Kanthasamy*, *supra* note 21, but finding that the officer had failed to address the importance of the child maintaining connections to her Indigenous identity and heritage if her father, a permanent resident living in Canada since 1966, was removed).

³¹ See *Munar*, *ibid*; *Baptiste v Canada (Citizenship and Immigration)* 2015 FC 1359 (where the Court held that 3 weeks, which was the time between the mother’s arrest and her scheduled removal date, was inadequate).

parents of Canadian-born children.”³² The result is that the parent may be separated from the child, or the child may be removed with the parent, before the best interests of the child are fully explored, considered, and weighed against other *IRPA* objectives.

While a deferral or stay, if granted, will not confer permanent resident status, they do alter one’s immigration status temporarily and buy crucial time to initiate a family law proceeding. An ongoing or quickly initiated family law proceeding to sort out custody arrangements may not only help to ensure that a deferral is granted but will provide a more fulsome opportunity for consideration of the best interests of a child by a decision-maker in the family law realm, who, unlike an enforcement officer, has expertise in assessing children’s best interests. One of the lawyers interviewed reported good success in securing short-term deferrals of the execution of removal orders in cases where a family court proceeding was concurrently underway, noting that in all the cases he has dealt with where a family court process has been engaged, “immigration has let [the family court process] run its course.”³³ In this context, the decision of Justice Harrington in *Jones v Canada*³⁴ provides a helpful precedent. Here the father was without status and facing removal as a result of a conviction related to domestic violence. His request for a deferral pending the outcome of a custody proceeding related to the three children of the relationship was denied. His application to stay the removal pending his application for leave and for

³² *Crawford*, *supra* note 30 at para 28.

³³ Interview 3 May 2022.

³⁴ 2007 FC 302.

judicial review of the officer's decision was granted, with the court finding that not only would the father be severely prejudiced in the family law proceeding if removed, but the "interests of his children may also be prejudiced if his wife gains custody solely by default."³⁵ "Natural justice," the Court concluded, "requires that Mr. Jones be given a full opportunity to be heard in the pending custody hearings."³⁶ Success in preventing the removal of a survivor or removal without her children in circumstances where a valid removal order has been issued may turn then, on prompt action taken in the family law realm.³⁷

³⁵ *Ibid* at para 20.

³⁶ *Ibid* at para 21. See also *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 at para 73 (addressing the importance of the mother's effective participation—here, necessitating state-funded legal representation—to the proper determination of the children's best interests).

³⁷ The linkages between family law and immigration law are made all the more explicit by the fact that the Minister of Public Safety and Emergency Preparedness, who is responsible for removals, has standing in some family law proceedings as a result of *IRPA*, *supra* note 4, s 50 (which provides that "a removal order is stayed (a) if a decision that was made in a judicial proceeding—at which the Minister shall be given the opportunity to make submissions—would be directly contravened by the enforcement of the removal order"). Where the Minister's counsel does appear, the reported case law indicates that the Minister's position is that the family court should make no order that would impede the ability of the Minister to execute the removal order: See e.g. *Patterson v Osazuma*, 2015 ONCJ 454; *MAW v JAW*, 2013 ONCJ 34; *SM v PPR*, *supra* note 18; *Ffrench v Williams*, 2011 ONCJ 406; *NEC v AAA*, 2010 ONCJ 54. An important recent decision of the ONCA addresses the scope of the Minister's role in the context of a child welfare proceeding, in that case where a mother and one of her children were the subject of a removal order: See *Catholic Children's Aid Society of Toronto v SKS*, 2022 ONCA 228. The jurisprudence has also made clear that the family court cannot make an order with the

(D) FAMILY VIOLENCE TEMPORARY RESIDENT PERMITS

A significant development in July 2019 was the introduction of the Family Violence Temporary Resident Permit (FVTRP) which, once granted, does provide protection against removal.³⁸ FVTRPs, as the name suggests, are temporary in nature, normally granted for a 6-month period and with the possibility of renewal. The initial application is fee-exempt and successful applicants are eligible for both a fee-exempt work permit and Interim Federal Health Program coverage.

However, the FVTRP is available only in a defined set of circumstances and the limited scope of coverage was a concern raised by the lawyers I interviewed.³⁹ To qualify, the applicant must be physically located in Canada and experiencing abuse from their spouse or common-law partner (including where the applicant left the relationship due to abuse or remained due to fear of losing immigration status) in a context where seeking permanent resident status is contingent on remaining in that relationship. While the FVTRP applications are to be processed

purpose of frustrating the removal process: See e.g. *JH v FA*, 2009 ONCA 17.

³⁸ Immigration, Refugees and Citizenship Canada, “Temporary resident permit (TRP) for victims of family violence” (last modified 6 December 2022), online: *Government of Canada* <www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/temporary-residents/permits/family-violence.html> [FVTRP].

³⁹ Interviews 2 May 2022, 3 May 2022.

expeditiously, the experience of interviewees was mixed, with two interviewees pointing to significant delays.⁴⁰

Interviewees also noted challenges related to proof of family violence; such concerns are not unique to accessing the FVTRP and I review the challenges of proof for women with precarious status more fully below. Here it is significant to note that similar to, but more expansive than, the Guidelines for H&C applications, officers are instructed to consider police records; criminal or family court documents; medical and shelter letters or reports; and assessments by psychologists, psychiatrists, and counsellors.

If family violence is established to the satisfaction of the Officer, the Officer is to take various considerations into account in deciding whether to issue a FVTRP. These include “child custody or any other family law-related issue,” the applicant’s ties to Canada, and “a period of reflection for victims of family violence who are out of status to further consider their immigration options.” Further, “[o]fficers may consider the best interests of any affected children, even though this is not a legislative requirement for TRP consideration.”⁴¹

In sum, the existence of a concurrent family law proceeding, the evidence adduced, the findings of fact, and the outcomes of that proceeding all potentially bear in significant ways on decision-making in the immigration realm. Family law proceedings will, in some instances,

⁴⁰ Interviews 3 May 2022, 31 May 2022.

⁴¹ FVTRP, *supra* note 38.

impact whether survivors are able to access enhanced immigration status security, which in turn, is critical to their safety and that of their children. It is not only the content and outcome of family law proceedings that matter, but also how expeditiously they can be brought, a matter I return to in discussing the importance of collaboration between counsel.

III. IMMIGRATION STATUS AND ITS RELEVANCE TO FAMILY LAW

In this Part, I shift focus to explore the various ways in which immigration law and immigration status are relevant to family law decision-making in cases where family violence is present. I begin by unpacking the relevance of precarious status to the definition of “family violence” in the *Divorce Act* and then turn to consider mothering under deportability.

(A) “FAMILY VIOLENCE” AND PRECARIOUS STATUS

The March 2021 reforms to the *Divorce Act* provided for the first time a definition of “family violence” and make explicit its importance to a child’s “physical, emotional and psychological safety, security and well-being.”⁴² Significantly, the definition reflects the multiple forms that abuse takes, including physical violence, threats,

⁴² *Divorce Act*, RSC 1985, c 3 (2nd Supp), ss 2(1), 16(2)–(4). These changes are mirrored in recent amendments to Ontario’s *Children’s Law Reform Act*, RSO 1990, c C12, ss 18(1)–(2), 24(3)(j), 24(4) [CLRA]. Several other provinces have also amended their legislation, mirroring the changes to the *Divorce Act*.

psychological abuse, financial abuse, and patterns of coercive and controlling behaviour.

As noted earlier, for women with precarious immigration status, the promise of a family class sponsorship application and/or the threat of withdrawal or cancellation of it are central elements of coercion and control. A substantial literature has documented how immigration sponsorships, as well as manipulation of information about a woman's status, are used by abusive men to deepen their control and entrap their partners.⁴³ These findings from the research were echoed in my interviews: without exception, interviewees described the threat of deportation and the use of precarious immigration

⁴³ See e.g. Wendy Chan, *Hiding in Plain Sight: Immigrant Women and Domestic Violence* (Black Point: Fernwood Publishing, 2020); Heather Neufeld, "Inadequacies of the Humanitarian and Compassionate Procedure for Abused Immigrant Spouses" (2009) 22 J L & Soc Pol'y 177; Janet Mosher, "The Complicity of the State in the Intimate Abuse of Immigrant Women," in Vijay Agnew, ed, *Racialized Migrant Women in Canada: Essays on Health, Violence and Equity* (Toronto: University of Toronto Press, 2009) 41; Andr e C t , Mich le K risit & Marie-Louise C t , "Sponsorship ... For Better or For Worse: The Impact of Sponsorship on the Equality Rights of Immigrant Women" (March 2001), online (pdf): Government of Canada <publications.gc.ca/collections/Collection/SW21-54-2000E.pdf>; West Coast Legal Education and Action Fund, "Position Paper on Violence against Women without Immigration Status" (May 2012), online (pdf): West Coast Leaf <www.westcoastleaf.org/wp-content/uploads/2014/10/2012-POSITION-STATEMENT-Women-without-Status-in-Canada.pdf> [West Coast LEAF]; YWCA Vancouver, "Mothers Without Status" (December 2009), online (pdf): ywcavan.org/sites/default/files/resources/downloads/Mothers%20Without%20Legal%20Status%20Handbook.pdf; Ferzana Chaze et al, *Domestic Violence in Immigrant Communities: Case Studies*, (Books & Chapters, 2020) (e-book updated 1 June 2020).

status by abusers to invoke fear, ensure silence, and demand compliance as pervasive in the lives of their clients. As described by one lawyer, the clear message of abusive partners is, “I am in complete control here. I’m the sponsor, and if you don’t do this, I will remove you from Canada and take the kid away.”⁴⁴ This messaging is often, as explained by another lawyer, reinforced by cryptic, chilling text messages, such as “CBSA” and “bye-bye.”⁴⁵ The threat of removal from Canada carries with it, for many women, not only the potential separation from their children, but shame related to the failure of the marriage—which one interviewee pointed out in some cultural contexts is a marriage for seven more lives to come⁴⁶—and return to a country to which one may no longer have connections.⁴⁷ The fear of removal from Canada, combined with the lack of access to services (detailed more fully below), make it exceedingly difficult to reach out for help and reveal the abuse; disclosure carries the weight of enormous risk.

While the abusive spouse/partner does not, in fact, ultimately determine whether a women will be removed from Canada, it is difficult to overestimate the power that the law puts in his hands. If, for example, he withdraws a SCLPC class permanent residence application, the likely

⁴⁴ Interview 3 May 2022.

⁴⁵ Interview 6 June 2022. “CBSA” here refers to the Canada Border Services Agency.

⁴⁶ Interview 2 May 2022.

⁴⁷ Interview 17 May 2022 (this lawyer provided an example of a woman returned to New Delhi, far from her original home, and left destitute, with no access to supports or resources).

immediate result is that the sponsored spouse or partner will be without status and subject to removal unless able to successfully access one of the limited routes to temporary or permanent resident status described earlier. Similarly, if he has promised to initiate a sponsorship application but has not done so, a call to the Canada Border Services Agency (CBSA) will trigger the removal process. The family law decision in *Ffrench v Williams*⁴⁸ illustrates the ramifications of such a call: here, the father persuaded his reluctant former partner (who was without status) to give her current address to him, claiming that this would facilitate the coordination of access exchanges. He promptly advised immigration authorities of her address, and nine days later she was arrested and held in immigration detention with their two young children (eighteen months and three years of age) for approximately five weeks before her aunts were able to post the \$10,000 in bail required for her release.⁴⁹ Similarly in the family law case of *NEC v AAA*, the father's call to police on an occasion when "the parties fought" led police to discover an outstanding immigration warrant against the mother, whom police arrested and held in detention without their child.⁵⁰ She was given a removal date for a mere eight days later. Illustrating both the critical importance of access to knowledgeable counsel and the interplay of family and immigration law, the mother was able to retain counsel who acted quickly in bringing a motion without notice in family court, *the day before her scheduled removal*. Consequently, she was able to secure an order for

⁴⁸ *Ffrench v Williams*, *supra* note 37.

⁴⁹ *Ibid* at paras 31–38.

⁵⁰ *NEC v AAA*, *supra* note 37 at para 11.

temporary custody and no access to the father, and on the day of her scheduled removal, a temporary deferral of her removal by CBSA. In *Albavera v Alarcon*, the father, a labourer who was eligible to apply for permanent residency, not only threatened to report his wife (who was without status) to immigration authorities but promised to include her in his application on the condition that she give up all rights to the children.⁵¹ In *HS v RS*, the mother, who was sponsored by her husband, a veterinarian surgeon, separated from him due to his physical violence and the emotional abuse from both him and his mother.⁵² The father immediately contacted immigration authorities to withdraw his sponsorship and forced the mother, then six months pregnant, out of their home. By the time of the custody proceeding, a deportation order had been made and her removal interview, originally scheduled for the same day as the custody matter, was rescheduled for twelve days later. The custody application, brought by mother, was argued on “a very urgent basis,”⁵³ as she was facing imminent deportation from Canada to Pakistan.

While earlier decisions such as *Ffrench*, *NEC*, and *HS* have considered these acts of betrayal as evidence relevant to the father’s concern for the best interest of the child and/or the threats of deportation as controlling behaviour,⁵⁴ the recent decision in *Dworakowski v*

⁵¹ 2013 ABQB 519.

⁵² 2015 BCSC 1856 (the mother was granted sole custody and an order permitting her to relocate in Pakistan with the child).

⁵³ *Ibid* at para 1.

⁵⁴ See *Ffrench v Williams*, *supra* note 37 at para 84; *NEC v AAA*, *supra* note 37 at para 45; *HS v RS*, *supra* note 52 at para 20.

Dworakowski is an important development in that threats to revoke an immigration sponsorship are expressly recognized as constituting “family violence” under the *Divorce Act*.⁵⁵ On a motion before Justice Papageorgiou, she was satisfied by the evidence that on the same day as the closure of a property in the father’s name that was made possible with a substantial cash contribution from the mother, the father had withdrawn his spousal sponsorship. Three days later the mother received a letter from Immigration Canada referencing the father’s revocation of the sponsorship and indicating that she must depart Canada immediately and, failing that, action would be taken against her.⁵⁶ While Justice Papageorgiou was not prepared to decide as between the various competing allegations of other abuse in the relationship—noting that “[t]here may be police reports, CAS reports and other evidence that could assist a court at a future date with this issue”⁵⁷—she went on to conclude that the “[f]ather’s admitted withdrawal of immigration support [was] a form of domestic violence which is adequately proven on this record”⁵⁸ and to observe that the father was “prepared to see [the mother] deported without any consideration to the impact this would have on the Child.”⁵⁹ Attentive to the interplay between the results in the family law case and the mother’s H&C application in which her “establishment” would be assessed, Justice Papageorgiou astutely observed that the mother’s financial circumstances and unstable

⁵⁵ *Dworakowski v Dworakowski*, 2022 ONSC 734.

⁵⁶ *Ibid* at para 42.

⁵⁷ *Ibid* at para 58.

⁵⁸ *Ibid*.

⁵⁹ *Ibid* at para 61.

living situation (in which she and the child had been residing in a women's shelter, then with friends) could jeopardize the H&C application that she had initiated.⁶⁰ To enhance the mother's stability, the Court ordered child support based on income imputed to the father, as well as a spousal support, having been satisfied that the mother's unstable living situation and debt accumulated since the separation demonstrated a need for such support. While the matter of the mother's potential removal will be decided in another legal realm, Justice Papageorgiou's attention to the mother's financial and housing stability and her clear conclusion that "[t]he deportation of the Mother, who the evidence before me demonstrated had been, and was still, the primary caregiver for the Child, would not be in the Child's best interests"⁶¹ will be important considerations weighed in the exercise of the section 25 H&C discretion.⁶²

Justice Sharma, after a full trial, came to a different conclusion on the facts. Finding the father to be a more credible witness than the mother, Justice Sharma held that

⁶⁰ *Ibid* at para 8.

⁶¹ *Ibid*.

⁶² In a subsequent ruling, Papageorgiou J held that the mother was entitled to costs on a full recovery basis (approximately \$17,000), given the bad faith conduct of the father. That bad faith included the steps taken by the father that may result in the mother's removal from Canada and falsely swearing an affidavit that he had not signed the child's passport application (the court found that he had indeed signed). These steps, the court concluded, were taken with the intent of inflicting financial or emotional harm on the mother and deceiving the court and constituted not only "bad faith" within the meaning of the family law costs rules, but a form of "family violence" within the meaning of the *Divorce Act*; see *Dworakowski v Dworakowski*, 2022 ONSC 1270.

on the evidence adduced at trial, the withdrawal of the sponsorship did not constitute family violence, although it did reflect a failure to consider the best interests of the child.⁶³ Importantly, however, Justice Sharma expressly agreed with,

... a conclusion reached by Papageorgiou J. in her interim ruling in this case. Namely, that a withdrawal of an immigration sponsorship can be a form of family violence ... Where a spouse is dependent upon the other spouse to support or maintain their immigration status, that dependency can be leveraged as a threat or as a means to exert coercion and control over the other. The threat can be particularly traumatic for a spouse who is also a parent, who in addition to fearing deportation, may also fear losing parenting time and being removed from the care of their child for immigration reasons.

Under s. 2(1) of the *Divorce Act*, “family violence” has an expanded meaning and includes “any conduct...that is violent or threatening...or that constitutes a pattern of coercive and controlling behaviour...” Where one spouse threatens to withdraw his or her support of a spouse’s immigration application or uses such threats as a means to coerce or control the other spouse, I find it can constitute family violence under the *Divorce Act*.⁶⁴

Moreover, Justice Sharma’s conclusion that the deportation of the mother would be traumatic for the child

⁶³ *Dworakowski v Dworakowski*, 2022 ONSC 7209.

⁶⁴ *Ibid* at paras 98, 99.

and poses a “real risk that the child’s immediate and future sense of security and well-being would suffer significantly should his mother be deported” is well-founded. Justice Sharma goes on to explain that “for this reason, I make parenting orders that the child have significant parenting time with both parents” and explicitly directs his remarks to immigration officials in concluding that “[t]his finding may be considered by Immigration Canada officials in their determination of the mother’s immigration status.”⁶⁵

The use of immigration status in the web of coercion and control also manifests in the manipulation of information about a woman’s status and control over immigration documents. As such, even when threats of deportation have no material foundation, because women often do not have access to accurate information about their status and corresponding rights, the threats operate as a powerful deterrent to seeking help and/or leaving. For example, as mentioned earlier, while the two-year conditional permanent residency requirement was repealed in 2017, one of the interviewees explained that many of her clients are under the impression that it continues to be in effect. Women with permanent resident status remain in abusive relationships for fear that should they separate before two years, they will be deported. The conduct of abusers in isolating women from family, friends, and community supports and intensely surveilling their activity means that it can be extraordinarily difficult for women to access accurate information about their status or about services and supports. The interviewees all identified the inaccessibility of information as an enormous problem.

⁶⁵ *Ibid* at paras 109, 112.

Not only is the accuracy of information important, but so too is its timeliness. This concern is amply illustrated by one interviewee who explained that women are sometimes removed from Canada without their children by members of their extended families before they have the opportunity to access information and supports.⁶⁶ The fear instilled by threats is profound and, indeed, readily exploited by abusers: For example, in *RS v MSM*, the father threatened that, if the mother “did not leave Canada quietly that he would make sure she left Canada alive or dead” and that he would show her how he could “take her child from her.”⁶⁷

Yet a further form of abuse is that of false reports by abusers. This strategy of control and coercion is not unique to men who have sponsored their spouses,⁶⁸ however for women with precarious status, the possibilities for harm are expanded. For women who secured permanent resident status through a family class sponsorship, the false allegation to Immigration, Refugees and Citizenship Canada (IRCC) by their spouses or partners that the marriage was one of convenience will prompt, as noted

⁶⁶ Interview 17 May 2022.

⁶⁷ *RS v MSM*, *supra* note 54 at paras 76, 78, 87, 91.

⁶⁸ Janet Mosher, “Grounding Access to Justice Theory and Practice in the Experiences of Women Abused by their Intimate Partners” (2015) 32 *Windsor YB Access Just* 149; Heather Douglas & Emma Fell, “Malicious Reports of Child Maltreatment as Coercive Control: Mothers and Domestic and Family Violence” (2020) 35:8 *J Family Violence* 827.

earlier, an investigation for misrepresentation.⁶⁹ If such allegations are believed, survivors face removal and remain ineligible to apply for permanent resident status for five years.⁷⁰

Another arena for false reporting is the criminal justice system, one utilized by abusive men in many contexts but again, with the potential for especially devastating consequences for women with precarious status. In some instances, abusive men have been known to contact police to report that they are the victims—not the perpetrators—of abuse, with the intention of triggering the charging, conviction, and removal of their spouses/partners.⁷¹ The potential for removal arises as a result of the “criminality” provisions of *IRPA*.⁷² A “foreign national,” meaning a person without permanent resident status, is subject to removal if convicted of an indictable offence (and all hybrid offences are deemed indictable irrespective of how the Crown elects to proceed) or any two

⁶⁹ See e.g. *Alves v Londran*, 2016 ONCJ 466. See also Sarah Pringle, “The ‘Threat’ of Marriage Fraud: A Story of Precarity, Exclusion, and Belonging” (2020) 33:1 Can J Fam L 1.

⁷⁰ *IRPA*, *supra* note 4, s 40(1)–40(2). See also *IRPR*, *supra* note 4, s 4(1) (which provides that a “foreign national shall not be considered a spouse, a common-law partner or a conjugal partner of a person if the marriage, common-law partnership or conjugal partnership (a) was entered into primarily for the purpose of acquiring any status or privilege under the Act; or (b) is not genuine”).

⁷¹ See Anita Grace, “‘They Just Don’t Care’: Women Charged with Domestic Violence in Ottawa” (20) 42:3 Manitoba LJ 153; Shoshana Pollack et al, “The Unintended Consequences of Mandatory Charge Policies,” (Toronto: WACT, 2005).

⁷² *IRPA*, *supra* note 4, ss 36(1)–(3).

offences not arising out of the same transaction.⁷³ For example, assault is a hybrid offence,⁷⁴ therefore deemed indictable under *IRPA*, and hence a conviction for assault provides a sufficient basis for a finding of inadmissibility and potential removal from Canada of a foreign national. But even a permanent resident is inadmissible and subject to potential removal if convicted of an offence that falls within the definition of “serious criminality”—an offence punishable by a maximum term of at least ten years, or where an actual term of imprisonment of at least six months is imposed.⁷⁵ Assault with a weapon, for example, is also a hybrid offence and for immigration purposes deemed to be an indictable offence. Punishment is up to ten years (by comparison, assault is five) and as such, assault with a weapon falls within the definition of “serious criminality.” “Weapons” may include various objects that women use to defend themselves—a water bottle or tape dispenser for example—and survivors have been criminally charged in such circumstances. If convicted, even women with permanent resident status face potential removal. Three of the lawyers interviewed who practice in the immigration field reported that they regularly see cases of women who are inappropriately charged and noted the significant role that language barriers play.⁷⁶

⁷³ *Ibid*, s 36(2)–32(3)(a).

⁷⁴ *Criminal Code*, RSC 1985, c C-46, s 266.

⁷⁵ *IRPA*, *supra* note 4, s 36(1).

⁷⁶ Interviews 27 April 2022, 2 May 2022, 17 May 2022. See also Jennifer Koshan, “Myths and Stereotypes in Domestic Violence Cases” (2023) 31:1 *Can J Fam L* 33.

In the context of a family law proceeding, understanding how precarious status is exploited and manipulated by abusers is critically important to establishing “family violence”—not only how it manifests, but why women may have remained in the relationship for so long, why they may have told no one of the violence, and, as developed more fully below, why there may be so little corroborating evidence.

(B) MOTHERING IN THE CONTEXT OF PRECARIOUS STATUS

Also relevant to the family law domain is an understanding of the challenges of parenting in the context of precarious status and deportability.⁷⁷ Karina Horsti and Päivi Pirkkalainen describe “deportability” as “a condition in which a person is constantly subject to the possibility of forced, potentially violent removal” and as a form of slow violence—“[a] violence that occurs gradually and out of sight, a violence of delayed destruction that is dispersed across time and space, an attritional violence that is typically not viewed as violence at all”—that erodes well-

⁷⁷ See Jodi Cardoso et al, “Parenting in the Context of Deportation Risk” (2018) 80:2 J Marriage & Family 301. Families where one or both parents are without status experience high rates of poverty arising from low wages, labour exploitation, and the limited access to social benefits and programs; see also Hudson et al, *supra* note 6 (on the degradation of mental and physical health).

being over time.⁷⁸ This form of “slow violence” is intensified and its harms magnified in the context of an abusive relationship where the threat of deportation is routinely invoked. As their research illustrates, deportability impacts not only the potential subject of removal, but those who are proximate, including children.⁷⁹ One interviewee provided a distressing example of this in circumstances where a mother and child with special needs were facing potential removal. The stress was acute and worsened the child’s condition, ultimately leading to a situation where the child assaulted the mother, who then agreed to have the child placed in the temporary care of child welfare authorities. Subsequently the mother was removed from Canada, while her child remained in the care of a Children’s Aid Society.⁸⁰

The amendments to the *Divorce Act* reflect a growing awareness of the harms to children of exposure to family violence, and recent literature advances our understanding of how children too may be victims of coercive control, both during and after their parents’

⁷⁸ Karina Horsti & Päivi Pirkkalainen, “The Slow Violence Of Deportability” (25 January 2021), Online (Blog): *Border Criminologies* <Blogs.Law.Ox.Ac.Uk/Research-Subject-Groups/Centre-Criminology/Centreborder-Criminologies/Blog/2021/01/Slow-Violence> (citing Rob Nixon). See also Nathalie Peutz & Nicholas De Genova, eds, *The Deportation Regime: Sovereignty, Space, And The Freedom Of Movement* (Durham: Duke University Press, 2010).

⁷⁹ See Horsti & Pirkkalainen, *ibid.* See also Judith K Bernhard et al, “Living with Precarious Legal Status in Canada: Implications for the Well-Being of Children and Families” (2007) 24:2 *Refuge* 101.

⁸⁰ Interview 17 May 2022.

relationship.⁸¹ In the context where a parent faces potential removal from Canada these harms may be magnified. Children whose parent(s) face a daily fear of deportation, whether or not the children will be removed as well, experience a form of toxic stress that impacts neurobiology and are at higher risk of poor health, educational, and economic outcomes.⁸²

Understanding the harms of deportability renders with clarity how the promises and threats of abusive partners regarding sponsorship impair the well-being and safety of both women and children. Yet, as observed by one lawyer, there is a lack of understanding in the family legal system of how precarious status impacts a mother's "capacity to parent in a safe way and her children to have a safe life."⁸³

It is also clear that a central thread of coercive control is that of isolation, and here again, for women with precarious status, the depth of isolation is profound. Language, newcomer status, and the abuser's restriction on, and monitoring of, his spouse's daily activities all serve to enforce her isolation. But this isolation is also reenforced by a legal framework that makes removal from Canada

⁸¹ Emma Katz et al, "When Coercive Control Continues to Harm Children: Post-Separation Fathering, Stalking and Domestic Violence" (2020) 29:4 Child Abuse Review 310.

⁸² Bill Ong Hing & Lizzie Bird, "Curtailing the Deportation of Undocumented Parents in the Best Interest of the Child," (2020) 35 Geo Immigration L J 11 at 123. See also *Dworakowski*, *supra* note 63 (where Sharma J recognizes the traumatic impact of deportation of the child's mother).

⁸³ Interview 2 May 2022.

possible and offers so few alternate avenues to status security. It is not only their intimate partners who women fear may make a disclosure that could lead to their removal, but virtually anyone and everyone. Women with precarious status are acutely aware of what Paloma Villegas calls the “surveillance assemblage of illegality”—the web of diffuse, multi-layered relations which functions to track, police, and ultimately remove precarious status migrants.⁸⁴ As Villegas maintains, surveillance is not simply a top-down activity organized and carried out by enforcement officers but rather an expansive network comprised of multiple actors dispersed across a range of fields (health, politics, social work, etc.). Even in the context of so-called “Sanctuary Cities” like Toronto where “don’t ask, don’t tell” policies exist, the potential is all too real that a request for assistance will lead to a call to CBSA.⁸⁵ Indeed, consistent with the literature,⁸⁶ one interviewee indicated that such policies “do nothing” to facilitate women’s disclosure and access to services.⁸⁷ As a public legal information guide for immigrant, refugee, and non-status women warns, “the police, the Crown Counsel (lawyer for the government), or another Court official could find

⁸⁴ Paloma E Villegas, “Fishing for Precarious Status Migrants: Surveillant Assemblages of Migrant Illegalization in Toronto, Canada” (2015) 42:2 *JL & Soc’y* 230.

⁸⁵ Hudson et al, *supra* note 6. Hudson et al conclude that, while Toronto City Council adopted a resolution in 2012 committing to the provision of all municipal services without the need to disclose immigration status, implementation has been very uneven, and their report captures how powerful counter-narratives of criminality, security, and illegality work to limit access.

⁸⁶ *Ibid.*

⁸⁷ Interview 17 May 2022.

out that you do not have legal status in Canada and tell immigration officials. If this happens, you could be detained and deported.”⁸⁸

The challenge of not knowing who, if anyone, can be trusted, combined with the intense fear of removal, make it exceptionally difficult for women with precarious status to reach out for assistance or to disclose the abuse. In *OCW v TKM*, the mother, who was without status (having overstayed a visitor’s visa), was convinced her abusive partner could have her deported and take away her children. In the family law proceeding, while she disclosed multiple forms of family violence, she claimed that “the most significant abuse perpetrated by the father against her was his constantly threatening to report her lack of immigration status to authorities” if she disclosed the abuse, left home with the children, didn’t give him the parenting time he sought, or didn’t support him.⁸⁹ Consequently, she was afraid to “engage with the police, the court or any service providers.”⁹⁰ While it is common for decision-makers (and others) to expect that women

⁸⁸ Family Law Education for Women, “Family Law Issues for Immigrant, Refugee and Non-Status Women,” online: *One Family Law* <onefamilylaw.ca/family-law-resources/family-law-issues-immigrant-refugee-non-status-women/>.

⁸⁹ *OCW v TKM*, 2022 ONCJ 82 at para 31.

⁹⁰ *Ibid* at para 58. The Court found that the father perpetrated family violence against the mother, including physical, emotional, psychological, and financial abuse and exercised coercive control (*ibid* at para 62), and ordered that the children have their primary residence with the mother and that she exercise sole decision-making in most matters. The Court also ordered that the mother “immediately notify the father in writing if she receives a removal order” (*ibid* at para 167).

experiencing abuse will report to police,⁹¹ most—even citizens—do not.⁹² As one interviewee explained in relation to those without citizenship, “if there’s a status issue, police is the last person they’re going to want to call.”⁹³ This interviewee recounted that clients will often ask if they will be safe in terms of deportation if they go to police and the frank, difficult answer is “no”—“nobody can guarantee that.”⁹⁴ If medical assistance is sought, women will often make an excuse, or their spouses will accompany them and control the exchange of information.⁹⁵

Justice Sherr captures this hesitancy to disclose in his decision in *RS v MSM*, where he rejected the father’s

⁹¹ Justice Menthune, in her decision in *Ahluwalia v Ahluwalia*, 2022 ONSC 1303 at para 63, draws attention to the jurisprudence cautioning against reliance upon “stereotypical reasoning about the proper comportment and behaviour of survivors” including contacting the police. Justice Menthune explains that she had warned the father’s counsel that it would be improper to suggest that the Mother could not be believed because she immigrated to Canada with the father after the first incident of violence. On the prevalence of myths and stereotypes in family law, see Koshan, *supra* note 76 (in this issue).

⁹² See Shana Conroy, “Spousal violence in Canada, 2019” (6 October 2021), online: *Canadian Centre for Justice and Community Safety Statistics* <www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00016-eng.htm> (in the General Social Survey administered in 2019, 80% of victims of spousal violence did not report the violence to police).

⁹³ Interview 27 April 2022. See also Hudson, *supra* note 6; West Coast LEAF, *supra* note 43.

⁹⁴ Interview 3 May 2022. Reluctance to contact police may also be related to experiences in one’s home country; interview 17 May 2022.

⁹⁵ Interview 17 May 2022.

assertion that the mother's failure to provide shelter or police records undermined the credibility of her claim to having been abused:

The court is not prepared to draw that conclusion. Domestic violence is complicated and a victim's actions, or lack of action must be looked at in context. Here, the mother is very alone in Canada. She speaks limited English. If her evidence is accurate, she has been controlled by the father and his family for a long time. She is afraid of them. There is a significant power imbalance between them. She is afraid they have the power to deport her and the child. She and the child are economically vulnerable. She is humiliated by what has happened. She is likely concerned about a government's ability to protect her and the child. It would not be easy for a woman in these circumstances to come forward and report what has happened to her.⁹⁶

Additionally, as described earlier, even permanent residents, if convicted of particular crimes, may be subject to removal. If the abusive spouse is a permanent resident, the survivor may not want to trigger her partner's potential

⁹⁶ *RS v MSM*, 2016 ONCJ 297 note 54 at para 91. In assessing the mother's entitlement to spousal support, the Court relied upon the sponsorship and financial undertaking given by the father and the finding that the domestic violence perpetrated by the father had contributed to the mother's economic disadvantage in computing spousal support. The Court also issued a restraining order against the father.

removal. In explaining the hesitancy to contact police, one lawyer added that, "... the word is also out that if your partner is convicted of certain crimes, and they're a PR [permanent resident], that could trigger the loss of their status."⁹⁷ Moreover, if convicted of a crime involving bodily harm (or threat thereof) to, among others, a spouse or conjugal partner, even a citizen is no longer eligible to sponsor a family class member, with crushing consequences for a survivor whose status is dependent upon a sponsorship.⁹⁸ Another lawyer, in underscoring the concern of loss of sponsorship, provided an example of a permanent resident application in which the father was the principal applicant, his wife and children dependents. If convicted, not only the father, but the entire family, would be inadmissible.⁹⁹

Interviewees also described the commonality of threats to take children away and survivors' fear of the family court process:

And the threat of the idea that you're going to lose your child, because if we go to family court, I'm here, I'm a citizen, I'm this, you have nothing... When you're thinking about how the family court looks at this population of people, they're looked at without credibility, they're looked down on, and they don't meet the conditions to be able to satisfy

⁹⁷ Interview 27 April 2022.

⁹⁸ *IRPR*, *supra* note 4, s 133(1)(e).

⁹⁹ Interview 3 May 2022.

the court that they can do parenting in the way the court wants them to do.¹⁰⁰

The concerns are pronounced for women without status, given a context of pitched vitriol that labels them as “illegals,” “cue jumpers,” and “fraudsters”¹⁰¹ and where stereotypes are widespread. As one lawyer observed about South Asian litigants:

In immigration, it’s a known thing, the view of South Asian clients from different countries is that they’re not credible. We see it in sponsorship, we see it in breakdowns, we see it in the way that our clients are treated. And I’ve worked in other legal clinics, I’ve worked in other communities, and I’ve sort of seen a very direct difference in the way in which these populations are treated. It’s slowly changing, but there’s still a lot of stereotyping in immigration. I also think, in the family courts, in the times that I’ve been in family court with clients ... it’s my experience that when clients are not good at English or French, and they present as Brown or Black or visibly racialized, that that somehow makes judges angry. And it’s a knock on the credibility of the client.

¹⁰⁰ Interview 27 April 2022.

¹⁰¹ See Hudson et al, *supra* note 6. See also *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651; *Feher v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 335.

And I've seen it to the extent that the client will say it, and they won't listen, and I will literally say the exact same thing and somehow it's elevated to a different level of credibility. So I think, absolutely the way in which clients are not able to answer questions in front of these judges, not able to present in a way that they believe is sort of a Western normative way of responding to things, is a knock. And genuinely, most of my clients don't understand what's happening when they're appearing in court. They're terrified. ... Because what they're thinking is, "I'm going to lose my children." And in every case they've been the ones who've been the primary caregivers, from birth onwards, in the family context. In many of those cases, I think, the partner doesn't even care. They don't want these kids.¹⁰²

Interviewees described women's fear that if they left the relationship, without the economic support of their abusive partners they would not be able to provide adequate shelter and food for their children. Housing is, as noted by one interviewee, a "huge issue" on its own, but also because without adequate housing, the potential for child welfare involvement and the loss of children also arises.¹⁰³ Women's fears of being unable to support themselves and their children can be traced both to the impacts of domestic violence (isolation, the denial of access to employment or English language courses, for example) and the lack of

¹⁰² Interview 27 April 2022.

¹⁰³ Interview 31 May 2022.

access to material supports, many of which are tied to immigration status. For example, in Ontario, while priority access to social housing is accorded to survivors of domestic violence, eligibility also turns on immigration status (each member of the household must be a Canadian citizen or has made an application for permanent resident status or a claim for refugee protection).¹⁰⁴ So too, access to social assistance is tied to immigration status. And while in Ontario one is eligible unless an enforceable removal order has been issued or a person is a visitor and neither a claim for refugee status nor an H&C application has been initiated,¹⁰⁵ the interviewees described clients being denied

¹⁰⁴ *Housing Services Act*, 2011, SO 11 c6, Sched 1, O Reg 367/11, s 24(1)(b);

¹⁰⁵ *Ontario Works Act*, 1997, SO 1997, c25, Sched A, O Reg 134/98 General, s 6. Access to social assistance in Ontario is made more complicated by the requirement that those under an immigration sponsorship make reasonable efforts to secure financial support from their sponsor and immigration authorities will be notified of the default as the sponsor is required under the terms of the sponsorship to repay any social assistance provided to the sponsored person. While the obligation to seek support can be waived in instances where a relationship has broken down due to abuse, one need knowledge of this possibility, as well as some means to verify this; see Ontario Works Policy Directive 3.11, “Sponsored Immigrants,” online: <www.ontario.ca/document/ontario-works-policy-directives/311-sponsored-immigrants>. Note that the Supreme Court of Canada, in *Canada (Attorney General) v Mavi* 2011 SCC 30 held that while there is no discretion as to whether social assistance need be repaid, there is a limited discretion to delay enforcement and to negotiate the terms of repayment. This, the Court held, was the interpretation most compatible with successful integration, one of the objectives of *IRPA*, noting that it “would hardly promote ‘successful integration’ to require individuals to remain in abusive relationships” (para 62). This holding was in response to the circumstances of one of the co-applicants who had co-sponsored with her husband other family members. She later left him due to his abuse, she and her sponsored relatives then relied

benefits due to status ineligibility in other circumstances and the “constant push for them to try and prevent people accessing” assistance.¹⁰⁶ In one example given, a survivor who had been living in a situation of abuse for ten years and had a Canadian-born child was refused social assistance, notwithstanding involvement of police and Children’s Aid, because she had a valid visitor’s visa and no application was in process for permanent resident status. As the interviewee put it, “they still let her fall through the social assistance crack.”¹⁰⁷

For women without status, the supports, benefits, or entitlements to which they are entitled are exceptionally limited.¹⁰⁸ As Justice Lee of the Alberta Queen’s Bench observed in *Albavera v Alarcon*, a mother without status “cannot work to support herself or her children, is not

on social assistance, and she was assessed with a significant debt owing under the sponsorship agreement.

¹⁰⁶ Interviews 3 May 2022, 31 May 2022. There is tremendous variability across programs within any given provincial or territorial jurisdiction and between these various jurisdictions: See Jennifer Koshan, Janet Mosher & Wanda Wieggers, “A Comparison of Gender-Based Violence Laws in Canada: A Report for the National Action Plan on Gender-Based Violence Working Group on Responsive Legal and Justice Systems” (30 April 2021), online (pdf): <papers.ssrn.com/sol3/papers.cfm?abstract_id=3995519>. See also Chan, *supra* note 43.

¹⁰⁷ Interview 31 May 2022.

¹⁰⁸ Ineligibility for social benefits and services can be traced to migrant illegalization, wherein those labelled “illegal,” or “alien” are cast as undeserving; see Paloma E Villegas, “‘I made myself small like a cat and ran away’: workplace sexual harassment, precarious immigration status and legal violence,” (2019) 28:6 J of Gender Studies 674; *supra* note 101.

entitled to receive social assistance or any social services program, and could be deported from Canada on short notice at any time.” Like Ms. Alarcon, women in these circumstances have a heightened vulnerability to domestic violence.¹⁰⁹

In the interviews several concerns were raised specifically about the Canada Child Benefit (CCB).¹¹⁰ By all accounts the CCB, introduced in 2016, has had a measurable impact on child poverty and is a vital resource to low-income families.¹¹¹ To be eligible, the parent claiming the benefit must be a citizen, permanent resident, a protected person (someone who has received refugee status), a temporary resident who has been a resident in Canada throughout the preceding 18 months and has a valid permit in the 19th month, or an “Indian within the meaning of the *Indian Act*.”¹¹² While the benefit is to be paid to the parent who assumes primary responsibility for the care of the child(ren), women with particular forms of precarious status (e.g. refugee claimants, women without status, etc.) will be unable to access the benefit in the event that they leave the relationship with their child(ren).¹¹³ One

¹⁰⁹ *Albavera v Alarcon*, *supra* note 51 at para 1.

¹¹⁰ Interviews 3 May 2022, 6 June 2022.

¹¹¹ Income Security Advocate Centre et al, “Every Child Counts: Making Sure the Canada Child Benefit is a Benefit For All Children” (September 2018), online (pdf): <incomesecurity.org/wp-content/uploads/2020/04/Every-Child-Counts-Canada-Child-Benefit-for-All-September-2018.pdf>.

¹¹² *Income Tax Act*, RSC 1985, c 1 (5th Supp) s 122.6.

¹¹³ A constitutional challenge to this provision of the *Income Tax Act* was launched in February, 2021, in which it was argued that the provision constitutes discrimination against families with precarious

interviewee described a situation where the mother with five Canadian-born children was kicked out of the family home by the abusive father and fled to a shelter with the children. She continued to receive the CCB but was then, about 6 months later, assessed with a \$20,000 overpayment given her status ineligibility.¹¹⁴ Another interviewee, commenting that “I cannot tell you how many cases I’ve had ... how many women I’ve had who are assaulted because of the Canada Child Benefit,” went on to describe instances where women had left with their children and were living in shelters, while the fathers continued to receive the benefit (a situation that also arose in the *OCW v TKM* discussed earlier),¹¹⁵ and others where the CCB was deposited into accounts to which mothers had no access.¹¹⁶ Access to the CCB is especially important for survivors seeking permanent residence status because

immigration status contrary to s 15 of the *Canadian Charter of Rights and Freedoms* and violates the *Convention on the Rights of the Child*: see Press Release, “Community Legal Clinic Sues Federal Government for Denying Canada Child Benefits to Low Income Precarious Immigrant Families and Children” (9 February 2021), online (pdf): *Chinese and Southeast Asian Legal Clinic* <csalc.ca/press-release-re-constitutional-challenge-to-ccb/>; Tiran Rahimian, “Parental Undocumented Status as an Analogous Ground of Discrimination” (2020) 16:1 *JL & Equality* 93.

¹¹⁴ Interview 3 May 2022.

¹¹⁵ *OCW v TKM*, *supra* note 89 at paras 25, 40. The father continued to collect the CCB while the mother was in a shelter with the children. Notwithstanding that the Court had ordered the father to transfer the CCB funds to the mother, he continued to collect the CCB and short the mother on the transfer of payments to her.

¹¹⁶ Interview 6 June 2022.

unlike receipt of social assistance which renders an applicant inadmissible, receipt of the CCB does not.¹¹⁷

Many survivors with precarious status will be without access to the CCB, ineligible for social assistance, and too afraid to seek a family law support order against the father.¹¹⁸ Again, consider this public legal education advice to women without status:

[I]t is important to know that if you have to go to Court for any reason you will have to identify yourself. Although you have the same family law rights as any other woman, if you do not have legal status in Canada, immigration officials may find out about you, and you could get deported. Your right to stay in Canada depends on your immigration status. To protect yourself and your children, you need to know your rights and what you can do.¹¹⁹

¹¹⁷ Interview 3 May 2022; Receipt of social assistance renders a person financially inadmissible to Canada (s39 IRPA, *supra* note 4), unless H&C considerations warrant an exemption. Ministerial guidelines provide that an exception “could be applied” where the applicant is a victim of family violence, Canada, “Humanitarian and compassionate: Financial inadmissibility—Social assistance (A39)” (04 February 2021), online: www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/processing/dealing-with-inadmissibility/financial-inadmissibility-social-assistance-a39.html.

¹¹⁸ Interview 31 May 2022.

¹¹⁹ FLEW, *supra* note 85.

Given these extraordinary constraints, many women remain locked in abusive relationships, attempting to parent in conditions that can be dangerous and harmful for them and their children. Importantly, the family law jurisprudence has begun to recognize some of the challenges that arise for women without status, most recently in cases where fathers have sought return of children (in both *Hague* applications and non-*Hague* contexts) to a country where the mother has no status and hence, no legal entitlement to remain.¹²⁰

In the 2019 decision on a *Hague* application in *WDN v OA*, Justice O’Connell identified as a significant issue the uncertainty of the mother’s immigration status in the United States (the mother was a citizen of Nigeria who had overstayed her student visa) and its impact on her article 13(b) grave risk of harm defence.¹²¹ As the mother

¹²⁰ The *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980 (1 December 1983) [*Hague*] has been incorporated in domestic legislation across the country. In Ontario, see *CLRA*, *supra* note 42, s 41. The *Hague Convention* makes provision for the prompt return of children wrongfully removed from the State of their habitual residence. Importantly, it also provides that a State is not bound to order the return of the child if there is a grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation (*Hague*, art 13(b)). In instances where the child is alleged to have been wrongfully removed from a State that is not a party to the *Convention*, a Court in Ontario will only exercise its jurisdiction to make or vary a parenting or contact order if the child is physically present in Ontario and the court is satisfied that the child would suffer serious harm if returned (*CLRA*, *supra* note 42, s 23).

¹²¹ *WDN v OA*, 2019 ONCJ 926; decision upheld on appeal, *Nacoulma v Ajiaji*, 2022 ONSC 5819. The trial judge concluded that under Michigan law the father did not have, and was not exercising, rights of custody and therefore the removal of the children was not “wrongful” under the *Convention* (para 253, 254). The trial judge further

was legally aided, the court directed Legal Aid Ontario to pay the costs of an expert opinion on US immigration law, which Legal Aid agreed to do.¹²² The expert opined that while the mother may be eligible as a temporary visitor to the US or may have access to a special visa for survivors of domestic violence, these were “options in the abstract.” The Court found there to be reliable evidence that, among other abusive acts, the father had assaulted the mother on multiple occasions, the children had witnessed some of these assaults, and the father had “threatened and controlled [the mother] as a result of her vulnerable immigration status.”¹²³ Justice O’Connell accepted as well the mother’s evidence that she could not report the father’s abuse to the police or child protection authorities because

concluded that if she was wrong in this conclusion, that the test under article 13(b) had been satisfied. The implications of a parent’s status in the country to which the return of a child is sought was also in issue in the case of *F v N*, 2022 SCC 51. Here, the mother, if she returned to Dubai (the country to which the father was seeking the children’s return under s 40 of the *CLRA*) would be without legal status. The mother relied on s 23 of the *CLRA* (see *supra*, note 120) to argue that the children would suffer serious harm if returned to Dubai because she did not intend to return and the children would therefore be separated from their primary caregiver. The Court divided 5 to 4, with the majority upholding the decision of the trial judge not to exercise jurisdiction. While the majority accepted that there may be circumstances where legitimate reasons exist not to return, they did not find such circumstances here. In contrast, the dissenting judges found that the trial judge seriously misapprehended the evidence, including the fact of the mother’s precarious residency status in Dubai (her chances of obtaining a residency permit were dependent on the father’s sponsorship and she would be under his financial control) and her concerns about living under the laws of the UAE as a woman.

¹²² *WDN v OA*, *supra* note 121 at paras 187–195.

¹²³ *Ibid* at para 257.

she was very afraid that this would lead to her deportation and separation from her children, with the children then being either left in foster care or with the father who had repeatedly threatened to take them to Burkina Faro (a country where she would also not have status).¹²⁴ Significantly, Justice O’Connell concluded that,

[t]he state of Michigan could not protect the mother or the children in these circumstances given the mother’s vulnerable immigration status.

Further, there are no undertakings that can protect the children from being exposed to further domestic violence or an abusive environment. According to the court appointed Michigan immigration law expert, the mother’s ability to return to the United States is “marginal at best.” The mother’s ability to regularize her immigration status in the United States and to return to the United States is very unlikely. ...

I find as a fact that if the children are returned to Michigan without their mother, their primary caregiver, then the children would be placed with an abusive and violent father who has used corporal punishment against them or placed otherwise in foster care. Their mother would not be there to protect them.

¹²⁴ *Ibid* at paras 81–82, 259.

I find as a fact that in these circumstances, there is a grave risk that returning these children to Michigan would expose them to physical or psychological harm or otherwise place them in an intolerable situation.¹²⁵

Although not directly addressed in the decision, the fear of detention that the mother expressed is well-founded. In the context of the abusive relationship, there existed the very real possibility that, should the mother return to the US, the father would report the mother to border control, leading to her immigration detention. As discussed earlier, this was precisely the outcome in two of the Canadian family law decisions. Furthermore, as interviewees pointed out, in these circumstances, not only are children separated from their primary caregiver, but the revelation of—and protection from—the father’s abuse becomes entirely dependent upon third parties noticing harm to the children.¹²⁶

In sum, a contextual understanding of mothering in the context of deportability and of the specific ways in which coercive control may manifest where survivors have precarious immigration status is critical to determinations of “family violence” and assessments of the extent of the harms to women and children. Moreover, both the abusive partner’s control and a system of social supports that often excludes women with precarious status can make meeting the “establishment” threshold on an H&C application enormously challenging, pointing to the need to consider,

¹²⁵ *Ibid* at paras 260–263.

¹²⁶ Interviews 31 May 2022, 6 June 2022.

as the motions judge did in *Dworakowski*, these factors in assessing spousal support.

IV. CONCLUSION

While it is no doubt true that, as insisted in the family law jurisprudence, family law judges are not deciding immigration matters, the evidence adduced and findings made in the family law realm reverberate—sometimes loudly and with significant consequences for the safety of survivors and the best interests of children—in the immigration law realm. The failure to establish family violence in a family law proceeding may make establishing family violence that much more challenging in the immigration context. So too, a conclusion regarding parenting in the family law context made without an appreciation of mothering in the context of deportability may adversely impact an outcome in the immigration context, in some instances supporting the removal of a survivor without her children. It is also clear that a woman's immigration status has significant implications in the family law realm, including whether she accesses family law decision-making at all, and if she does, what information can be safely shared, how family violence and the best interests of a child should be assessed, how her mothering and parenting plan should be evaluated, and what evidence will be available.

Survivors are often compelled to deal with multiple legal domains, in some instances simultaneously. Not surprisingly, inconsistencies between the evidence of the parties in the immigration and family law realms arise and are relied upon to undermine credibility. In some instances, this may work to the advantage of survivors, as in *RS v*

MSM where discrepancies between the father's representations regarding his employment and income in the sponsorship application and the family law proceeding led the family court to conclude that the father's financial information could not be trusted.¹²⁷ Nevertheless, of course, they may work, in problematic ways, to undermine the credibility of survivors. For example, an early narrative provided in the immigration or refugee context where a women's status is entirely dependent upon her abusive spouse is unlikely to include information about the abuse. As one lawyer explained, the "sponsorship application [may say] "we're together, and [include] happy photos ... and then suddenly something shifts towards something else, and you need to describe a different reality."¹²⁸

Conversely, it may be that a survivor has not disclosed particular forms of abuse in a family law proceeding, because unlike the immigration context, her documents are publicly accessible. She may, for example, not want her spouse or extended family to know that in the immigration context she has disclosed the risks of a forced marriage of a child of the relationship.¹²⁹

The complex and dynamic intersections between family law and immigration law in cases of family violence point to the need for expert navigators who embody a deeply contextual appreciation of the dynamics of domestic violence in the context of precarity of status. All the lawyers I interviewed spoke to the challenges of

¹²⁷ *RS v MSM*, *supra* note 96.

¹²⁸ Interview 3 May 2022.

¹²⁹ Interview 6 June 2022.

establishing family violence, challenges which are especially daunting in cases involving mothers with precarious immigration status.¹³⁰ As the above discussion makes evident, for a host of reasons grounded in both fear of removal and the inaccessibility of services and supports, survivors often do not disclose the abuse. The police and medical records referenced in the immigration Guidelines as potentially forthcoming to assist in assessing competing allegations of abuse, are in a great many instances simply non-existent. As one lawyer described,

almost every client we work with has either zero or maybe one thing that they can use to

¹³⁰ Notable too are the ways in which frontline service providers in other legal domains could both assist and impede counsel's ability to establish family violence. One interviewee noted the challenges that arise where after opening an investigation, a Children's Aid Society worker quickly closes a file, finding the allegations of domestic violence to be unsubstantiated. In the face of such a conclusion—which may have been based on a brief investigation and without the time to build the trust necessary for disclosure—establishing the violence is an uphill battle (Interview 17 May 2022). Conversely, another interviewee recounted the multiple ways in which a local Children's Aid Society had assisted survivors without status, including by providing letters of support for their H&C applications and paying the associated fees (Interview 27 April 2022). Another example given was that of victim services: while many clients have reported to one of the lawyers whom I interviewed that they found victim services to be supportive, this lawyer expressed frustration that victim services staff were reluctant to provide letters in support of clients' immigration applications, on the basis that to do so would appear to be "taking sides" (Interview 3 May 2022). For an excellent discussion of the multiple reasons women's accounts of violence are discredited see Deborah Epstein & Lisa A Goodman, "Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences" (2019) 167:2 U Pa L Rev 399.

corroborate [the domestic violence]. They don't call the police, they don't see health practitioners—it's almost every case. So what's interesting for us is that almost every submission that we send in, in these types of cases, has a large volume of expert evidence, including our own, on why you won't see corroborating evidence. ... we actually have to specifically address why we don't have the corroborating evidence.¹³¹

The lawyers I interviewed devote enormous amounts of time to track down all potential sources of corroboration and to find ways—through evidence adduced from experts or their clients or drawing on secondary literature—to help the decisionmaker understand why the various documents that they may expect to see if the allegations were true, simply do not exist.

Also clear from my interviews is that these experienced lawyers have not only a depth of understanding of the dynamics of domestic violence in the context of precarious status but also within particular cultural communities. This latter knowledge includes varied cultural understandings of discipline and abuse for example, as well as awareness of the particular stereotypes that immigrant women, women without status, and racialized women are likely to encounter in decision-making forums.¹³²

¹³¹ Interview 27 April 2022.

¹³² Interviews 27 April 2022, 2 May 2022, 17 May 2022; see also e.g., Patrina Duhaney, "Criminalized Black Women's Experiences of

Moreover, they are acutely aware of the time necessary to build trust; for a survivor to gain confidence that her lawyer is not part of the “surveillance assemblage” and that she can safely share information. They understand the scope of their role to include a responsibility to connect survivors to resources and supports.¹³³

As these lawyers consistently expressed, none of the processes in immigration or family law are easily navigable by unrepresented litigants. As one lawyer explained and queried when speaking of FVTRP applications,

we have a good understanding, so what we submit as an application is so far beyond what I think we even need to submit, that it’s difficult for someone to say “no.” So it would be very interesting to find out: how do they treat people who go into it unrepresented? Which I’m always kind of trying to think about, do they get it when a lawyer hasn’t put it together and told you exactly what you need to hear, based on your own guidance? Or do they not get it?¹³⁴

Another lawyer conjectured,

Intimate Partner Violence in Canada” (2022) 28:11 Violence Against Women 2765.

¹³³ Interviews 17 May 2022, 31 May 2022.

¹³⁴ Interview 27 April 2022.

And imagine that somebody with a whole range of emotions, and completely in trauma in an unsettled situation—they're not going to be able to write very clear submissions. They're not going to be able to amass evidence and submit a petition in a very orderly fashion.¹³⁵

Noting the extent of advocacy required to prevent removal, another observed, “[i]t’s a level of advocacy that, if you don’t have representation or you have to pay and can’t afford it—I don’t know what you would do.”¹³⁶

The complex and dynamic interplay of family law and immigration law requires not only an expert navigator in each domain, but navigators who are thoroughly committed to collaboration. The lawyers I interviewed stressed the importance of family and immigration counsel coordinating with each other, and among this small group of lawyers, cross-referrals to trusted counsel and coordination were common. As one lawyer noted, “as counsel we have to be on the same page for our clients.”¹³⁷ Collaboration reduces the possibility of inconsistency between legal domains and enhances the ability to explain apparent inconsistencies if they do arise. It facilitates the ability to establish domestic violence in each legal domain, to buy the vital time needed to sort out parenting plans, and ultimately to ensure that survivors are not removed from

¹³⁵ Interview 3 May 2022.

¹³⁶ Interview 27 April 2022.

¹³⁷ Interviews 27 April 2022, 3 May 2022, 17 May 2022, 6 June 2022.

Canada, or if removed, that their relationship with their children is not severed.

However, the stark, on-the-ground reality, is that these practices are exceptional, and few survivors have access to one expert navigator, and fewer still—especially outside of larger urban centres—to the coordinated expert practices of the lawyers I interviewed. Indeed, finding a knowledgeable lawyer in either family or immigration law is itself a challenge:

The almost impossibility for people to get family law lawyers is at a level that I have not seen before. Even if they get a certificate, trying to convince someone to take it is like a whole day's work in and of itself. And many don't [take them] and women are going into these spaces unrepresented to do work around the essentials of your client's life, or to do work around status on your own. With additional barriers of trauma, language, battling systemic racism—all of those things. We're at a low point.¹³⁸

The family lawyers I interviewed take legal aid certificates, but as the quote above reflects, many do not. Moreover, the hours provided on family law certificates in Ontario were described as “ridiculously low”; the lawyers I interviewed put in countless pro bono hours to do the trauma-informed, coordinated practice that I have described. Moreover, access to funding to retain expert reports from

¹³⁸ Interview 27 April 2022.

psychologists and others—which can be crucial to establish the abuse and its impacts—is extremely limited.

On the immigration side, in Ontario, legal aid certificates are available for some H&C applications, but, again, the hours and disbursements are limited. Several of Ontario’s community legal clinics do provide representation; while not facing the hourly restrictions that several of lawyers on certificates encounter, the very significant time devoted to representation does limit the number of clients for whom representation can be provided.¹³⁹

As pointed out by two of the lawyers, there is a significant gap between political rhetoric surrounding the importance of supporting survivors and ending domestic violence and the systems and structures in place that in various ways, enable domestic violence.¹⁴⁰ Access to justice requires the funding of high-quality legal representation and the creation of structures to support coordination between counsel; that survivors have access to timely and accurate information about their status, their rights, and resources and to safe housing, income security, and counselling; and that counsel and decision-makers have a deep understanding of domestic violence. Crucially too, access to substantive justice for survivors with

¹³⁹ See also Wendy Chan & Rebecca Lennox, “‘This Isn’t Justice’: Abused Women Navigate Family Law in Greater Vancouver” (2023) 35:1 *Can J Fam L* 81 (in this issue), regarding the challenges created by the lack of access to funded legal representation. One lawyer suggested shifting monies used to fund legal advice to the funding of full representation: Interview 2 May 2022.

¹⁴⁰ Interviews 27 April 2022, 3 May 2022, 6 June 2022.

precarious status requires better routes to permanency. As West Coast LEAF has asserted, substantive equality “requires legislation and policy that allows women who have experienced domestic violence or abuse an independent means to regularize their status in Canada.”¹⁴¹

¹⁴¹ West Coast LEAF, *supra* note 43 at 2.

